COMMONWEALTH OF KENTUCKY
42nd JUDICIAL CIRCUIT
MARSHALL CIRCUIT COURT
INDICTMENT NO. 18-CR-00030

FILED 7/15/19
TIFFANY FRALICX GRIFFITH
CIRCUIT CLERK
MARSHALL COUNTY
BY: D.C.

COMMONWEALTH OF KENTUCKY

PLAINTIFF

v. **MOTION TO SUPPRESS DEFENDANT'S STATEMENTS**

G.R.P., a child

DEFENDANT

*** *** *** *** ***

Defendant G.R.P., by and through undersigned counsel, moves this Court to suppress any and all statements he made to law enforcement officers on or about January 23, 2018, during an interrogation conducted at the Marshall County Sheriff's Office. Defendant brings this motion under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections 2 and 11 of the Kentucky Constitution, and in compliance with the requirements of RCr 8.20, RCr 8.27, and other relevant sections of the Kentucky Rules of Criminal Procedure.

Introduction

The Commonwealth alleges that on the morning of January 23, 2018, G.R.P., a fifteen-year-old sophomore at Marshall County High School in Benton, Kentucky, fired a handgun at several classmates in the school's commons area just before the opening bell, killing two students and wounding several others. The Commonwealth has charged G.R.P. with multiple counts of murder and first-degree assault. Within minutes of the shooting incident, G.R.P. was in police custody. He was transported immediately to an interview room at the Marshall County Sheriff's Office, where he was interrogated by five officers from three different law enforcement agencies (Marshall County Sheriff's Office, Kentucky State Police, and Federal Bureau of Investigation). During the

interrogation, G.R.P. made incriminating statements and was subsequently charged with the serious crimes noted above. Based on the totality of the circumstances pertaining to the interrogation, G.R.P.'s statements were not voluntary and were obtained in violation of his Fifth Amendment privilege against self-incrimination and the holding of *Miranda v. Arizona, infra,* and in violation of his Sixth Amendment right to counsel.

Facts

The facts relevant to this Court's analysis of the issues presented in this motion are gleaned from a variety of sources: Marshall County Sheriff's Office CAD records; the anticipated testimony of Mary Garrison (G.R.P.'s mother), Attorney Bethany Willcutt, and Attorney Cheri Riedel; the recorded (and transcribed) interview of G.R.P.'s interrogation at the Marshall County Sheriff's Office; and the anticipated testimony of several witnesses who had contact with G.R.P. and Mary Garrison during the hours following the incident at the high school.

On the morning of January 23, 2018, Marshall County 911 Dispatch received a call regarding an active shooter at Marshall County High School. The incident began at approximately 7:55 a.m., just before the opening bell. At 7:57 a.m., Marshall County 911 received its initial call reporting the incident (Exhibit 1: CAD Detail Report). Numerous law enforcement officers from multiple agencies responded to the scene, as did EMS, Fire Department personnel, and many other first responders.

The CAD Detail Report indicates Marshall County Unit 01 reported "one in custody" at 8:11 a.m. (*Id.*), which means G.R.P. was in police custody within 15 minutes of the initial call. G.R.P. was handcuffed with his hands behind his back, and told by Marshall County Deputy Sheriff Bret Edwards, the transporting officer, to lie down on

the back seat of the police cruiser so no one would see him. G.R.P. complied, but his glasses fell off during transport, and he was unable to retrieve them. For the entirety of the post-arrest custodial interrogation, G.R.P., who is nearsighted, was not wearing his glasses.

G.R.P. was taken immediately to the interview room at the Marshall County Sheriff's Office. Video of the interrogation shows G.R.P. initially sitting quietly, his hands cuffed behind his back, waiting for the interrogation to begin. (Exhibit 2: DVD). At approximately 8:30 a.m., the interrogation began. At 8:33 a.m., Marshall County Sheriff's Detective Jeff Daniels read G.R.P. his rights and asked him if he understood them. G.R.P. acknowledge that he understood by nodding his head, and asked if the document Daniels had just read to him contained his *Miranda* rights. Daniels responded, "yeah buddy," and then proceeded to begin questioning G.R.P. Det. Daniels did not ask if G.R.P. wished to waive his rights, nor did Daniels ask G.R.P. to sign the rights waiver form. There was no further discussion of G.R.P.'s waiver of his *Miranda* rights until later in the interrogation.

At 8:48 a.m., Marshall County Sheriff's Captain Matt Hillbrecht entered the interrogation room and took over questioning from Daniels. Within minutes, Hilbrecht acknowledged to G.R.P. that he knew G.R.P.'s mother:

Hillbrecht:	You're Mary Garrison's son, aren't you?
GRP:	Yes.
Hillbrecht:	That's what I was thinking.
GRP:	Oh, you know her?
Hillbrecht:	I know Mary, yeah.

Detective Daniels realized then that he knew her as well, and had even been to G.R.P.'s residence:

Daniels:	Mary?
Hillbrecht:	Yeah.

. . .

Daniels:	In fact, did y'all live on Pirates Cove for a while? Do you remember me coming out because somebody stole your Xbox?
GRP:	Oh, was that you? I can't tell without my glasses."
Hillbrecht:	Where are your glasses, Gabe?
GRP:	They fell off in the car that I was taken in.

Following this exchange, G.R.P. provided the officers with his mother's phone number:

Hillbrecht:	How do we get hold of [your mom] if we need to?
GRP:	906 – no, no. It's 270-906.
Hillbrecht:	270-906?
GRP:	[*xxxx*].
Hillbrecht:	[*xxxx*]. And she at the same address as you, right?
GRP:	Yes.

Despite having been given Mary Garrison's phone number, and despite the fact that both interrogating officers already knew her, none of the law enforcement officers involved in the interrogation attempted to comply with Kentucky's parental notification statute by contacting her prior to proceeding any further with the interrogation.

Three more officers joined the group in the interrogation room: Kentucky State Police Detectives David Dick and Corey Hamby, and FBI Agent Sean Miller. The interrogation proceeded, and G.R.P. made several admissions and incriminating statements. At 9:27 a.m.—after the interrogation had been underway for 57 minutes—Captain Hillbrecht noticed that the rights waiver form lying on the table was unsigned, so he questioned G.R.P. about it:

Hillbrecht:	Gabe, let me ask you something. I walked in here and Jeff was already talking to you.
GRP:	Um-hmm.
Hillbrecht:	I saw Jeff had this waiver out. He told you about your rights, didn't he?
GRP:	Yes.
Hillbrecht:	He did, okay. I noticed it wasn't signed at the bottom, he didn't ask you to sign it?
GRP:	No, he didn't.
Hillbrecht:	I just looked over and saw that. And I knew he told you about your rights but –

GRP: Witness or?
Hillbrecht: No, just right here on the blank line.

G.R.P. then signed the form. At no time did Captain Hillbrecht ask G.R.P. if he wished to waive those rights.

The interrogation continued until 10:22 a.m., ending with G.R.P.'s invocation of his right to counsel:

GRP: I would like to request an attorney.
Dick: Okay. Well, I suspect your mother will be here shortly. So when she gets here, we'll let her come back here with you.
. . .
Dick: She should be getting here shortly, she texted a while ago and said she was coming.

Not only did the officers know the phone number for Mary Garrison, at least one of them had been in communication with her. None of the officers, however, attempted to comply with the parental notification requirements of KRS Chapter 610.

As G.R.P. was being interrogated by as many as five law enforcement officers, his mother, Mary Garrison, was experiencing a different sort of morning. After dropping her son off at school shortly before 8:00 a.m., Mary headed back to her house. She had traveled homeward for about 10 minutes when she received a phone call alerting her to a shooting at the school. She immediately turned around and drove back towards the school, arriving before the police blocked all the entrances.

Mary will describe the scene at the school as chaotic. In January of 2018, Mary was a reporter with the Marshall County Daily in Benton, so she was attempting to do her job by sending updates and photos regarding the shooting to her editor. Her first concern, though, was the safety of her son. She told Rachel Collins, a reporter from the Benton Tribune who was present at the scene, that she was going to North Marshall Elementary School, where she had been told students from the high school were being

bused. However, before she could leave, she received information from someone standing near her vehicle that someone named "Gabe" or "Gabe Powers" was the shooter.

Mary became visibly upset by this news, and became even more upset when she received a text message from her husband, Justin Minyard, that the Kentucky State police were at their house. She called Justin, who told her that he did not know why the police were there. Mary assumed that her son had been shot, and she will testify that she became hysterical. The pastor of a local church approached her and she assumed that he was going to tell her that her son was dead. Mary became even more hysterical. Rachel Collins, the reporter who had remained with Mary during this time, unsuccessfully tried to call Justin using Mary's phone. Mary attempted to obtain information from a KSP trooper standing nearby, but the trooper told her that he had no information to convey.

Justin called Mary a short time later and informed her that G.R.P. was the accused shooter. At this point, Mary was inconsolable, and began vomiting and sobbing uncontrollably. Almost immediately, she began to receive phone calls and test messages from unknown numbers on her phone. One of the calls she received (and answered) was from Bethany Willcutt, an attorney with the Department of Public Advocacy's Murray office.[1] Willcutt told Mary that Mary needed to tell the police to stop questioning her son. Mary began screaming "I want a lawyer right now . . . get my son a lawyer right now!"

Ann Beckett, who worked with Mary at the newspaper, had just arrived at Mary's location and took possession of Mary's phone. Mary told Beckett to call Willcutt again,

[1] Mary Garrison-Minyard and Bethany Willcutt had known each other for many years. They attended high school together in Marshall County and had recently become reacquainted.

and Willcutt advised that Mary should call Det. Hillbrecht at the Sheriff's Office to tell the officers to stop the interrogation. Mary asked Willcutt to help her son.

Mary attempted to call Det. Hillbrecht but did not have his number, so she called Marshall County Sheriff Byars, who did not answer her call. Beckett told a Kentucky State Police trooper who was standing nearby that the interrogation of her son needed to stop because Mary was requesting a lawyer for him. The trooper acknowledged the demand by saying "okay" and indicated that he was going to make a call. The trooper then returned to his cruiser, presumed by Beckett for the purpose of carrying out Mary's demand. Beckett returned to Mary's location and informed her that the attorney request was taken care of. Mary then called Justin and told him that she had requested a lawyer and that the interrogation would end.

