Commonwealth of Kentucky
Supreme Court
2008-SC-000060-DG

Cassandra Smith — Appellant

On Discretionary Review from the Kentucky Court of Appeals
No. 2006-CA-002120-MR

V.

Appeal from the Jefferson Circuit Court
Action No. 04-CR-0637

Commonwealth of Kentucky — Appellee

Reply Brief for Appellant, Cassandra Smith

Submitted By:

Elizabeth B. McMahon
Assistant Public Defender
Office of the Louisville Metro
Public Defender
Advocacy Plaza
717-719 West Jefferson Street
Louisville, Kentucky 40202
(502) 574-3800
Counsel for Appellant

Certificate of Service

I hereby certify that a copy of this brief was mailed with first-class postage prepaid to: Hon. Charles L. Cunningham, Jr., Judge, Jefferson Circuit Court, Division Four, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202; Hon. Amanda Snider, Assistant Commonwealth's Attorney, 514 West Liberty Street, Louisville, KY 40202; and Hon. Jeffrey A. Cross, Assistant Attorney General, Office of Criminal Appeals, Office of the Attorney General, 1024 Capital Center Drive, Frankfort, KY 40601-8204 on May 12, 2009. I further certify that the record on appeal was not removed from the Office of the Clerk of the Supreme Court.

Elizabeth B. McMahon
ELIZABETH B. McMAHON

STATEMENT OF POINTS AND AUTHORITIES

	Page
PURPOSE OF THIS BRIEF	1
ISSUES TO WHICH THIS BRIEF IS ADDRESSED	
I. The trial court committed reversible error by failing to suppress the statements allegedly made by Cassandra Smith. The statements were the products of custodial interrogation, and the police officers did not provide Miranda warnings.	1-7
1. The statement made in the bedroom	1-5
Taylor v. Commonwealth, 182 S.W.3d 521 (Ky. 2006)	1
United States v. Foster, 376 F.3d 577 (6th Cir. 2004)	1
Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)	1, 2, 3, 4
U.S. Const. Amend. IV	2
U.S. Const. Amend. V	2
U.S. Const. Amend. VI	2
Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)	2, 5
United States v. Smith, 3 F.3d 1088 (7th Cir. 1993)	2
Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984)	2
Turner v. State, 252 S.W.3d 571 (Tex. App. 2008)	3-4
New York v. Quarles, 467 U.S. 649, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984)	4, 5
Henry v. Commonwealth, 275 S.W.3d 194 (Ky. 2008)	4-5

STATEMENT OF POINTS AND AUTHORITIES

	Page
2. The statements made in the living room	5-7
California v. Beheler, 463 U.S. 1121, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983)	7
Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977)	7
Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)	7
II. The trial court committed reversible error by precluding Cassandra Smith from introducing evidence concerning Armon Perry's felony drug convictions.	8
KRE 404(b)	8
R. Lawson, The Kentucky Evidence Law Handbook, § 2.25(8), pp. 158 (4th ed. 2003)	8
Crane v. Kentucky, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986)	8
Barnett v. Commonwealth, 828 S.W.2d 361 (Ky. 1992)	8
CONCLUSION	9

PURPOSE OF THIS BRIEF

The purpose of this brief is to demonstrate the deficiencies in the arguments made by the appellee in its brief.

ISSUES TO WHICH THIS BRIEF IS ADDRESSED

I. The trial court committed reversible error by failing to suppress the statements allegedly made by Cassandra Smith. The statements were the products of custodial interrogation, and the police officers did not provide Miranda warnings.

1. The statement made in the bedroom

In its brief, the appellee argues that Taylor v. Commonwealth, 182 S.W.3d 521 (Ky. 2006), "stands for the premise a person is not *automatically* in custody when handcuffed" and "[t]hat is exactly how the Court of Appeals' majority applied Taylor...." (Appellee's Brief, p. 16) (emphasis in original). Although the Court of Appeals stated that "Smith was not in police custody simply because she was placed in handcuffs while the officers completed their search and investigation," the Court of Appeals merely cited to Taylor and United States v. Foster, 376 F.3d 577, 587 (6th Cir. 2004), and conducted no further analysis before concluding that "no Miranda warnings were necessary." (Court of Appeals Opinion, p. 5). Contrary to the appellee's assertion, the Court of Appeals was indeed applying Taylor as if it "set forth a *per se* rule regarding handcuffs and the 'in custody' requirement of Miranda," regardless of whether or not this Court intended Taylor to be read that way. (Appellee's Brief, p. 16). Therefore, at a

minimum, this Court needs to clarify that a person can be in custody for purposes of Miranda without being under arrest.

