Commonwealth of Kentucky
Supreme Court
No. 2008-SC-000060-DG

CASSANDRA SMITH **APPELLANT**

On Discretionary Review from Court of Appeals (2006-CA-2120)
Appeal from Jefferson Circuit Court
Hon. Denise Clayton, Judge
Indictment No. 04-CR-637

COMMONWEALTH OF KENTUCKY **APPELLEE**

Brief for Commonwealth

Submitted by,

JACK CONWAY
Attorney General of Kentucky

JEFFREY A. CROSS
Assistant Attorney General
Office of Criminal Appeals
Attorney General's Office
1024 Capital Center Drive
Frankfort, Kentucky 40601
Phone: (502) 696-5342

CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been delivered this 27th day of April, 2009, to Hon. Charles L. Cunningham, Jr., Judge, Jefferson Circuit Court, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, Kentucky 40202 (via U.S. mail, postage prepaid); R. David Stengel, Esq., Commonwealth's Attorney, 514 West Liberty Street, Louisville, Kentucky 40202 (via electronic mail); Elizabeth B. McMahon, Esq., Assistant Public Defender, Office of the Louisville Metro Public Defender, 200 Advocacy Plaza, 719 West Jefferson Street, Louisville, Kentucky 40202, Counsel for Appellant (via U.S. mail, postage prepaid).

Jeffrey A. Cross
Assistant Attorney General

INTRODUCTION

This is a criminal case in which Appellant has sought review of the decision of the Court of Appeals affirming her convictions from the Jefferson Circuit Court for possession of a controlled substance and possession of drug paraphernalia.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not believe that oral argument is necessary in this appeal because the issues are sufficiently addressed in the parties' briefs.

STATEMENT CONCERNING CITATIONS TO THE RECORD

To assist the Court in referring to the record, the following abbreviation(s) shall be used herein:

TRx	refers to volume of record, e.g., TR2, with the record containing two volumes; and
VRx	refers to videotape, e.g., VR2, with the record containing five videotapes of trial (VR1-VR5) and one videotape of hearings (VR6).

In addition, the abbreviation "AB" refers to Appellant's brief, and "CA Opinion" refers to the Court of Appeals opinion being reviewed in this action.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

1. Indictment.

On February 24, 2004, Appellant was indicted by the Jefferson County grand jury and charged with one count of trafficking in a controlled substance (cocaine) in the first degree and one count of possession of drug paraphernalia. (TR1, 1.) The charges stemmed from the execution of a search warrant at Appellant's home on April 24, 2003, resulting in the seizure of crack cocaine from Appellant's person. (See, TR1, 2.) Appellant pled "not guilty" to these charges. (TR1, 19.)

2. Suppression Motion, Hearing, and Ruling.

In late 2005, Appellant filed a motion to suppress "any and all statements" she made to agents of the government during the execution of the search warrant. (TR1, 78-81.) In a separate motion, Appellant sought to suppress the drugs found on her person during the execution of the search warrant. (TR1, 118-119.)

As would be revealed in more detail during the suppression hearing, Appellant wanted three statements suppressed, the two she made in the living room of her house (i.e., she "knew this was gonna happen one day" and she "wasn't a big drug dealer") and the statement made in her bedroom that she had drugs in her pocket. (CA Opinion, 5 & 7.)

a. Day One of Suppression Hearing.

The suppression hearing was held over two days. During the first day, the lead detective on the case, Scott Gootee, testified that on April 24, 2003, he and fellow officers served a search warrant on a house located on 15th Street in Louisville. (VR6; 03/20/06; 11:36:35–11:38:05.) At the time, Detective Gootee had both a physical description of the suspect and a first name of "Sandy." (Id.)

The search warrant was served via "dynamic entry" and once offices had breached the door (via force), the officers went their separate ways throughout the house clearing each room until the house was secure. (VR6; 03/20/06; 11:38:05–11:40:10.) The detective testified such entries are common in narcotics cases since people try to destroy evidence and the overwhelming presence of officers prevents people from doing things against the police, e.g., violence. (Id.) He also added that there is always a 50-50 chance of weapons being present when serving a narcotics warrant, and officers must always assume weapons are present due to the fact that weapons are so often found in narcotics cases. (Id.)