While Mary was attempting to put a stop to the interrogation, Attorney Bethany Willcutt was engaged in similar efforts. Although Willcutt had heard about the shooting at just a few minutes after 8:00 a.m., she did not learn that G.R.P. had been identified as the suspect until she was at the Circuit Court Clerk's Office inside the Marshall County courthouse. As noted in footnote 1, Willcutt and Mary Garrison-Minyard had known each other for years, and Willcutt instantly recognized G.R.P.—whose photo had already been posted on social media, where he was identified as the shooter—as Mary's son.

Knowing that an interrogation was likely underway or about to begin, Willcutt texted Cheri Riedel, Willcutt's supervising attorney at the Department of Public Advocacy (hereinafter DPA), that she was going directly to the Marshall County Sheriff's Office to attempt to stop the interview. Upon arrival at the Sheriff's Office, Willcutt identified herself as an attorney and informed the front desk staff of the purpose of her visit. After a few minutes, Capt. Hillbrecht emerged from the interrogation room and

advised Willcutt that she would not be allowed in the interrogation room to see G.R.P. because the public defender's office had not yet been appointed in the matter.[2]

Willcutt texted Riedel and informed her of the police response, and then proceeded immediately to Marshall District Judge Telle's office, where she was informed that Judge Telle would not be in until 11:00 a.m. Willcutt then came to this Court's chambers. Upon the arrival of former Commonwealth Attorney Mark Blankenship, this Court conducted a hearing and appointed DPA to represent G.R.P. Armed with that appointment, Willcutt returned to the Sheriff's Office, where she discovered that Attorney Mike Crider, a colleague at the Murray Public Defender's Office, was also attempting to gain entry into the interrogation room. Willcutt again told the front desk staff that she was there to see G.R.P. as his counsel. At that moment, Capt. Hillbrecht came out of the interrogation room and informed Willcutt and Crider that G.R.P. had requested an attorney and that the interrogation was concluded. Only at that point were Willcutt and Crider (as well as other attorneys and investigators with DPA) allowed into the interrogation room. Mary Garrison-Minyard was eventually transported to the Marshall County Judicial Center, but she too never saw her son until the interrogation had concluded, her requests for counsel and for termination of the interrogation having been ignored.

Argument

I. Defendant's statements must be suppressed because they were obtained in violation of his Fifth Amendment protection against self-incrimination.

Kentucky courts have long recognized that children are different from their adult counterparts and require special protections. For instance, Kentucky protected juveniles

[2] As will be argued *infra*, the appointment was unnecessary under RCr 2.14.

from incarceration without the possibility of parole in *Workman v. Commonwealth*, 429 S.W.2d 374 (Ky. 1968), decades before the United States Supreme Court followed suit in *Graham v. Florida*, 130 S.Ct. 2011 (2010). The United States Supreme Court has noted that children are ill-equipped to understand and safeguard their own rights, "often lack[ing] the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti v. Baird*, 443 U.S. 622, 635 (1979). Recognizing this fact, Kentucky's Juvenile Code provides for a child's absolute right to counsel (KRS 610.060), limits how long a child can be held in custody (KRS 610.220(2)), and requires parental notification of a child's arrest (KRS 610.200(1)). It is in this context that this Court should review the issues raised herein, because the law enforcement officers involved in G.R.P.'s arrest and interrogation ignored all of the safeguards that the law provides to juveniles accused of crimes.

A. The police failed to obtain a voluntary, knowing, and intelligent waiver of G.R.P.'s rights under *Miranda v. Arizona*.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the United States Supreme Court held that a person subjected to custodial interrogation must first be informed of his right to remain silent, his right to an attorney, and of the fact that anything he says may be used against him in court. These rights can be waived, however, "provided the waiver is made voluntarily, knowingly, and intelligently." *Id.* at 444. For a waiver to be valid, "the Commonwealth must show by a preponderance of the evidence that the defendant made an uncoerced choice to abandon his constitutional rights and that he was fully aware of both the nature of the right being waived and the consequences of waiving it." *Taylor v. Commonwealth*, 276 S.W.3d 800, 807 (2008) (internal quotations omitted).

The prosecution in this case cannot show any evidence—much less a preponderance thereof—that G.R.P. made such a knowing and intelligent waiver.

Detective Daniels was so eager to begin the interview that he made no attempt to determine whether G.R.P. understood his rights or whether he wished to waive them. Even when Capt. Hillbrecht noticed that G.R.P's rights waiver form remained unsigned after the interrogation had begun, his only concern was in getting G.R.P.'s signature on the form. Hillbrecht never asked G.R.P. a single question about his understanding of those rights or about his desire to waive them. G.R.P.'s confusion as to where he should sign the form—(GRP: "Witness or?" Hillbrecht: "No, just right here on the blank line")—indicates that G.R.P. may not have known what he was signing, and certainly should have raised concerns in Hillbrecht's mind regarding the knowing and intelligent waiver that he believed he was obtaining from G.R.P.

The situation before the Court is unlike that in *Ruff v. Commonwealth*, 2013 WL 1789861 (Ky., Apr. 25, 2013), or *Campbell v. Commonwealth*, 732 S.W.2d 878 (Ky. 1987), cases in which a defendant refused to sign a rights waiver form yet proceeded to answer the interrogator's questions.[3] Here, G.R.P. was never asked to sign the form and he never acknowledged to any of the officers that he understood his rights or wished to waive them. The Kentucky Supreme Court has held that "a waiver must . . . be given with the knowledge of the full nature of the rights being waived, as well as the consequences of waiving those rights." *Matthews v. Commonwealth*, 168 S.W.3d 14, 21 (Ky. 2005). Because there was no discussion at all and no acknowledgment of his understanding, there was no waiver in this case. Without a valid waiver, the statements were taken in violation of G.R.P.'s rights under the Fifth and Fourteenth Amendments.

[3] The unpublished opinion in *Ruff v. Commonwealth* is attached hereto as Exhibit 4.

B. Under the totality of the circumstances, G.R.P.'s statements were not voluntary.

In the context of a motion to suppress, the burden is on the Commonwealth to prove by a preponderance of the evidence that the defendant's statements were voluntary. *Stanton v. Commonwealth*, 349 S.W.3d 914 (Ky. 2011). To do this, the Commonwealth must show, based on the totality of the circumstances, that the investigating officers did nothing to break or override the defendant's will, *Chambers v. Florida*, 309 U.S. 227 (1940), and that his statements were "the product of a rational intellect and a free will." *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960). Factors this Court should consider in such a totality-of-the-circumstances analysis include the details of the interrogation and the characteristics of the defendant. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

With respect to the characteristics of the defendant, "courts consider such factors as age, education, intelligence, and linguistic ability." *Bailey v. Commonwealth*, 194 S.W.3d 296, 300 (Ky. 2006). Regarding details of the interrogation, courts should look at "the length of the detention, the lack of any advice to the accused concerning his constitutional rights, the repeated or prolonged nature of the questioning, and the use of overtly coercive techniques such as the deprivation of sleep, or the use of humiliating tactics." *Id.* Finally, the use of this analysis "embodies [the] belief that voluntariness cannot 'turn on the presence or absence of a single controlling criterion' but rather a 'careful scrutiny of all the surrounding circumstances.'" *Id.* at 302.

The voluntariness of a juvenile's confession is measured no differently, *i.e.* it is "gauged according to the totality of the circumstances." *Fare v. Michael C.*, 99 S.Ct. 2560 (1979).

> The totality [of the circumstances] approach permits—indeed it mandates—inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights . . . . [Juvenile courts will be able to] apply the totality-of-the-circumstances analysis so as to take into account those special concerns that are present when young persons, often with limited experience and education and with immature judgment, are involved.

Id. at 2572. Thus, the "totality of the circumstances" in the case of a juvenile confession must take into account circumstances that are not present in the case of an adult defendant.

GRP's video interrogation was recorded (and attached hereto under seal as Exhibit 2), so this Court will have the opportunity to review it in its entirety. The Commonwealth will likely point out that GRP was not deprived of food or sleep, that the interrogation did not last an inordinate amount of time, and that the officers used a calm, conversational tone throughout the interview. In addition, Marshall County Sheriff's Detective Jeff Daniels read G.R.P. his *Miranda* rights near the beginning of the interview (although as noted *supra*, Daniels never received an oral or written acknowledgment from G.R.P. that he understood the rights or wished to waive them).

Miranda warnings, however, "may serve to assure an adult, or even a mature minor, that he is free to say nothing and even to leave the officers' presence any time he desires," *Commonwealth v. Bell*, 365 S.W.3d 216, 224 (Ky. 2012), but the warnings do not necessarily provide the same assurances to a fifteen-year-old boy, especially one such as G.R.P. who had with no previous contact with the court system. As the United States Supreme Court has noted:

> Age 15 is a tender and difficult age for [any boy]. He cannot be judged by the more exacting standards of maturity. That which

> would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces.

Haley v. Ohio, 332 U.S. 596, 599 (1948). The quoted passage is particularly astute, and particularly applicable in this case, because the "crisis of adolescence" can create great instability that can overwhelm a boy such as G.R.P., who had absolutely no experience with the police or with the court system prior to his total immersion in it on January 23, 2018. Even Det. Daniels acknowledged to G.R.P. near the beginning of the interrogation that 15 "is a tough age . . . I understand that."

In addition, the absence of a parent or legal counsel (both of whose absences are discussed in greater detail *infra*), surely created even more uncertainty with respect to G.R.P's "waiver" of his rights:

> We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique—but not in principle—depending on the age of the child and the presence and competence of parents. The participation of counsel will, of course, assist the police, Juvenile Courts and appellate tribunals in administering the privilege. **If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright, or despair.**

In re: Gault, 387 U.S. 1, 55 (1967) (emphasis added). Counsel was indeed not present during G.R.P.'s interrogation, but as argued *infra*, not for a "permissible reason." The interrogating officers had a young boy handcuffed in a strange place, surrounded by heavily-armed authority figures, with no parent or attorney anywhere in sight. Such a scene is the essence of coercion.