The appellee argues that because Cassandra was "in handcuffs for security purposes...she was not in custody, [and] Miranda warnings were not required at that point." (Appellee's Brief, p. 20). Like the Court of Appeals, the appellee apparently mistakenly believes that a Fourth Amendment analysis can be substituted for a Fifth Amendment Miranda analysis. However, a court's "inquiry into the circumstances for a Fifth and Sixth Amendment Miranda analysis requires a different focus than that for a Fourth Amendment Terry stop." United States v. Smith, 3 F.3d 1088, 1096 (7th Cir. 1993). Sergeant Gentry's claims, that the officers were "just securing everybody to make sure the scene was rendered safe" and that it is "typical" for the police to "secure people" with handcuffs, are immaterial to the issue of whether custodial interrogation occurred. (VR No. 1; 3/29/06; 10:58:04-10:58:45). Although handcuffing Cassandra may have arguably been reasonable under a Fourth Amendment analysis, neither the appellee nor the Court of Appeals addressed, or even considered, the coercive effect of this force for Fifth Amendment purposes.

Under Miranda and its progeny, "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." Berkemer v. McCarty, 468 U.S. 420, 422, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317 (1984). Police officers forced entry into Cassandra Smith's house by ramming the front door open and scattered throughout the house. (VR No. 6; 3/20/06;

11:38:02-11:39:25). Sergeant Yvette Gentry went into Cassandra Smith's bedroom, handcuffed her, and asked Cassandra whether she had any drugs or weapons on her without advising Cassandra of her Miranda rights. (VR No. 1; 3/29/06; 10:57:35-10:59:00, 11:08:10-11:09:22). Under these circumstances, a reasonable person in Cassandra's situation would not have believed she was free to leave and that she could simply walk out of her house in handcuffs.

The appellee also quotes from the case of Turner v. State, 252 S.W.3d 571, 580 (Tex. App. 2008), in which "the Texas appellate court concluded 'handcuffing [the defendant] based on customary safety concerns, and only for the duration of transport in a car lacking a safety cage, does not show custodial status.'" (Appellee's Brief, p. 19). But the appellee's reliance on that case is misplaced, as the facts are quite distinguishable from the case at hand. The issue in Turner was whether the defendant's "statements were the product of an unlawful arrest" where he was handcuffed and transported by police from his house to the station. Turner, 252 S.W.3d at 576. The court found that the defendant was not under arrest because he voluntarily agreed to go with the police and the officers repeatedly told the defendant he was not under arrest and that he was only being handcuffed for safety reasons: "We conclude a reasonable person would understand the actions of the officers after being told multiple times the purpose of the handcuffs was not to place him under arrest but for safety purposes." Id. at 582. In addition, the police "removed [defendant's] handcuffs when they arrived at the police station before taking him

to a room" and questioning him. Id. In contrast, Cassandra Smith was immediately interrogated about drugs and weapons after being placed in handcuffs. She did not consent to being handcuffed, and she was not told that she was being handcuffed for safety purposes or that she was not under arrest.

In addition, it should be clarified that contrary to the statement made by the Court of Appeals at page 6 of its opinion, as well as by the appellee at page 21 of its brief, Cassandra Smith did not "alternatively contend[]" that "she was not in custody" when arguing that the public safety exception does not apply. Cassandra has consistently maintained that she was *in custody* for Miranda purposes when she allegedly made statements to the officers in this case. In fact, the United States Supreme Court in New York v. Quarles, 467 U.S. 649, 657, 658, 104 S.Ct. 2626, 2632, 81 L.Ed.2d 550 (1984), recognized the public safety exception as "a narrow exception to the Miranda rule," and Miranda only applies only when *custodial* interrogation has occurred.

Cassandra Smith acknowledges that "[w]hile this case was pending, this Court recognized and applied Quarles in Henry v. Commonwealth, 275 S.W.3d 194 (Ky. 2008)." (Appellee's Brief, p. 21). But this Court found the facts in Henry to be "strikingly similar to Quarles" based on the following:

> The officer here, as in Quarles, had reason to believe that Henry had abandoned a gun in an area accessible by the public, and as in Quarles, the officer limited his pre-warning questions to those designed to locate the gun and remove the hazard. Because the officer's questions were reasonably prompted by a concern for public safety, under Quarles they did not violate Miranda's warning requirement.

Henry, 275 S.W.3d at 198. In contrast to the facts in Quarles and Henry, the police were not confronted with the immediate necessity of finding and removing a gun from a public place when they burst into Cassandra Smith's house, and they had no information or indication that a gun was concealed on Cassandra. Although Sergeant Gentry claimed that they were "securing everybody to make sure the scene was rendered safe," she did not testify that she believed her own safety or the safety of the public was in jeopardy after Cassandra was placed in handcuffs. (VR No. 1; 3/29/06; 10:58:04-10:58:45). Yet, that is when Sergeant Gentry asked Cassandra whether she had any drugs or weapons on her – after Cassandra was handcuffed. If Sergeant Gentry was concerned about weapons, she could have patted Cassandra down. See Terry v. Ohio, 392 U.S. 1, 29-30, 88 S.Ct. 1868, 1884-1885, 20 L.Ed.2d 889 (1968). Further, the officers could not reasonably believe Cassandra could "dispose of the drug evidence" after being handcuffed and placed under police supervision. (Appellee's Brief, p. 22). Under these circumstances, where Sergeant Gentry was present to execute a search warrant based on alleged drug activity at that address, asking Cassandra Smith whether she had drugs or weapons was clearly "designed solely to elicit testimonial evidence from a suspect" and was not justified under the public safety exception. Quarles, 467 U.S. at 658-659, 104 S.Ct. at 2633.