While executing the warrant, officers found Appellant and two of her daughters in the house. (Id.) Detective Gootee testified that two other officers, Sergeant Yvette Gentry and Detective Shara Parks, found Appellant in her bedroom and brought her to the living room. (VR6; 03/20/06; 11:40:10–11:42:15.) When Appellant arrived in the living room, she was in handcuffs "because we do handcuff everybody, you know, for safety purposes when we do do these entries." (Id.) According to Detective Gootee, before asking her any questions he read Appellant her Miranda[1] rights from a card he carried with him. (Id.) He testified this reading of Miranda rights was part of his "normal routine" when executing search warrants. (Id.) At no point did Appellant indicate she wished to speak with an attorney and she never indicated she wanted to not speak with the detective. (Id.)

After Appellant was read her rights, Detective Gootee told her he had a search warrant for the premises and the police were looking for narcotics. (VR6; 03/20/06; 11:42:15–11:44:15.) As later testimony would reveal in more detail, by that time other officers had already found cocaine in Appellant's pocket. (Id.) Appellant then said, "Well, I knew this was

---

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

going to happen one day so that's why I've told my kids this may happen one of these days [referring to narcotics]" and that she was not "big drug dealer" and she did it "to get by." (Id.) Detective Gootee described what prompted this statement as follows:

> Prosecutor: When she started saying these things, was it in response to anything that you had said, had you asked her a question?
>
> Witness: 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, to tell you the truth, I can't recall if I asked her a question that led her to the statement or not.

(Id.) Detective Gootee testified he believed this statement was witnessed by Sergeant Gentry, Detective Parks, and perhaps another officer. (VR6; 03/20/06; 11:57:20–11:58:50.)

The detective testified that once Appellant began talking, he did not interrupt her and she made one continuous statement. (VR6; 03/20/06; 11:42:15–11:44:15.) He also noted his gun was not out when he spoke with Appellant. (VR6; 03/20/06; 11:44:25–11:45:50.)

After being cross-examined by Appellant's counsel, Detective Gootee and the prosecutor had the following exchange:

> 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?
>
> Witness: 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, you know, anytime kids are present at any . . . If I had to guess, that would, that would be how it would be brought up.

(VR6; 03/20/06; 11:58:50–12:00:20.) The detective further testified the statements made in the living room were made in the context of Appellant speaking about her children, and her two daughters were present when she made these statements. (VR6; 03/20/06; 12:00:20–12:01:10.)

Detective Gootee was the only witness to testify during the first day of the suppression hearing, which was continued to a later date.

b. Day Two of Suppression Hearing.

The second day of the suppression hearing was held nine days later. The first witness for the government was Sergeant Gentry. (VR1; 03/29/06; 10:55:15.) The sergeant testified that upon entering the house, she went to the back bedroom and came upon Appellant almost immediately (also described as "pretty quick"). (VR1; 03/29/06; 10:56:35–10:59:30.) Once in the bedroom, she secured Smith via he use of handcuffs, patted Appellant down, and asked her if she had any drugs or weapons on her, to which Appellant responded she had "something" in her pocket. (VR1; 03/29/06; 10:56:35–10:59:00 & 11:07:40–11:09:20.) It was at that time Sergeant Gentry found the cocaine in Appellant's pocket, and handed the drugs off to Detective Parks for inventory purposes. (VR1; 03/29/06; 10:56:35–10:59:00.) The sergeant did not read Appellant her Miranda rights. (VR1; 03/29/06; 11:07:40–11:09:20.)

When describing the process of securing a house in this context, Sergeant Gentry testified she used handcuffs as "temporary restraints" with the idea being to secure the scene at the outset for safety purposes (in case, for example, the police are outnumbered). (VR1; 03/29/06; 10:58:30–10:59:00.) After securing the scene, the persons secured would be taken to a central location, the handcuffs would be removed, and officers would proceed with the search and investigation. (VR1; 03/29/06; 11:07:40–11:09:20.)

As applied here, Sergeant Gentry testified that when Appellant was secured she was not under arrest and the point of securing her was to make sure everyone was safe. (VR1; 03/29/06; 10:56:35–10:59:00.) Once the drugs were found, however, Appellant was placed under arrest. (Id.)