When looking at coercive police activity during the interrogation of a juvenile, the methods and techniques exist across a spectrum. At one end of the spectrum is police

activity such as that in *Dye v. Commonwealth*, 411 S.W.3d 227 (K7. 2013), where officers, during a lengthy interrogation, "repeatedly [and incorrectly] threatened a seventeen-year-old suspect with the death penalty" if he failed to confess to the crime of which he was accused, a process the Kentucky Supreme Court found to be "objectively coercive." *Id.* at 233 (citing *Henson v. Commonwealth*, 20 S.W.3d 466, 469 (Ky. 1999). At the other end of the spectrum, there is the calm demeanor of the officers in *Taylor v. Commonwealth*, 276 S.W.3d 800 (Ky. 2008), which involved an interrogation that consisted of the officers providing the suspect with "a meal, drinks, cigarettes, and bathroom breaks" and their specific warning to the suspect that "they could not guarantee any specific outcome in exchange for his cooperation." *Id.* at 806.

The interrogation to which G.R.P. was subjected on January 23, 2018, falls between the two poles, and bears great resemblance to the interrogation in *Commonwealth v. Bell*, 365 S.W.3d 216 (Ky. App. 2012). In *Bell*, as in the case before

this Court, the suspect was not deprived of food or sleep, and the interrogating officers "used a calm, conversational tone throughout the interview." *Id.* at 224. The officers also read Bell his *Miranda* rights, as did the officers in this case. However, in this case, as in *Bell*, "although the [length of the interrogation] may not seem excessive, the repetitive questioning amounted to coercion by importunity." *Id.* at 225. To paraphrase *Bell*: GRP, alone and handcuffed and without the ability even to see the faces of his interrogators because his glasses remained on the floor of the police cruiser, was ordered by police officials into a room where he was literally surrounded by the blurry faces of adult authority figures with considerable power who repeatedly demanded answers that GRP would have to provide. Such a setting was objectively coercive and G.R.P. would certainly have been susceptible to such coercion.

C. The interrogating officers' willful disregard of Kentucky's parental notification statute rendered G.R.P.'s statements involuntary.

Kentucky's parental notification statute requires that when a juvenile is arrested, the child's parent be immediately notified of the charges and reasons for taking the child into custody. KRS 610.200. The Kentucky legislature created this rule out of "concern for 'the protection of the rights of accused juveniles when they come in contact with our law enforcement agencies.'" *Murphy v. Commonwealth*, 50 S.W.3d 173, 187 (Ky. 2001) (internal citations omitted).

In *Murphy*, the Kentucky Supreme Court addressed the issue of an interrogating officer's failure to comply with the requirements of KRS 610.200. Acknowledging that the statute "requires a peace officer to immediately notify a child's parent that the child has been taken into custody, and to give the parent notice of the specific charge and the reason for taking the child into custody," the Court essentially ruled that unless a

defendant could also show that his statement was involuntarily given, the technical violation of the requirements of this statute would provide an insufficient reason to suppress the statement, despite the mandatory language contained therein. *Id.* at 185. What is interesting about the *Murphy* case is Justice Keller's concurring opinion. While Keller agreed with the majority that the technical statutory violation does not alone support the suppression of incriminating statements, she considered the provisions to be "mandatory requirements which are inherently intertwined with questions concerning the voluntariness of a juvenile's incriminating statements [and that] courts should consider police authorities' compliance with the provisions of KRS 610.200 as an important variable in determining whether a juvenile's confession was given voluntarily." *Id.* at 187.

Justice Keller's language in her concurrence seems to have become the law of the Commonwealth. In *Shepherd v. Commonwealth*, 251 S.W.3d 309, 320 (Ky. 2008), a majority of the Kentucky Supreme Court adopted the reasoning and analysis from Justice Keller's concurrence in *Murphy* in determining that "technical" violations of KRS 610.220 should be viewed under the same "totality of the circumstances" lens that Justice Keller had used to view a violation of the parental notification requirement of KRS 610.200, *i.e.*, as "an important factor in the overall determination of whether a juvenile defendant gave his statement voluntarily." [4]

[4] When dealing with adolescent defendants, the defendant's juvenile status must inform a reviewing court's analysis. Another instance is found when a court must determine whether a suspect is "in custody" for purposes of *Miranda*, which involves an objective determination focusing on the circumstances surrounding the investigation and the hypothetical reasonable person's response to those circumstances. Despite the "reasonable person" standard, the United States Supreme Court has ruled unequivocally that when dealing with adolescent suspects, "a child's age properly informs the Miranda custody analysis." *J.D.B. v. North Carolina*, 564 U.S. 261, 265 (2011). The Court held that "so long as the child's age was known to the officer at the time of questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test." *Id.* at 277.

Kentucky's parental notification statute certainly creates a parent's right to be present at questioning or to intervene in questioning. This is not to argue that a parent must be present at every interrogation of a child or that an interrogation must be halted when a parent cannot be diligently contacted. However, when a parent makes an unequivocal request that she or an attorney be present during an interrogation, a police officer cannot proceed in the parent's absence or otherwise interfere with a family member's (or an attorney's) access to the child. Here, Mary Garrison-Minyard made such an unequivocal request, when she informed the trooper at the scene that she wanted the interrogation stopped, and when she enlisted the aid of Attorney Willcutt to help her in stopping the interrogation.

Kentucky's notification statute certainly implies that if a parent has requested that a custodial interrogation cease and/or invokes the child's right to counsel, police officers cannot summarily dismiss such an invocation of rights. To find otherwise would be to interpret the statute into meaninglessness. Parents would be informed that their child was in custody and subject to police interrogation, yet have no power to protect their child's rights. Such a scenario is directly at odds with the purpose of the statute as interpreted by the Kentucky Supreme Court: to protect juvenile's rights when confronted by the police.

The interrogating officers made no attempt at all to comply with the requirements of KRS 610.200. Their failure is made more egregious by the fact that most of them already knew G.R.P.'s mother personally, and that G.R.P. gave them her cell phone number during the opening minutes of the interrogation. Such overt defiance of the legal requirements of Kentucky's Juvenile Code should not be tolerated by this Court.

II. Defendant's statements must be suppressed because they were obtained in violation of his Sixth Amendment right to counsel.

The government deprived G.R.P. of his right to counsel when the interrogating officers barred two attorneys from seeing G.R.P. during the time of his custodial interrogation in the interview room of the Marshall County Sheriff's Office.

RCr 2.14(2) provides (with emphasis added):

> Any attorney at law entitled to practice in the courts of this Commonwealth shall be permitted, at the request of the person in custody **or of someone acting in that person's behalf**, to visit the person in custody.

This rule once had teeth. In *West v. Commonwealth*, 887 S.W.2d 338 (Ky. 1994), the Kentucky Supreme Court reviewed a case with almost identical facts, in which a public defender attorney learned of an ongoing interrogation of a murder suspect (that he did not then represent) and, at the request of the suspect's family member, attempted to stop the interrogation. After being denied access to the suspect, the public defender obtained a court order from a circuit judge that required the investigating officers to cease questioning the suspect until he could speak to the lawyer. The Kentucky Supreme Court held that a "circuit court's jurisdiction does not, strictly speaking, depend on the filing of an indictment [and that] there existed a justiciable cause sufficient to invoke the jurisdiction of the [circuit court]." *Id.* at 340-41. The circuit judge's order was upheld.

The holding of *West* recognized the truth set out in the Commentary to the rule—namely, that if there is any point "from the time of his arrest to final determination of his guilt or innocence [that] an accused really needs the help of an attorney, it is in the pre-trial period," a period that "is so full of hazards for the accused that, if unaided by competent legal advice, he may lose any legitimate defense he may have long before he is arraigned and put on trial."

Then along came *Terrell v. Commonwealth*, 464 S.W.3d 495 (Ky. 2015), a case that explicitly overruled *West* on the issue of exactly when—that is, at what point during a criminal prosecution—a court can intercede on behalf of a suspect to stop an interview that is taking place without counsel. The *Terrell* court rejected *West*'s holding and ruled that "jurisdiction to deal with the matters covered by RCr 2.14(2) does not vest in any court until prosecution of the accused begins in the court system." *Id.* at 501.

Despite the harshness of *Terrell*'s bright-line rule that until the formal commencement of prosecution, courts cannot intercede under this particular criminal rule to force police to stop questioning a suspect so that the suspect's attorney can visit with the client, the rule still retains some of its former vitality. Even under *Terrell*, compliance with RCr 2.14(2) requires that **"when an attorney arrives at the place where the individual is detained, the officers *must* allow the attorney to visit privately with the individual."** *Terrell*, 464 S.W. 3d at 501-02 (italics in original; boldface added).

When Bethany Willcutt (an attorney) arrived at the Marshall County Sheriff's Office (the place where G.R.P. was detained), Capt. Hillbrecht and the other officers were under a duty—even under the holding of *Terrell*—to allow her private access to her client, regardless of whether her office had been appointed to represent him. The material provided in discovery and the anticipated testimony at the upcoming suppression hearing indicate that two different attorneys arrived at the location where G.R.P. was detained for the express purpose of visiting privately with him. These two individuals—who were to some degree acting at the behest of G.R.P.'s mother—were all denied access during the time when he was being questioned. It was not until the questioning turned hostile—focusing swiftly and aggressively on the question of what

punishment G.R.P. should face—that the interrogation ended, and the officers allowed the attorneys and G.R.P.'s mother to enter the room. Such actions on the part of Capt. Hillbrecht and the others constituted a clear violation of G.R.P.'s Sixth Amendment right to counsel, and the entirety of G.R.P.'s interrogation should be suppressed and made unavailable for use by the prosecution at the trial of this matter.

Conclusion

The United States Supreme Court has emphasized "that admissions and confessions of juveniles require special caution" because "authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children." *Gault*, 387 U.S. at 52. In this case, the failure of the interrogating officers to obtain a knowing, intelligent, and voluntary *Miranda* waiver, their failure to comply with Kentucky's parental notification statute, and their refusal to allow admittance to an attorney whose counsel had been sought by G.R.P.'s family, all combined to render any statement G.R.P. made to them on the morning of January 23, 2018, involuntary and inadmissible at the trial of this action.

WHEREFORE, Defendant moves this Court to enter the attached Order suppressing and excluding from trial all statements made by him during the course of the police interrogation conducted on January 23, 2018. Defendant requests and reserves the right to supplement this motion with a Memorandum of Facts and Authorities following the hearing on August 19, 2019.

Respectfully submitted this 15th day of July, 2019.

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and

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Douglas Moore

NOTICE

Please take notice that the foregoing motion will be brought on for hearing before the Marshall Circuit Court on August 19, 2019, at 9:00 a.m.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing motion was served on **Dennis Foust, Esq.**, Commonwealth Attorney for the 42nd Judicial Circuit, 80 Judicial Drive, Benton, Kentucky 42025, by hand-delivering a true and accurate copy of same on this 15th day of July, 2019.