2. The statements made in the living room

The appellee claims that the appellant "mis-interprets (sic) the detective's testimony" and "conveniently over-looks (sic) the fact Detective Gootee could

not, three years later, be certain what spurred [Cassandra Smith] to make her statement." (Appellee's Brief, p. 25). But what is really "convenient" is how Detective Gootee went quickly from certainty to uncertainty when first asked if Cassandra had made the statements in the living room in response to any questioning:

> Det. Gootee: I'm sure I did that led to it. What I exactly asked her, I don't remember. It was basically I, I don't know if it was like a question that would lead her in that direction. I don't know if it was just a blunt statement that she had made to herself. I just don't know what was said and, um, to tell you the truth, I can't recall if I asked her a question that led her to the statement or not.

(VR No. 6; 3/20/06; 11:42:58-11:43:40). It is also "convenient" that the appellee chooses to believe Detective Gootee's memory loss yet disputes Detective Gootee's later testimony concerning the context in which Cassandra's statements were made:

> Prosecutor: I want to go back to the statement about when she talks about "I knew this would happen, I've told them about it," speaking to her kids. Do you remember how her kids even came up?
>
> Det. Gootee: It may have been the fact that "we can't believe you're," and then again, this is, you know, I'm not 100% sure because it's been three years ago. Uh, but if I recall somewhat, I think it came up that "we can't believe that you're here doing, you know, you're selling drugs with your kids present, you know, putting them in that kind of danger." Basically the same statements that we make anytime, you know, kids are present at any...If I had to guess, that would, that would be how it would be brought up.

(VR No. 6; 3/20/06; 11:58:52-11:59:40). In addition, the appellee conveniently surmises that the "gap in Detective Gootee's memory was...filled by Detective Parks and her recollection that Appellant's statements were made in the context of addressing the needs of her children" (Appellee's Brief, pp. 26-27), which is in direct contrast to Detective Gootee's description of "the same statements that we make anytime...kids are present," such as, "'We can't believe that you're here doing, you know, you're selling drugs with your kids present, you know, putting them in that kind of danger.'" (VR No. 6; 3/20/06; 11:58:52-11:59:40).

Cassandra Smith was in custody at the time she made the alleged statements in the living room as she had been placed under arrest. See California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275, 1279 (1983), and Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977). Detective Gootee's questions or comments concerning the dangers of drug dealing were reasonably likely to elicit an incriminating response. Rhode Island v. Innis, 446 U.S. 291, 300, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980). He routinely made these same remarks concerning the danger of drug dealing in every case where children were present and was obviously attempting to elicit some type of admission or explanation from the parents he was arresting. (VR No. 6; 3/20/06; 11:58:52-11:59:40). In fact, he initially acknowledged that it was his actions that probably led Cassandra to make such statements (VR No. 6; 3/20/06; 11:42:58-11:43:40). Under these circumstances, Cassandra Smith was subjected to custodial interrogation in the living room.

II. The trial court committed reversible error by precluding Cassandra Smith from introducing evidence concerning Armon Perry's felony drug convictions.

The appellee argues that evidence of Armon Perry's felony drug convictions "does not fit within the exception to the prohibition set forth in KRE 404(b)." (Appellee's Brief, p. 28). However, "[b]ecause the other crimes evidence in this situation creates lesser concern about prejudice (than when evidence is offered against an accused), admissibility should depend upon whether the evidence is relevant and whether admission would have the effect of unduly proliferating the issues." R. Lawson, The Kentucky Evidence Law Handbook, Section 2.25(8), pp. 158 (4th ed. 2003). Evidence that Armon Perry had previously been convicted of drug offenses was relevant to support Cassandra Smith's defense that Armon Perry placed the drugs in her pocket without her knowledge and tended to disprove one of the elements of possession of a controlled substance (i.e., knowledge). Contrary to the appellee's assertion, the trial court's error in precluding this evidence was not harmless (Appellee's Brief, p. 29), as it deprived Cassandra of her right to fully present her defense. Crane v. Kentucky, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986); Barnett v. Commonwealth, 828 S.W.2d 361 (Ky. 1992).

CONCLUSION

For the reasons stated in this brief and in her original brief, the appellant, Cassandra Smith, by counsel, respectfully submits that her convictions must be reversed and her case remanded for a new trial.

Elizabeth B. McMahon
ELIZABETH B. McMAHON
Assistant Public Defender
Office of the Louisville Metro
Public Defender
200 Advocacy Plaza
719 West Jefferson Street
Louisville, Kentucky 40202
(502) 574-3800
Counsel for Appellant

Daniel T. Goyette
DANIEL T. GOYETTE
Louisville Metro Public Defender
Of Counsel