After Sergeant Gentry testified, the prosecutor announced there would be no further witnesses for the government. (VR1; 03/29/06; 11:12:55.) Appellant then offered testimony from her two daughters, and testified herself.

According to Acacia Smith, who was 12-years-old when the search warrant was executed, when police arrived she was immediately handcuffed but then the handcuffs were removed shortly thereafter. (VR1; 03/29/06; 13:08:40, 13:12:45, & 13:15:20.) Her mother was brought into the living room, handcuffed, about 10 minutes after she (the daughter) had been taken there. (VR1; 03/29/06; 13:09:00–13:12:40.) Naturally, she did not hear her mother being read her Miranda rights. (VR1; 03/29/06; 13:10:55.) She also testified the drugs found on Appellant were taken from her mother in the living room, and not the bedroom. (VR1; 03/29/06; 13:09:00–13:12:40.)

Just like her sister, Alexia Smith, who was 11-years-old at the time of the incident, testified she was in the living room, did not hear any Miranda rights being read, and the drugs were seized from Appellant in the living room, not the bedroom. (VR1; 03/29/06; 13:21:35–13:25:50 & 13:26:10.) She also heard her mother state dealing with the "wrong people" can lead to "situations" and she (Appellant) was being treated like "notorious drug dealer" despite the fact she (Appellant) did not know why officers were at the house. (VR1; 03/29/06; 13:31:50–13:32:30.)

According to Appellant, it took officers three to four minutes to reach her (from the time of entry) and once two officers did find her, she was asked if she had any drugs on her, she said "no," she was patted down, she was handcuffed, and then taken to the living room. (VR1; 03/29/06; 13:34:55–13:37:55 & 13:43:40–13:45:50.) Once in the living room, she was thoroughly searched at which point the drugs were found in her pocket. (VR1; 03/29/06; 13:37:55–13:39:50.) Appellant asserted she was never read her Miranda rights and never made any statement about having drugs on her person. (VR1; 03/29/06; 13:37:55–13:39:50.) She also noted she was never free to go since she was in handcuffs the whole time. (VR1; 03/29/06; 13:39:10.)

Once Appellant was done with her proof, the Commonwealth offered testimony from Detective Parks, who assisted with the search. (VR1; 03/29/06; 13:47:50.) Detective Parks testified she was present when Sergeant Gentry found the drugs on Appellant in the bedroom. (VR1; 03/29/06; 13:49:25–13:51:45.) The detective also testified that while she did not hear Miranda rights being read, she did hear Appellant say (while in the living room) that she had talked with her children, they knew what was going on, and the children knew it was a possibility the police would come one day. (VR1; 03/29/06; 13:58:25 & 13:53:40–13:55:00.) According to Detective Parks, this statement was prompted by the officers' inquiry about where her children could be taken since one of them was terribly upset, i.e., screaming, crying, and yelling. (VR1; 03/29/06; 13:53:40–13:55:00.)

Detective Parks was the last person to testify at the suppression hearing.

c. The Trial Judge's Rulings.

Initially, the trial judge granted the motion to suppress the three statements, i.e., that Appellant "knew this might happen," that she was not "a big time drug dealer," and that the

drugs were "in her pocket," because the trial judge was not convinced Appellant had been advised of her Miranda rights (VR1; 03/29/06; 15:18:00-15:20:00).

A matter of hours after the trial judge's ruling, however, the Commonwealth filed a motion to reconsider, arguing (1) Appellant was not in custody (in the bedroom) simply because she was handcuffed, and thus no Miranda warnings were required prior to Sergeant Gentry asking her security-based questions and (2) even if the trial judge was not convinced she was given Miranda warnings (in the living room), Appellant was not subject to interrogation at the time and thus there was no basis to suppress her unsolicited statements. (TR2, 176-180.)

After considering the government's motion, the trial judge, relying on the decision Taylor v. Commonwealth, 182 S.W.3d 521 (Ky. 2006), ruled Appellant's statement in the bedroom about the drugs being in her pocket was admissible because she was not in custody at that time. (VR2; 03/30/06; 10:24:00-10:29:00.) Citing Rhode Island v. Innis, 446 U.S. 291 (1980), the trial judge also found Appellant's statements in the livingroom, to the effect that "she knew this might happen" and that she was "not a big time drug dealer," were admissible because those statements were not made in response to any police inquiry designed to elicit an incriminating response (Id.)