Douglas Moore

APPENDIX

Exhibit 1

CAD Detail

Print Date: 06-Feb-18
Print Time: 10:23:16 AM
User Name: tonya

Incident #2018-00004760

Hide Incident Log; Hide System Messages; Hide Media

Incident Location:	416 HIGH SCHOOL RD, BENTON	**Apt:**	
Inc Loc Info:	MARSHALL COUNTY HIGH SCHOOL	**Latitude:**	36.91415843065906
Building:		**Longitude:**	-88.33218758508346
Community:	BENTON		
Municipality:	BENTON		
Caller Name:		**Disposition:**	C
Caller Location:		**Apt:**	
Call Loc Info:		**Building:**	
Phone:		**Source:**	ADMIN
Call Back Phone:			
Incoming 911:	23-Jan-18 07:57:26 AM	**Created By:**	tonya
Create Date/Time:	23-Jan-18 07:57:26 AM	**Sent By:**	tonya
Dispatch Date/Time:	23-Jan-18 07:59:34 AM	**Language:**	
Enroute Date/Time:	23-Jan-18 08:33:49 AM		
Onscene Date/Time:	23-Jan-18 08:51:15 AM	**Priority:**	1
Clear Date/Time:	26-Jan-18 16:36:53 PM	**Event:**	SHOTS FIRD
Closed Date/Time:	26-Jan-18 16:36:53 PM		

Associated Case Numbers:

Unit	Unit Org	Employee	Case#	Date/Time	Rescinded
MC17	MCSO	RAY CHUMBLER	2018-001326	23-Jan-18 07:59:34 AM	
B06	BPD	WILLIAM TREADWAY	2018-000436	23-Jan-18 08:20:31 AM	
CC23	CCPD	ROBERT JOHNSON	2018-001911	23-Jan-18 16:23:22 PM	

Remarks:

User Name	Date/Time	Remarks
tonya	23-Jan-18 07:59:29 AM	HOW MANY SHOTS 5-6 SHOT FIOREED
tonya	23-Jan-18 08:00:01 AM	[redacted]
maranda	23-Jan-18 08:00:34 AM	HOW MANY SHOTS 5-6 SHOT FIOREED
tonya	23-Jan-18 08:02:03 AM	SHOTS IN COMMONS AREA, NO IDEA, CALLERS IN TECH CENTER ONE KID SHOT IS IN THE DR BYRAN DENTAL OFFICE

* Date/Time is Backfilled

CAD Detail

Print Date: 06-Feb-18
Print Time: 10:23:17 AM
User Name: tonya

Incident #2018-00004760

Hide Incident Log; Hide System Messages; Hide Media

Remarks:

User Name	Date/Time	Remarks
tonya	23-Jan-18 08:04:34 AM	SHOTS FIRED/ ONE IN THE COMONS AREA
tonya	23-Jan-18 08:09:37 AM	POSSIBLY IN THE WAIT ROOM
tonya	23-Jan-18 08:11:24 AM	MC01- ONE IN CUSTODY
tonya	23-Jan-18 08:12:45 AM	ONE IN THE BOARD OF EDUCATION// SHOT IN THE STOMACH//
tonya	23-Jan-18 08:12:57 AM	CALLER ADVISED THAT HE SEEN THE SHOOTER//
tonya	23-Jan-18 08:13:16 AM	CALLER ADVISED HE KNOWS HIM FROM SHCOOL//
tonya	23-Jan-18 08:14:59 AM	ONE IN THE BOARD OF EDUCATION//
tonya	23-Jan-18 08:15:35 AM	MERCY MEDICAL//
tonya	23-Jan-18 08:16:42 AM	HOW MANY SHOTS 5-6 SHOT FIRED
tonya	23-Jan-18 08:20:48 AM	SHOTS IN COMMONS AREA, NO IDEA, CALLERS IN TECH CENTER 3 UNITS ON THE WAY FROM CALLOWAY CO
maranda	23-Jan-18 08:22:00 AM	MC18 has a new remark: 10-15 TO SIG 4 10699.
tonya	23-Jan-18 08:24:13 AM	WEIGHT ROOM- MALE
tonya	23-Jan-18 08:24:19 AM	135- CODE 3 TO MARSHALL CO
tonya	23-Jan-18 08:24:36 AM	595- CODE 2 TO MARSHALOL CO
tonya	23-Jan-18 08:29:44 AM	B11 has a new remark: 2 WILL BE TRANSPORTING TO LOURDES -.
tonya	23-Jan-18 08:31:17 AM	105- 97 154.9-
tonya	23-Jan-18 08:31:23 AM	595- 924.4
tonya	23-Jan-18 08:31:43 AM	HOLD ROOM AND AG BUILDING - TC 4
tonya	23-Jan-18 08:32:29 AM	2-3 VICTIMS//
tonya	23-Jan-18 08:34:26 AM	105- CODE 2 MARSHALL
tonya	23-Jan-18 08:34:55 AM	135- 102.8- 97
tonya	23-Jan-18 08:36:00 AM	595- ON THEIOR WAY BACK TO THE HYOSPITAL;
tonya	23-Jan-18 08:41:37 AM	MC52 has a new remark: BACK IN TO THE SO.
tonya	23-Jan-18 08:42:42 AM	B11 has a new remark: NOTIFY LOURDES THEY ARE ENROUTE .
tonya	23-Jan-18 08:43:21 AM	MC57 has a new remark: CAN I GET A UBNIT AT HIS LOCATION.
tonya	23-Jan-18 08:46:26 AM	107-AIR EVAN ON GROUND
tonya	23-Jan-18 08:47:11 AM	110- ADVISED 641- IS TOTALLY SHIT DOWN
vince	23-Jan-18 08:51:11 AM	500 has a new remark: helicopters on the ground.
tonya	23-Jan-18 08:51:34 AM	AIR EVAC- IN BOUND// ANOTHER COPTER
tonya	23-Jan-18 08:53:45 AM	POST- ADVISED THAT THEY NEED TO CORONER// COMMONS AREA/ REQ THE C1
tonya	23-Jan-18 08:54:10 AM	MC40- 2 IN THE WOODS GOPING TO CHECK THEM OK
tonya	23-Jan-18 08:58:45 AM	EMS ADVISED THEY HAVE CONTACT WITH AIR EVAN
tonya	23-Jan-18 08:59:00 AM	EMS ADVISED TRUYCKS ARE SWECURE
vince	23-Jan-18 08:59:02 AM	MC13 has a new remark: cleared woods.

* Date/Time is Backfilled

Exhibit 2

(Filed under seal)

Exhibit 3

(Filed under seal)

Exhibit 4

2013 WL 1789861
Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

Supreme Court of Kentucky.

Alexander L. RUFF, Appellant
v.
COMMONWEALTH of Kentucky, Appellee.

No. 2011–SC–000640–MR.
|
April 25, 2013.

Synopsis

Background: Following denial of his motions to suppress, defendant was convicted in the Jefferson Circuit Court, Mitch Perry, J., of wanton murder and first-degree robbery. He appealed.

Holdings: The Supreme Court held that:

[1] trial court could find that Commonwealth's race-neutral reason for removing African-American venireperson by peremptory strike was not based on racial discrimination;

[2] defendant's suspicious behavior gave rise to an independent articulable suspicion sufficient to justify slightly prolonged stop and request to search vehicle;

[3] defendant understood his right to remain silent and voluntarily waived that right when he was transported to police station to discuss possible involvement in robbery;

[4] defendant resumed contact with police officers after he had invoked his right to counsel and was waiting to take polygraph exam; and

[5] defendant knowingly and voluntarily waived right to counsel while waiting to take polygraph exam.

Affirmed.

West Headnotes (22)

[1] **Criminal Law**
Summoning, Impaneling, or Selection of Jury

A trial court's denial of a *Batson* challenge is reviewed for clear error.

Cases that cite this headnote

[2] **Constitutional Law**
Peremptory Challenges

Equal Protection Clause forbids challenging potential jurors by use of racially discriminatory peremptory strikes. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[3] **Jury**
Peremptory Challenges

Batson provides a three-step process for a trial court to use in adjudicating a claim that a peremptory challenge was based on race: (1) a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; (2) if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and (3) in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Cases that cite this headnote

[4] **Jury**
Peremptory Challenges

In evaluating the *Batson* challenge, based on Commonwealth's exercise of peremptory strike, a trial court must consider all circumstances bearing on racial animosity, including inconsistencies in the treatment of the stricken juror and similarly situated jurors outside the suspect class.

Cases that cite this headnote

[5] **Criminal Law**
Decision in General

On *Batson* challenge based on preemptory strike, the Supreme Court would examine similarities between African-American venireperson's answers in opposing death penalty and responses of Caucasian venirepersons to determine if the Commonwealth engaged in intentional discrimination, where record was fully developed regarding venirepersons' responses to death penalty related questions.

Cases that cite this headnote

[6] **Jury**
Peremptory Challenges

Trial court's finding that Commonwealth's race-neutral reason for removing African-American venireperson by peremptory strike was not based on racial discrimination was not clear error; African-American venireperson clearly explained that he could not consider the death penalty when assessing potential punishments for intentional murder and robbery, and none of the similarly situated Caucasian venirepersons expressed the same level of reluctance toward considering the death penalty as African-American venireperson.

Cases that cite this headnote

[7] **Criminal Law**
Evidence Wrongfully Obtained

Criminal Law
Acts, Admissions, Declarations, and Confessions of Accused

Any error in failing to suppress evidence and defendant's pretrial statements was not rendered harmless beyond a reasonable doubt by defendant's ultimate admission of guilt before the jury; in determining suppression issue, reviewing court was required to focus on findings of fact from the suppression hearing and not the proof adduced at trial. Rules Crim.Proc., Rule 9.78.

Cases that cite this headnote

[8] **Criminal Law**
Review De Novo

Supreme Court, on review of a motion to suppress evidence, reviews de novo the trial court's application of the law to findings of fact to determine whether its decision is correct as a matter of law.

Cases that cite this headnote

[9] **Criminal Law**
Necessity

While a lack of specific findings of fact may impair Supreme Court's ability to undertake a meaningful review of record from suppression hearing, appellate review is possible if the trial court's legal conclusions are adequately adduced and there is little disagreement as to the facts.