3. Trial.

The parties' proof presented at trial was very similar to that presented at the suppression hearing, albeit a touch more detailed. For example, when discussing her encounter with Appellant, Sergeant Gentry explained she asked Appellant if she had any drugs or weapons on her before sticking her (the sergeant's) hands into Appellant's pockets, stating, "I'm very careful, I don't want to get stuck with needles or anything of that sort." (VR3; 03/31/06;

11:33:15–11:37:50.) At that point, Appellant responded she did have drugs in pocket, and Sergeant Gentry retrieved same from Appellant's front, left pants pocket. (Id.)

Detective Parks also repeated her testimony about one of the statements Appellant made in the living room. (VR3; 03/31/06; 13:53:05–13:54:00.) Again, she testified that at one point while in the living room one of Appellant's daughters became very upset, e.g., crying and screaming, and the officers asked if there was somewhere the child could go so she (the child) would not have to be present during the search. (Id.) In response, Appellant stated, "she had already spoken with her daughters and her daughters knew what was going on and that she had talked to them about the possibility that some day the police may come by, something to that effect was her statement." (Id.)

Detective Gootee testified, as well, and described his pre-warrant investigation, describing his surveillance of Appellant's house and the quite a bit of foot traffic up to the door of the house. (VR3; 03/31/06; 14:19:30–14:21:10.) Specifically, the detective testified that in less than one hour of surveillance he saw four to five people go up to Appellant's porch, a black female would come to the door for each different buyer, the buyer would stay on the porch as the black female would go back inside, the black female would return, and the buyer would leave. (VR3; 03/31/06; 14:23:50–14:25:00.) The detective testified it was the same sequence for each buyer. (Id.)

Detective Gootee also testified that while in the living room and after he was given custody of Appellant (who was under arrest at that point), he heard Appellant say something similar to the following: "I've talked to my daughters about this and I've explained to them that this might happen one day, that the police might come" and that she was not a "big drug dealer" but sold "only small amounts." (VR3; 03/31/06; 15:02:25–15:06:20.) When asked

if he recalled the question(s) asked of Appellant that prompted her statements in the living room, the detective testified he could not recall. (VR3; 03/31/06; 15:40:25–15:41:55.)

Detective Gootee again testified he read Appellant her Miranda rights as soon as she was brought into the living room from the bedroom. (VR3; 03/31/06; 15:33:30.)

As for Appellant, she presented testimony from an investigator that her husband at the time, Armon Perry, was incarcerated on the day she was arrested, he stopped by the house that day to see Appellant, and he was on work release (when he stopped by). (VR4; 04/03/06; 14:24:20–14:26:35.)

She also had her two daughters testify again, and they repeated the same stories given during the suppression hearing. (VR4; 04/03/06; 14:38:30–15:24:25.) The one major difference is that Acacia Smith testified Appellant's husband, A. Perry, stopped out in front of the house on the day of the search, she went out to A. Perry's car along with her mother, A. Perry asked Appellant to hold onto something and put the "something" into her mother's pocket, and she and her mother were at the car for about 10 minutes. (VR4; 04/03/06; 15:09:10–15:10:55.) Surprisingly, Acacia Smith was able to recall these details despite being only 11-years-old on the day in question, these events having been three years before trial, and her receiving government benefits for a mental health disability. (VR4; 04/03/06; 15:06:30 & 16:09:10.)

Testifying on her own behalf, Appellant repeated her daughter's story about A. Perry stopping by, adding the details that her husband put an item in her pocket and said, "Here's something for you," and that she did not bother to look to see what was put in her pocket, as she thought it was money. (VR4; 04/03/06; 16:11:25–16:15:45.) She also denied knowingly

possessing the drugs found in her pocket, and reiterated much of her suppression hearing testimony. (E.g., VR4; 04/03/06; 16:25:15.)

After being instructed, the jury found Appellant guilty of the lesser offense of possession of a controlled substance, as well as possession of drug paraphernalia. (TR2, 191-199.) Rather than submit to jury sentencing, the parties agreed Appellant would serve three years on the controlled substance charge and 12 months on the paraphernalia charge, to run concurrently, with the Commonwealth not objecting to probation. (TR2, 216-217.)

4. Post-Trial Motions and Sentencing.

After trial, Appellant filed typical post-trial motions, which were denied. (TR2, 219-227 & 267.) The trial judge sentenced Appellant per her agreement with the Commonwealth. (TR2, 268-270.) Appellant then appealed her convictions to the Court of Appeals. (TR2, 273.)

5. Appeal.

The Court of Appeals, in a divided decision, affirmed Appellant's convictions. (CA Opinion, 1-15.) As for Appellant's statement made in the bedroom, the three-judge panel relied on Taylor and ruled as follows:

> Here, Smith was placed in handcuffs almost immediately after officers encountered her in the bedroom. Testimony elicited at the suppression hearing and at trial revealed this detention was for officer safety and to prevent Smith from destroying or concealing any contraband while the search warrant was being executed.
>
> We hold Smith was not in police custody simply because she was placed in handcuffs while the officers completed their search and investigation. Therefore, no *Miranda* warnings were necessary, and the trial court correctly so ruled in denying the motion to suppress the bedroom statement.

(CA Opinion, 5 (citations omitted).)

The panel likewise rejected Appellant's alternative argument that even if she was not in custody then a Miranda violation occurred when Sergeant Gentry asked her about having drugs and weapons. (CA Opinion, 6.) Relying on the United States Supreme Court precedent, New York v. Quarles, 467 U.S. 649 (1984), very recently adopted by this Court in Henry v. Commonwealth, 275 S.W.3d 194 (Ky. 2008), the panel found "*Miranda* does not preclude questions regarding the location of contraband, especially in situations such as in this case *sub judice* where a suspect is detained but is not in custody." (CA Opinion, 6.) The panel also observed,

> It would have been plainly unreasonable, if not inept police work, for the officers herein to have simply allowed Smith to wander about without at least cursory questioning regarding contraband considering the circumstances under which the officers came to be present in her home, that is, in order to execute a search warrant.

(CA Opinion, 6-7.)

The panel also affirmed the trial judge's ruling with respect to the statements made by Appellant in the living room, finding "no interrogation occurred," the offices' question about where Appellant's children could be taken (away from the crime scene) could not be interpreted "as an attempt to elicit an incriminating response," and "no *Miranda* violation occurred." (CA Opinion, 7-9.)

As for the evidentiary issue raised with respect to Appellant's husband, A. Perry, the panel affirmed the trial judge's decision prohibiting the admission of testimony about his prior drug convictions. (CA Opinion, 9-11.)

A single judge from the panel filed a concurring opinion, lamenting the panel was, in his estimation, "bound" to follow Taylor and its "holding" that "being placed in handcuffs does not constitute such 'custody,' or deprivation of freedom of action" that would render

Miranda applicable. (CA Opinion, 11-12.) This single judge also noted he disagreed with the Taylor decision and believed "the law set out therein should be changed." (CA Opinion, 12.)

ARGUMENT

I.

THE TRIAL JUDGE PROPERLY DENIED THE MOTION TO SUPPRESS.

For her first assignment of error, Appellant claims the Court of Appeals erroneously affirmed the trial judge's denial of her motion to suppress three specific statements made in her home. (AB, 6-40.) For ease of reference, the Commonwealth will follow Appellant's lead and address the statement made in the bedroom, and then those made in the living room.

A. The Bedroom Statement.

As described in more detail in the Counterstatement of the Case, during the execution of the search warrant Sergeant Gentry encountered Appellant in her bedroom and in the process of securing the house, Appellant advised she had drugs in her pocket. (VR1; 03/29/06; 10:56:35–10:58:25.) Citing Taylor v. Commonwealth, 182 S.W.3d 521 (Ky. 2006), the trial judge concluded Appellant was not in custody and, therefore, no Miranda warnings were necessary prior to Appellant's admission. (VR2; 03/30/06; 10:24:00–10:29:00.) The Court of Appeals, albeit with some hesitation on the part of one member of the three-judge panel, affirmed the trial judge's ruling. (CA Opinion, 1-7 & 11-15.)