Cases that cite this headnote

[10] **Automobiles**
Detention, and Length and Character Thereof

A traffic stop for the purposes of issuing a citation becomes unlawful if the detention continues beyond the time required to effectuate the purpose of the initial stop.

Cases that cite this headnote

[11] **Automobiles**
Detention, and Length and Character Thereof

Criminal Law
Traffic Regulation;Speed Traps, Roadblocks, Vehicular Markings, and Uniforms

Items discovered as a result of an illegally prolonged traffic stop are considered products of an unconstitutional seizure, and such

evidence must be suppressed. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[12] **Automobiles**
Detention, and Length and Character Thereof

Automobiles
Inquiry;License, Registration, or Warrant Checks

Defendant's suspicious behavior, fainting, after vehicle in which he was a passenger was lawfully stopped for unreadable temporary tag, gave rise to an independent articulable suspicion sufficient to justify a slightly prolonged stop, as well as officer's request to search vehicle; defendant's sudden loss of consciousness was suspicious, as it was common for individuals to pass out after ingesting narcotics, and the stop appeared to last no longer than 10 to 15 minutes. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[13] **Criminal Law**
Form and Sufficiency in General

A suspect may voluntarily, knowingly, and intelligently waive his or her Fifth Amendment rights, under *Miranda*, but any waiver must be voluntary, not the product of coercion, and must be given with the knowledge of the full nature of the rights being waived, as well as the consequences of waiving those rights. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[14] **Criminal Law**
Form and Sufficiency in General

Only when the totality of the circumstances surrounding police interrogation supports a finding of voluntariness and knowingness will the suspect's rights be deemed waived for *Miranda* purposes.

Cases that cite this headnote

[15] **Criminal Law**
Waiver of Rights

A suspect may voluntarily, knowingly, and intelligently waive his or her Fifth Amendment rights to an attorney and to remain silent. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[16] **Criminal Law**
Right to Remain Silent

In light of defendant's general demeanor and his willingness to speak with detectives, after being transported to police department's homicide office, defendant understood his right to remain silent and voluntarily waived that right, and thus suppression of defendant's subsequent statement to police officer was not required in murder prosecution, even though defendant refused to sign standard waiver of rights form after he was read his *Miranda* rights; when asked by detective if he understood what *Miranda* rights were, defendant replied, "yeah," and allowed the interrogation to continue. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[17] **Criminal Law**
Counsel

Criminal Law
Initiation by Defendant

A suspect who has invoked his Fifth Amendment right to counsel shall not be subjected to further police interrogation until a lawyer has been made available or the suspect reinitiates conversation with law enforcement. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[18] **Criminal Law**
Initiation by Defendant

Statements made to law enforcement officers after a suspect has invoked his right to counsel may be admitted only if the court finds that the suspect initiated further questioning and knowingly and intelligently waived the right he had previously invoked. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[19] **Criminal Law**
Initiation by Defendant

An accused's post-invocation reinitiation of questioning must be independently made, and cannot be considered voluntary if it is the product of police inducement or encouragement.

Cases that cite this headnote

[20] **Criminal Law**
Initiation by Defendant

Despite officer's comment to defendant "if I were innocent, I'd want to get my side of the story out," defendant, not police officers, resumed contact with officers after defendant had invoked his right to counsel, as required to support admission of defendant's subsequent statements in murder prosecution; officer testified that he had no interest in "getting involved" in defendant's case because he was working on unrelated case, and that he only responded to defendant's statement that he wanted a "ten-year deal" in an informal manner, and officer explained to defendant that he did not have to speak with him and acknowledged that defendant had invoked his right to counsel. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[21] **Criminal Law**
Warnings

The test to determine if an individual is in custody for *Miranda* purposes is whether, considering the surrounding circumstances, a reasonable person would believe he or she was free to leave. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[22] **Criminal Law**
Counsel

Defendant knowingly and voluntarily waived his right to counsel after initiating questioning with law enforcement as he waited for polygraph exam in police station, as required to support admission of defendant's subsequent statements in murder prosecution; police officer testified that defendant, handcuffed in a rolling chair, rolled himself into his office and stated that he wanted to talk, when officer refused to speak with him because he had invoked his right to an attorney, defendant said "f* * * the attorney" and asked for a "ten-year deal," and after hearing his *Miranda* rights for a second time, it was officer's impression that defendant "without a doubt" understood his rights, and insisted on continuing their conversation. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

On Appeal from Jefferson Circuit Court, No. 08–CR–003686; Mitch Perry, Judge.

Attorneys and Law Firms

Daniel T. Goyette, Cicely Jaracz Lambert, Louisville Metro Public Defender, Office of the Louisville Metro Public Defender, Louisville, KY, for appellant.

Jack Conway, Attorney General of Kentucky, James Hays Lawson, Assistant Attorney General, Office of Criminal Appeals, Office of the Attorney General, Frankfort, KY, for appellee.

MEMORANDUM OPINION OF THE COURT

*1 Alexander Ruff appeals as a matter of right from a Judgment of the Jefferson Circuit Court convicting him of wanton murder and first-degree robbery. Ky. Const. § 110(2)(b). Finding an aggravating factor of first-degree robbery, the jury recommended a sentence of life

imprisonment without the benefit of parole or probation for twenty-five years, and the trial court sentenced him accordingly. Ruff raises three issues on appeal: (1) the Commonwealth's peremptory strike of an African–American juror constituted a *Batson* violation; (2) the trial court erred in denying his motion to suppress evidence seized from Ruff and statements made during a traffic stop; and (3) the trial court erred in denying his motion to suppress statements made to officers after the arrest. For the reasons stated herein, we affirm the Judgment of the Jefferson Circuit Court.

RELEVANT FACTS

On November 24, 2008, Alexander Ruff entered the New York Fashions clothing store in Louisville, Kentucky, with the intent to rob the store and its customers. Ruff was accompanied that day by John Benton and Kendrick Robinson. With tee-shirts tied around their faces and armed with handguns, Ruff and Benton entered the store while Robinson waited in a nearby vehicle. Ruff fired a single shot into the ceiling and ordered the people inside to get on the ground and surrender their wallets and cash. Ruff fired the gun again, this time striking store owner Mohamed Abderlrahman in the abdomen. Ruff and Benton then collected the customers' wallets and fled in Robinson's car. Abderlrahman died as a result of internal bleeding caused by his injury.

Four days later, Louisville Metro Police Department ("LMPD") Officers Christopher Sheehan and Benjamin Lunte, while on narcotics patrol, stopped a vehicle driven by Ruff's girlfriend, Chesica White, for an unreadable temporary tag. Ruff happened to be seated in the passenger seat when the officers approached the vehicle. After White and Ruff exited the vehicle, Ruff suddenly fainted and fell to the street. The officers testified that, suspecting that Ruff had swallowed narcotics, they obtained consent from White to search the vehicle. White disputed that she gave consent. Officer Sheehan found a 45–caliber handgun and a garbage bag full of clothing under the passenger seat of the car. Ruff admitted ownership of the gun and clothing. He was then arrested on unrelated charges and transported to an LMPD substation for questioning.

That evening, Ruff was questioned and placed in jail on the unrelated charges. Five days later on December 3, Ruff was transported to the LMPD homicide office for further questioning. He once again returned for questioning on December 5. Over the course of his interviews with LMPD detectives, Ruff admitted to being involved in the New York Fashions robbery, and implicated Benton and Robinson as co-conspirators.

Ruff was indicted by a Jefferson County Grand Jury on one count of murder and three counts of robbery. His motions to suppress evidence found and statements made during the vehicle stop and subsequent statements at the LMPD office were denied. At trial, Ruff took the stand in his own defense. He confessed to his involvement in the robbery and shooting, including taking customers' wallets and firing his weapon in Mohamad Abdelrahman's direction. The jury convicted Ruff of wanton murder and first-degree robbery. [1] Finding an aggravating factor of first-degree robbery, the jury returned a sentence of life without the benefit of parole or probation for twenty-five years. The trial court sentenced in accord with the jury's recommendation, and this appeal followed.

ANALYSIS

I. The Trial Court Did Not Violate *Batson* When it Upheld the Peremptory Strike of an African–American Juror.

*2 **[1]** Ruff challenges the Commonwealth's use of a peremptory strike to dismiss an African–American juror as violative of the United States Supreme Court's holding in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Specifically, Ruff asserts that the trial court erred when it accepted the Commonwealth's race-neutral reason for striking the African–American juror when his answers were substantially similar to those offered by Caucasian jurors who were not stricken. *See Snyder v. Louisiana*, 552 U.S. 472, 483, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) (the disparate treatment of similarly situated jurors may give rise to a *Batson* challenge). We review a trial court's denial of a *Batson* challenge for clear error. *Chestnut v. Commonwealth*, 250 S.W.3d 288, 302 (Ky.2008).

During individual voir dire, the trial court asked an African–American potential juror ("Juror # 475406") if he could "consider the entire range of possible punishment" for the defendants. He replied that he could not. When the trial court asked him what punishment he could not

consider, Juror # 475406 responded that he could not consider the death penalty.[2] The trial court went on to ask Juror # 475406 if "regardless of what the evidence or the law might be" if he would not consider the death penalty, and he replied: "I would have to consider it, but I wouldn't want to." The Commonwealth then continued the individual voir dire, eventually asking Juror # 475406 directly if he could consider the death penalty. Juror # 475406 replied, "Like I said, man, I'm a firm believer in second chances, and the death penalty is not one of them." The Commonwealth then moved to strike Juror # 475406 for cause, arguing that he was "substantially impaired" in that he could not consider the death penalty as a possible punishment. The trial court deemed it a "close call," but ultimately denied the Commonwealth's motion to strike for cause, finding that "[Juror # 475406] could, if directed, follow the evidence and law." The Commonwealth exercised a peremptory strike against Juror # 475406.

[2] [3] As provided in *Batson v. Kentucky*, the Equal Protection Clause of the Fourteenth Amendment prohibits the racially discriminatory use of peremptory strikes. 476 U.S. at 89; *see also Snyder*, 552 U.S. at 478 (citing *United States v. Vasquez–Lopez*, 22 F.3d 900 (9th Cir.1994)) ("[T]he constitution forbids striking even a single prospective juror for a discriminatory purpose."). When a *Batson* challenge is raised, a three-step process is undertaken to address the alleged violation:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race[; s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

552 U.S. at 476–77 (citations and internal quotation marks omitted).

*3 Ruff joined Benton's *Batson* challenge to the Commonwealth's use of a peremptory strike against Juror # 475406. Defense counsel remarked that before the exercise of peremptory strikes, the percentage of African–Americans in the venire had been decreased from nine-percent to five-percent. In striking Juror # 475406, the number of African–Americans remaining in the pool was reduced to one. Defense counsel reasoned that with the possibility of the random draw-down removing the final African–American from the venire, there was a "substantial chance of having an all Caucasian jury" in a case with three African–American defendants. The trial court found that this established a prima facie showing of purposeful discrimination under *Batson*.[3] We now turn to the second step in the *Batson* inquiry: the Commonwealth's race-neutral explanation for exercising the peremptory strike. The Commonwealth maintained that Juror # 475406's views on the death penalty, particularly the fact that he was not rated "death-qualified" per the prosecutor's system of rating jurors, led to his peremptory strike. His occupation as a minister was also offered as a race-neutral basis for exercising the peremptory strike. The Commonwealth's explanation was sufficient to allow the trial court to consider it in light of Ruff's *Batson* challenge. *Rice v. Collins*, 546 U.S. 333, 338, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006) ("Although the prosecutor must present a comprehensible reason, the second step of this process does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices."). The trial court reviewed its notes on Juror # 475406, again remarking that he was a "close call" in reference to the Commonwealth's earlier motion to strike for cause. Ultimately, the trial court accepted the Commonwealth's race-neutral explanation and denied the *Batson* challenge.

[4] [5] In evaluating the *Batson* challenge, a trial court must consider all circumstances bearing on racial animosity, including "inconsistencies in the treatment of the stricken juror and similarly situated jurors outside the suspect class." *Brown v. Commonwealth*, 313 S.W.3d 577, 602 (Ky.2010) (citing *Snyder*, 552 U.S. at 478). Ruff now claims that the trial court's finding was clearly erroneous in light of the Commonwealth's refusal to strike similarly situated Caucasian jurors. The Commonwealth's comparative treatment of jurors was not presented for the trial court to consider. In fact, the defendants only objected to the number of African–Americans remaining in the venire as the basis for their *Batson* challenge.

While the United States Supreme Court has cautioned appellate courts against engaging in a juror comparison inquiry when the argument was not presented to the trial court, we may proceed if the issue has been "thoroughly explored and made part of the record." *Id.* at 483; *Clay v. Commonwealth,* 291 S.W.3d 210, 215 (Ky.2008). Here, the record is fully developed regarding the jurors' responses to death penalty related questions. We may, therefore, move forward and examine the similarities between Juror # 475406's answers and the responses of Caucasian venirepersons to determine if the Commonwealth engaged in intentional discrimination.

*4 [6] Upon review of the Caucasian jurors' responses to questions about the death penalty, we cannot say that the Commonwealth's race-neutral explanation for exercising a peremptory strike on Juror # 475406 was based on racial discrimination. On appeal, Ruff compares Juror # 475406's responses to those of six other jurors, all of whom expressed varying degrees of reluctance when asked if they could impose the death penalty. None of those jurors, however, unequivocally stated that they *could not* consider the death penalty.[4] Juror # 475406, on the other hand, repeatedly expressed an inability to consider the death penalty as a potential punishment. At the conclusion of the Commonwealth's voir dire, Juror # 475406 conceded that he could fairly consider the death penalty in a case where there is a murder with aggravating circumstances. Prior to that final response, however, Juror # 475406 reiterated that he was "a firm believer in second chances ... and the death penalty is not one of them." One Caucasian female juror, like Juror # 475406, explained that her reluctance was partially based on her religious background. She, however, explained that while "hesitant," she was capable of considering the full range of penalties, including the death penalty.

Here, we cannot say that the trial court erred in accepting the Commonwealth's death-qualification explanation for exercise of the peremptory challenge. Juror # 475406 clearly explained that he could not consider the death penalty when assessing potential punishments for intentional murder and robbery. In fact in ruling on the motion to strike for cause, the trial court stated that Juror # 475406 was a "close call." Further, in reviewing the juror comparison argument, we find that none of the similarly situated Caucasian jurors expressed the same level of reluctance toward considering the death penalty as Juror # 475406. In addition, the Commonwealth stated that Juror # 475406's occupation as a minister was another factor in the decision to use a peremptory strike. No information about the similarly situated Caucasian jurors' occupations was presented on appeal. Finally, we cannot ignore the fact that Ruff failed to present the trial court with these comparisons, and therefore denied the Commonwealth an opportunity to address its treatment of the similarly situated jurors. *See Brown,* 313 S.W.3d at 603 (the Court found no error in the peremptory strike of an African–American juror even in light of a juror comparison argument that was not presented for the trial court to consider). In sum, the trial court did not commit clear error when it denied Ruff's *Batson* challenge.

II. The Trial Court Properly Denied Ruffs Motion to Suppress Items Found in the Vehicle and His Ensuing Statements.

[7] Ruff argues that the trial court erred when it denied his suppression motions relating to items found in his girlfriend's car, a statement he made to the police during the investigative stop admitting ownership of those items, and statements made to police officers after his arrest. The Commonwealth erroneously maintains that any error in failing to suppress evidence and statements was rendered harmless beyond a reasonable doubt by Ruff's ultimate admission of guilt before the jury.[5]

*5 [8] When this Court reviews an order on a motion to suppress, the trial court's findings of fact are conclusive if supported by substantial evidence. Kentucky Rule of Criminal Procedure ("RCr") 9.78; *Adcock v. Commonwealth,* 967 S.W.2d 6 (Ky.1998); *Peyton v. Commonwealth,* 253 S.W.3d 504 (Ky.2008). We then review the trial court's application of the law to those findings *de novo* to determine if the trial court's ruling was correct as a matter of law. *Owens v. Commonwealth,* 291 S.W.3d 704 (Ky.2009).

[9] The trial court orally denied the motions and stated that a written order to that effect would be issued, but no such written order containing specific findings of fact appears in the record. A lack of specific findings of fact may impair this Court's ability to undertake a meaningful review of the record. *Commonwealth v. Jones,* 217 S.W.3d 190 (Ky.2006). Nevertheless, appellate review is possible if the trial court's legal conclusions are adequately adduced and there is little disagreement as to the facts.[6] *Coleman v. Commonwealth,* 100 S.W.3d 745 (Ky.2002). In the instant

case, the trial court denied Ruffs motions to suppress by stating the following from the bench:

> I will respectfully deny all of those motions to suppress. In the court's view, there were four. The statements to the police were all knowing, intelligently and voluntarily done, and at the scene—there were a couple of things kind of mixed together: both the seizure of the weapon, Ruff's alleged statements at the scene after the so-called fainting spells or whatever happened with that, and then the stop itself. I do believe that the police officers had reasonable suspicion to stop the automobile at the moment it was stopped by, I forget his name, the Special Agent Sheehan, and would respectfully deny that. And then the separate issue, kind of interesting, at one point Mr. Ruff asked for an attorney and then there was a delay in questioning and then it resumed. So, just referring to that—the resumption of that testimony—the court finds that that was done voluntarily and it was upon his insistence that that resumed, and he had then waived his right to be, well he was *Mirandized,* but waived his right. So I will respectfully deny all those.
>
> This was a very cursory set of findings and conclusions, particularly for a death-penalty eligible case. Nevertheless, we believe that these statements document the trial court's findings and legal conclusions. *See Jones,* 217 S.W.3d at 194 (a trial court's oral findings of fact sufficiently documented its legal conclusions allowing adequate appellate review). We may, therefore, proceed with our review.

Ruff moved to suppress the items found in the vehicle, arguing that the items were seized as a result of an unconstitutional detention. A suppression hearing was held where the trial court heard testimony from LMPD officers and detectives including Special Agent Sheehan, as well as Ruff's girlfriend, Chesica White. Officer Sheehan testified that he and Officer Lunte stopped a vehicle driven by White for an unreadable temporary tag. Ruff was seated in the passenger seat of the car when the officers approached the vehicle. Officer Sheehan said that he asked Ruff if there was anything in the car that would "get anybody in trouble." Ruff said "no," and exited the vehicle without any instruction from the officers to do so. Placing his hands on the hood of the vehicle, Ruff told Officer Sheehan that he could search him. After conducting a pat-down search of Ruff and finding no weapons or contraband, Officer Sheehan testified that he and Ruff moved towards the rear of the vehicle. Suddenly, Ruff fainted and struck his head on the concrete, rendering him unconscious. Officer Sheehan asked White if Ruff had ingested narcotics, and White said that she did not see him swallow anything. Officer Sheehan then asked White if he could search the vehicle, and she consented. While Officer Lunte tended to Ruff, Officer Sheehan searched the passenger side of the vehicle where he found a black garbage bag containing clothes on the floorboard and a 45–caliber handgun underneath the front passenger seat. By this point Ruff had regained consciousness and was being helped into a seated position on the curb by Officer Lunte. Officer Sheehan asked White if the gun belonged to her, and she said no. Officer Sheehan then asked Ruff if the gun belonged to him, and Ruff admitted to owning the gun. Ruff was placed in handcuffs and transported to a police substation seven blocks away.

***6** White testified to a much different version of the events. According to White, the officers asked her and Ruff to exit the vehicle. She claimed that she explained to the officers that the vehicle did not belong to her, and refused to give consent to a search. White stated that five to seven officers were present at the scene, and that they used flashlights to look through the windows of the car. White testified that she was handcuffed and placed in the back of the police cruiser after refusing to allow the officers to search the vehicle.

The trial court denied Ruffs motions to suppress, finding that the officers had reasonable suspicion to stop White's vehicle.[7] On appeal, Ruff maintains that the trial court's denial of his motion to suppress the seized items was erroneous. More specifically, Ruff argues that the officers' continued detention of Ruff after the initial traffic stop was unsupported by a reasonable suspicion of additional criminal activity, and that this illegal detention led to the seizure of the handgun and garbage bag filled with clothing.

[10] **[11]** A traffic stop for the purposes of issuing a citation becomes unlawful if the detention continues beyond the time required to effectuate the purpose of the initial stop. *Illinois v. Caballes,* 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005); *see also Epps v. Commonwealth,* 295 S.W.3d 807 (Ky.2009). Items discovered as a result of the illegally prolonged stop are considered products of an unconstitutional seizure, and such evidence must be suppressed. *Id.; Segura v. U.S.,* 468 U.S. 796, 104 S.Ct.