Before this Court, Appellant regurgitates her "in custody" argument, attacking this Court's Taylor decision and asks this Court to rule that because she was in handcuffs at the time she made her admission to Sergeant Gentry, she was automatically "in custody" for purposes of Miranda and was entitled to Miranda warnings at such time. Because she apparent-

ly was not read her Miranda rights between the time she was handcuffed and when she made her statement, she believes her "drugs in the pocket" statement should have been suppressed.

Not only is Appellant's argument based on a mis-reading of Taylor, it is without merit.

1. Appellant Has Mis-Read Taylor.

In reading Appellant's opening brief, it becomes evident she interprets the Taylor decision as setting forth a *per se* rule regarding the use of handcuffs in the context of the "in custody" determination under Miranda. That is, Appellant reads Taylor as "holding" a person in handcuffs is *not* in custody for Miranda purposes. Section I(A)(1)(b), infra.

Based on this mis-reading, Appellant asks this Court to overrule Taylor or, at the very least, clarify its "holding." (E.g., AB, 16-24.) As discussed below, Taylor does not set forth any *per se* rule and does not need to be overruled or even clarified.

a. The Taylor Decision.

The Taylor decision arose "from an opinion of the Court of Appeals which affirmed a judgment based on a conditional guilty plea entered by Taylor to one count of trafficking in a controlled substance and one count of possession of marijuana." 182 S.W.3d at 522. According to this Court, "The question presented is whether the circuit judge erred by denying the motion by Taylor to suppress his statements to the police and the evidence found on his person." Id.

The record before the trial court showed police received information from an informant that Taylor was in possession of crack cocaine and where he could be found. Id. When police went to the location specified, they found Taylor. Id. As the officers approached him, "Taylor moved in the opposite direction, occasionally making furtive glances at the officers.

Eventually, the officers confronted Taylor next to a wall and handcuffed him." Id. One of the officers testified Taylor was restrained because he was deemed a flight risk and they were in an area with "multiple escape routes." Id.

After being handcuffed, "the officers advised him that he was not under arrest and that they had been told he possessed drugs." Id. Upon hearing this, and within 15 seconds of being handcuffed, Taylor "voluntarily admitted to the officers that he had cocaine and marijuana in his pockets." Id. "The police then arrested Taylor, searched him and found the drugs on his person. He was read his Miranda rights after being formally arrested and he refused to answer any questions." Id.

In affirming the trial court's denial of Taylor's motion to suppress, this Court ruled Taylor was not in custody (despite being handcuffed) and was not subject to custodial interrogation:

> Taylor was handcuffed to allow officers to conduct an investigative stop in an area which they knew had multiple escape routes. The handcuffs were used only as a means of reducing the mobility of Taylor. The circumstances of the furtive glances given by Taylor as he walked away from the officers, as well as the escape route possibilities, caused them to consider him a serious flight risk.
>
> He was not placed in custody as that phrase has been generally used in the context of Miranda cases. As the officer began to tell Taylor why he was being stopped, Taylor spontaneously interrupted him stating that he had crack cocaine and marijuana in his pockets.
>
> . . .
>
> The evidence indicates that the statements made by Taylor were not in response to any police statement reasonably calculated to elicit an incriminating response. Miranda requires an individual who is stopped to be apprised of his/her rights only in the context of a custodial interrogation. Here, there was no custodial interrogation.

Id. at 523. This Court made clear the facts before the trial court did *not* support the conclusion Taylor was in custody for purposes of Miranda:

> Taylor was not in custody for Miranda purposes simply because he was handcuffed and detained in order to prevent his flight until the investigation was completed.

Id. at 524.

b. Taylor Did Not Establish a *Per Se* Rule.

Appellant's argument regarding the bedroom statement is premised on an incorrect reading of Taylor. Specifically, Appellant maintains Taylor sets forth a *per se* rule that if a person has been handcuffed then he is *not* in custody for purposes of Miranda. For example, Appellant states the following in her opening brief:

> The Taylor case is out of line with the majority of jurisdictions that have concluded that being placed in handcuffs **can** constitute being "in custody" for Miranda purposes even though a formal arrest has not been made.
>
> . . .
>
> Even if this Court is not willing to completely overrule Taylor, this Court should, at a minimum, clarify that a person **can** be "in custody" for purposes of Miranda without being under arrest.