3380, 82 L.Ed.2d 599 (1984); *Wilson v. Commonwealth*, 37 S.W.3d 745 (Ky.2001).

[12] Having carefully examined the record of the suppression hearing, we are convinced that the trial court's finding that Ruff's seizure was legal was supported by substantial evidence. First, we do not find that the length of the stop was unreasonably prolonged. Testimony from the suppression hearing revealed that Ruff exited the vehicle as soon as Officer Sheehan approached the passenger side door after being asked if there was anything in the car that would "get someone in trouble." After the pat-down, Ruff fainted. He was unconscious for roughly two minutes while Officer Sheehan conducted a search of the vehicle, which lasted no more than one minute. The handgun was found approximately one minute after Ruff regained consciousness, at which point he admitted to owning the gun and was transported to the LMPD substation for questioning. According to Officer Sheehan's account of the stop, the entire episode appears to have lasted no longer than ten to fifteen minutes. This, in our view, does not constitute an unreasonably prolonged detention. *See Ward v. Commonwealth*, 345 S.W.3d 249, 253 (Ky.App.2011) (a thirty-three minute delay between the initial stop and arrest was not reasonable); *Johnson v. Commonwealth*, 179 S.W.3d 882, 885 (Ky.App.2005) (a stop with a dog sniff lasting fifteen minutes was reasonable); *but cf. Epps*, 295 S.W.3d at 813 (ninety-minute delay for a traffic stop where drug-sniffing dogs are dispatched was unreasonable under *Caballes*). [8]

*7 Second, while we agree that the search of the vehicle went beyond the scope of the purpose of the traffic stop, Ruff's behavior gave rise to a reasonable articulable suspicion of criminal activity independent of the facts justifying the initial traffic stop. *See Terry v. Ohio*, 392 U.S. 1, 18–19, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (a seizure becomes unlawful when it is no longer justified by reasonable suspicion). Officer Sheehan was on narcotics patrol when the stop occurred and he testified that based on his experience in narcotics investigation, Ruff's sudden loss of consciousness was suspicious, as it is common for individuals to pass out after ingesting narcotics. Therefore, it appears that Officer Sheehan's decision to continue the seizure of Ruff and search the car was based on a reasonable suspicion that contraband might be found inside the vehicle. *See* 392 U.S. at 18. Further, Officer Sheehan testified that White consented to the search that yielded the discovery of the garbage bag filled with clothing and the .45 caliber handgun. *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976) (consent constitutes an exception to the warrant requirement). Though White denied consenting to the search of the vehicle, we cannot say that the trial court erred in adopting Officer Sheehan's version of events. *See Moore v. Asente*, 110 S.W.3d 336, 354 (Ky.2003) (a reviewing court must give deference to the trial court's determination of witness credibility and the weight of the evidence, as such decisions are in the sole discretion of the trial court).

Finally, we address the suppression of Ruff's statements to Officer Sheehan admitting ownership of the handgun and clothing. Ruff asserts that the trial court's denial of his motion to suppress was clearly erroneous because his statements to Officers Sheehan and Lunte were the product of an unlawful seizure. Having established the legality of the stop, we must conclude that Ruff's statement admitting ownership of the gun cannot constitute "fruit of the poisonous tree." *Colorado v. Spring*, 479 U.S. 564, 571–72, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987) ("A confession cannot be "fruit of the poisonous tree" if the tree itself is not poisonous."); *Cf. Williams v. Commonwealth*, 213 S.W.3d 671, 679 (Ky.2006) (statements derived from illegal detentions are subject to exclusion). [9]

The trial court's conclusion that the stop of the vehicle and the subsequent seizure of incriminating items was lawful is supported by substantial evidence. Officer Sheehan's testimony revealed that Ruffs suspicious behavior, fainting, gave rise to an independent articulable suspicion sufficient to justify a slightly prolonged stop as well as the consensual search. Therefore, the items discovered as a result of that search were lawfully seized, and the trial court's denial of Ruff's motion to suppress was not clearly erroneous.

III. The Trial Court Properly Denied Ruffs Motion to Suppress the Statements to Police.

Finally, Ruff contends that the trial court erred in denying his motion to suppress the statements he made to police officers while in custody. Ruff complains of two incidences, the first on December 3, 2008, and the second on December 5, 2008, where he alleges that officers interrogated him after he had asserted his Fifth Amendment rights. The trial court held a hearing on

the motion to suppress in which Detective Rick Arnold, Sergeant Denny Butler, and Detective Chris Middleton testified. [10] The trial court denied the motions, finding that all of Ruffs statements to the police were knowingly, intelligently and voluntarily made, and that in the case of the December 5, 2008 statements, he voluntarily resumed communication with officers and waived his *Miranda* rights after invoking his right to counsel.

a. Ruffs December 3rd Statements Were Properly Admitted.

***8** Detective Arnold testified that Ruff was transported to the LMPD homicide office on December 3, 2008 to discuss his possible involvement in the New York Fashions robbery and shooting. [11] Arnold stated that Ruff refused to sign the standard LMPD waiver of rights form after he read Ruff his *Miranda* rights. Although he refused to sign the form, Arnold testified that Ruff seemed to understand his rights when they were read to him. Arnold explained that Ruff's general demeanor and his willingness to speak with detectives indicated that he understood his rights and voluntarily waived them. Additionally, Arnold testified that it was not unusual for witnesses to refuse to sign the waiver of rights form and nevertheless waive their rights.

Ruff claims that the trial court erred when it refused to suppress his December 3rd statements. Suppression was warranted, Ruff argues, because Arnold continued to interrogate him after he sought to invoke his Fifth Amendment right to remain silent. Ruff complains that he did not waive his rights, as indicated by his refusal to sign the waiver of rights form, and therefore the continued interrogation was a constitutional violation under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[13] **[14]** **[15]** Under the United States Supreme Court's seminal *Miranda* decision, suspects must be advised of their Fifth Amendment right to remain silent and to the assistance of counsel before law enforcement officers may proceed with questioning. 384 U.S. at 471–72; *Soto v. Commonwealth*, 139 S.W.3d 827 (Ky.2004). If a suspect invokes his right to remain silent, the interrogation must cease, and any statement taken after is presumed to be the product of compulsion. 384 U.S. at 474. Of course, a suspect may voluntarily, knowingly, and intelligently waive his or her Fifth Amendment rights. *Spring*, 479 U.S. at 572–731; *Matthews v. Commonwealth*, 168 S.W.3d 14 (Ky.2005). Any waiver must be voluntary and not the product of coercion; a waiver must also be given with the knowledge of the full nature of the rights being waived, as well as the consequences of waiving those rights. *Matthews*, 168 S.W.3d at 21 (citing *Moran v. Burbine*, 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)). Only when the "totality of the circumstances surrounding the interrogation" supports a finding of voluntariness and knowingness will the suspect's rights be deemed waived for *Miranda* purposes. *Id.* at 22 (citing *Fare v. Michael C*, 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979)).

[16] In the instant case, we cannot say that the trial court erred in concluding that Ruff voluntarily waived his right to remain silent. The Commonwealth presented substantial evidence in the form of Arnold's testimony to support the conclusion that Ruff understood and knowingly waived his *Miranda* rights. Despite his seemingly inconsistent statements regarding "waiving" and "wanting all" of his "rights," Ruff clearly acknowledged understanding his *Miranda* rights as Arnold explained them to him. When asked by Detective Arnold if he understood what *Miranda* rights are, Ruff replied, "Yeah." Detective Arnold also explained that they could not talk if Ruff refused to be read his *Miranda* rights. Ruff then stated, "I'm just trying to help you guys out, so we don't have to keep going through this." He went on to reference his previous questioning from the night of the arrest. When Detective Arnold repeated that he had to read the *Miranda* rights, Ruff replied "I've already read my *Miranda* rights many times, I understand it."

***9** In light of his acknowledgment of his rights and general demeanor, the refusal to sign the rights waiver form did not indicate to Arnold that Ruff intended to exercise his right to remain silent. The Court faced a similar set of facts in *Campbell v. Commonwealth*, 732 S.W.2d 878 (1987), where a suspect was read his *Miranda* rights but refused to sign the rights waiver form. Finding no evidence of coercion, the trial court admitted the suspect's statements. 732 S.W.2d at 880–81. In affirming the trial court's decision to deny the suppression motion, the *Campbell* Court noted that the suspect proceeded with questioning even after he was read his rights and refused to sign the waiver of rights form. *Id.* at 881. Like the suspect in *Campbell*, Ruff allowed the interrogation to continue even after he refused to sign the rights waiver form. Given the substantial evidence of Ruff's voluntary waiver of his

Fifth Amendment rights, we conclude that the trial court did not err in denying the suppression motion as to the December 3rd statements.

b. Ruffs December 5th Statements Were Properly Admitted.

Ruff was transported to the LMPD homicide office for a second time on December 5th, 2008. As he awaited a polygraph exam, Ruff was handcuffed and seated in a chair in the central area of the homicide office. Detective Chris Middleton, who was completing paperwork on an unrelated case, testified that Ruff began to engage in some "small talk" with him as he sat at his desk. Without the detective speaking to him first, Ruff began to talk to Detective Middleton. Ruff expressed concern for his safety in jail. At some point in the conversation, Ruff stated "I can't believe I'm caught up in this," to which Detective Middleton replied, "If I was innocent, I'd get my side of the story out." According to Detective Middleton's testimony, he explained that Ruff "didn't have to talk" to him, and acknowledged that Ruff had asked for an attorney. Detective Middleton then brought Ruff some pizza and a Coke and left the central area of the homicide office. Sometime later, Ruff rolled his chair into Sergeant Denny Butler's office and started to talk to him. Sergeant Butler testified that he told Ruff that he couldn't talk to him as he had invoked his right to have counsel present. Ruff stated that he wanted to talk, and specifically, "[f* * * *] the attorney," and that he wanted a "ten-year deal." According to Sergeant Butler, Ruff appeared to unequivocally understand his rights and never asked to cease the questioning after he was reread his *Miranda* rights, although he again refused to sign a waiver of rights form.

Ruff contends that the trial court committed clear error in finding that he made the December 5th statements after knowingly and voluntarily waiving his Fifth Amendment right to counsel. Specifically, Ruff claims that Detective Middleton's comments induced Ruff to reinitiate questioning with Sergeant Butler, and that he did not voluntarily waive his previously invoked right to counsel.

*10 **[17]** **[18]** **[19]** A suspect who has invoked his Fifth Amendment right to counsel shall not be subjected to further police interrogation until a lawyer has been made available or the suspect reinitiates conversation with law enforcement. *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *Quisenberry v. Commonwealth*, 336 S.W.3d 19 (Ky.2011). Statements made to law enforcement officers after a suspect has invoked his right to counsel may be admitted only if the court finds that the suspect initiated further questioning and knowingly and intelligently waived the right he had previously invoked. *Smith v. Illinois*, 469 U.S. 91, 95, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984). An accused's post-invocation reinitiation of questioning must be independently made, and cannot be considered voluntary if it is the product of police inducement or encouragement. *Bradley v. Commonwealth*, 327 S.W.3d 512, 518 (Ky.2010) ("Only the suspect may reinitiate dialogue with the authorities; the authorities cannot continue to cajole or otherwise induce the suspect to continue to speak without first affording the suspect an attorney.") (citing *Edwards*, 451 U.S. at 484–85)); *see also Oregon v. Bradshaw*, 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983) (holding that the word "initiated" must be construed in its ordinary meaning in determining whether a suspect reinitiated contact with police).

The Commonwealth does not dispute the fact that Ruff invoked his right to counsel while in custody at the LMPD homicide office on December 5, 2008. Therefore, we need only address the trial court's conclusion that Ruff voluntarily resumed questioning and waived his right to counsel. Our analysis is two-fold: we must first determine if Ruff reinitiated questioning, and then separately determine if Ruff knowingly and voluntarily waived his right to counsel. *Smith*, 469 U.S. at 98.

[20] **[21]** First, there was substantial evidence in the record to conclude that Ruff, not the officers, resumed contact with officers after he had invoked his right to counsel. There was uncontroverted testimony at the suppression hearing that Detective Middleton and Sergeant Butler avoided any conversation with Ruff because they knew that he had asked for an attorney. Even after Ruff approached Detective Middleton, and later Sergeant Butler, both officers reminded Ruff that they could not talk with him because he had invoked his *Miranda* rights and asked for an attorney. [12] The question we must address is whether Detective Middleton's comment, "*If I were innocent, I'd want to get my side of the story out,*" subtlety induced Ruff to make statements to Sergeant Butler. After careful review of the record, we find that it did not.

We cannot say that Detective Middleton made a coercive attempt to induce Ruff to speak. *See Bradley*, 327 S.W.3d at 518. Detective Middleton testified that he had no interest in "getting involved in [Ruff's] case" because he was working on an unrelated case, and that he only responded to Ruffs comments in an informal manner. After making the statement that if he were innocent he'd want to share his story, Detective Middleton explained to Ruff that he did not have to speak with him and acknowledged that Ruff had invoked his right to counsel. Notably, Ruff offered no incriminating statements while speaking to Detective Middleton, and Detective Middleton did not ask any follow-up questions after making the comment. In fact, Detective Middleton testified that that brief exchange marked the end of his interaction with Ruff in the central area of the homicide office. In *Bradley v. Commonwealth*, we concluded that a suspect did not reinitiate questioning with law enforcement when an officer badgered him immediately after the suspect invoked his right to an attorney. 327 S.W.3d at 518. The officer in *Bradley* engaged in a dogged attempt to induce the suspect to speak, saying "Do you want to tell us? Just tell us what happened. It's nothing we can't get through. I mean there may be circumstances here that change this whole thing. Only you can tell us." *Id.* at 515. While our main inquiry in *Bradley* focused on the suspect's invocation of the right to an attorney, the case clearly illustrates an impermissible attempt to secure a confession after a suspect has invoked his *Miranda* rights. *See id.* at 21. Here, Detective Middleton's statement does not rise to the level of overreaching displayed by the officer in *Bradley*. Overall, we remain unconvinced that Detective Middleton coerced Ruff into offer incriminating statements. In our view, there was substantial evidence to support the trial court's determination that Ruff's resumption of questioning with Sergeant Butler was a product of his own volition, and not a response to Detective Middleton's isolated statement.

***11** **[22]** As for the waiver issue, we agree with the trial court's conclusion that Ruff knowingly and voluntarily waived his right to counsel after initiating questioning with law enforcement. Sergeant Butler testified that Ruff, handcuffed in a rolling chair, rolled himself into his office and stated that he wanted to talk. When Sergeant Butler refused to speak with him because he had invoked his right to an attorney, Ruff said "f* * * the attorney" and asked for a "ten-year deal." After hearing his *Miranda* rights for a second time, it was Sergeant Butler's impression that Ruff "without a doubt" understood his rights, and insisted on continuing their conversation. Ruff made statements and answered questions without requesting an attorney or asking to stop the interrogation.

In sum, we agree with the trial court's conclusion that Ruff resumed questioning and voluntarily waived his rights. The uncontroverted evidence presented at the suppression hearing indicates that Ruff initiated the conversation with Sergeant Butler, and then knowingly waived his *Miranda* rights before giving a statement. As such, the trial court did not err in denying Ruffs motion to suppress his December 5th statements.

CONCLUSION

The trial court properly denied Ruff's *Batson* challenge after the Commonwealth offered a race-neutral reason for striking an African–American juror. Furthermore, Ruffs motions to suppress items found in a car in which he was a passenger and his statements made to police officers were properly denied. Accordingly, we affirm the Judgment of Jefferson Circuit Court.

All sitting. All concur.

All Citations

Not Reported in S.W.3d, 2013 WL 1789861

Footnotes

1 John Benton was found guilty of second-degree manslaughter and first-degree robbery. Kendrick Robinson was found guilty of reckless homicide and first-degree robbery. Both Benton and Robinson were sentenced to fifteen years imprisonment and have waived their appeals.

2 Juror # 475406 explained: "I am a firm believer of second chances, so I guess you can say, being a man of faith that I am, I do know that, no matter what. So even, you know, that's why, according to the Bible, what it says talking about

no sin's greater than the other—killing, you know, getting someone pregnant, you know, drinking, it's pretty much all the same. That's according to what I believe in."

3 The Commonwealth urges this Court to abandon our *Batson* analysis at this juncture, maintaining that the defense failed to meet its burden in establishing a prima facie case. However, despite the Commonwealth's objection to the trial court's finding of a prima facie showing, the prosecutor proffered a race-neutral explanation for his use of a peremptory strike on Juror # 475406, and the trial court ruled on the ultimate issue. As such, we continue our inquiry. *Commonwealth v. Snodgrass,* 831 S.W.2d 176, 178 (Ky.1992) (citing *Hernandez v. New York,* 500 U.S. 352, 359, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991)); *see also Harris v. Commonwealth,* 134 S.W.3d 603, 611 (Ky.2004) ("Generally, numbers alone are insufficient to satisfy this step, but if the prosecution offers a race-neutral reason and the trial judge rules on the issue, the issue of whether a prima facie showing was made is, as here, mooted.").

4 Juror # 475537, a Caucasian female, stated that she believed that the death penalty is "really sad," but she "could consider it" and fairly impose the death penalty "once [she] heard all of the facts." A Caucasian male, Juror # 474962, expressed that he was "morally not a big fan of [the death penalty]," but would not be prevented from considering it as a penalty. Another Caucasian male, Juror # 475495, stated that he "does not support [the death penalty], but would not have a problem applying it to a case." Juror # 475395 indicated that she would have to be "100%" convinced of a defendant's guilt before she could consider the death penalty as a punishment.

5 Despite the Commonwealth's argument that Ruff's subsequent admission of guilt at trial rendered any alleged suppression error harmless, it is axiomatic that our review must focus on the findings of fact from the suppression hearing and not the proof adduced at trial. *See* RCr 9.78 ("If at any time before trial a defendant moves to suppress, or during trial makes timely objection to the admission of evidence consisting of (a) a confession or other incriminating statements alleged to have been made by the defendant to police authorities, (b) the fruits of a search, or (c) witness identification, the trial court *shall conduct an evidentiary hearing outside the presence of the jury* and at the conclusion thereof shall enter into the record *findings resolving the essential issues of fact raised by the motion or objection* and necessary to support the ruling.") (Emphasis supplied).

6 While there was some disagreement as to the facts surrounding the traffic stop, the trial court's findings, while dismally brief, give some insight as to the factual basis for the legal conclusions.

7 As to the stop and seizure of the items in the vehicle, the trial court stated: "I do believe that the police officers had reasonable suspicion to stop the automobile at the moment it was stopped by, I forget his name, the Special Agent Sheehan, and would respectfully deny that." Based on these conclusions, we discern that the trial court's findings would have been that the officers had reasonable suspicion justifying both the initial stop and the subsequent search and seizure of evidence. *See Jones* 217 S.W.3d at 194–95.

8 The recent Kentucky cases applying *Caballes* involve the use of drug-sniffing dogs during routine traffic stops. However, the application of the general rule from *Caballes* is not limited to instances where the use of drug dogs prolongs a traffic stop.

9 Ruff also argues that White's consent, if it was given, was the product of the unlawful detention and was not sufficiently attenuated from the primary illegality as to purge the taint of the illegal seizure. *Wilson,* 37 S.W.3d at 748, (evidence need not be excluded if the connection between the illegal conduct and discovery of evidence if "highly attenuated."). Having determined that the stop was lawful, we need not address this particular argument. *See Spring,* 479 U.S. at 571–72.

10 Over the course of the two-day suppression hearing, the trial court also heard testimony from Special Agent Sheehan, Chesica White, and Detective Roy Stalvey regarding separate motions to suppress. Their testimonies were discussed earlier in this opinion and are not germane to our analysis of this issue.

11 Ruff was being held at Louisville Metro Corrections on unrelated charges.

12 It is clear to the Court, and the Commonwealth does not dispute, that Ruff was in custody for *Miranda* purposes. The test to determine if an individual is in custody is whether, considering the surrounding circumstances, a reasonable person would believe he or she was free to leave. *Baker v. Commonwealth,* 5 S.W.3d 142, 145 (Ky.1999) (citing *United States v. Mendenhall,* 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)). Ruff was being held at Louisville Metro Corrections on unrelated charges when he was transported to the homicide office on December 3 and December 5. Ruff remained handcuffed while he awaited a polygraph exam on December 5. Ruff was, at all times, "in custody" for *Miranda* purposes on December 3 and December 5.

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