(AB, 23 & 24 (emphasis supplied to word "can").)

This mis-reading of Taylor appears to have been driven home by the concurring opinion of the Court of Appeals which lamented that court was "bound" by Taylor and its "holding" that being handcuffed "does not constitute such 'custody' or deprivation of freedom of action, so as to make *Miranda* applicable" and that "a suspect is not in custody, for *Miranda* purposes, even if handcuffed, apparently unless he or she is placed under arrest." (CA Opinion, 11-13 (footnote omitted).)

Two simple points make Appellant's reading error perfectly clear.

First, Taylor did not set forth a *per se* rule regarding handcuffs and the "in custody" requirement of Miranda. At no point in Taylor did this Court state a person *cannot* be in custody when handcuffed (but prior to arrest). Likewise, at no point did this Court state a person is *always* in custody when handcuffed.

Instead, this Court found that based upon the unique facts before it, the defendant in Taylor was not in custody for purposes of Miranda despite having been handcuffed. Read properly, Taylor stands for the premise a person is not *automatically* in custody when handcuffed. That is the extent of how Taylor should be read and applied. That is exactly how the Court of Appeals's majority applied Taylor: "We hold Smith was not in police custody simply because she was placed in handcuffs while the officers completed their search and investigation." (CA Opinion, 5.)

In addition, *per se* rules governing the "in custody" determination are inconsistent with Miranda. As the Supreme Court has noted more than once, the "in custody" determination under Miranda involves a consideration of "all of the circumstances," meaning that no one circumstance should govern to the exclusion of all others. E.g., Thompson v. Keohane, 516 U.S. 99, 113 n. 11 (1995); Stansbury v. California, 511 U.S. 318, 322 (1994) ("In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation . . ."); California v. Beheler, 463 U.S. 1121, 1125 (1983) ("Although the circumstances of each case must certainly influence a determination of whether a suspect is 'in custody' for purposes of receiving of *Miranda* protection, the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest"); United States v. Jones, 523 F.3d 1235, 1240 (10th Cir. 2008) ("We thus avoid hard line rules and instead allow several non-exhaustive

factors to guide us . . . Although these factors are useful, we emphasize that we must look to the totality of the circumstances and consider the police-citizen encounter as a whole, rather than picking some facts and ignoring others").

Second, the Court of Appeals's concurring opinion elevates mere dictum in Taylor to a binding holding. Again, the concurrence states Taylor "holds that being placed in handcuffs does not constitute such 'custody'" for Miranda purposes and that "a suspect is not in custody, for *Miranda* purposes, even if handcuffed, apparently unless he or she is placed under arrest." (CA Opinion, 12 & 13 (footnote omitted).) This is not the "holding" of Taylor, as the by-the-way mention of handcuffs, i.e., "Taylor was not in custody for Miranda purposes simply because he was handcuffed and detained in order to prevent his flight until the investigation was completed," was not necessary to the decision. See, Cawood v. Hensley, 247 S.W.2d 27, 29 (Ky. 1952). This observation regarding the effects of handcuffs on the "in custody" determination did not establish a legal principle and, in fact, was nothing more than a mere remark. As such, this Court's statement regarding handcuffs was non-binding dictum. Id.

Moreover, not even a pro-prosecution reading of Taylor can support the idea it means "a suspect is not in custody, for *Miranda* purposes, even if handcuffed." (CA Opinion, 13.) Rather, Taylor merely observed that being in handcuffs does not *automatically* mean one is in custody, nothing more, nothing less.

Because Taylor is not binding and provides only guidance when it comes to the "in custody" determination, there is no need to overrule the decision or even clarify it.

2. Appellant Was Not In Custody.

Irrespective of Appellant's mis-reading of Taylor, the Court of Appeals correctly affirmed the trial judge's conclusion that Appellant was not in custody when she told police she had drugs in her pocket.

The now-familiar Miranda warnings are required only when the suspect being questioned is "in custody." Commonwealth v. Lucas, 195 S.W.3d 403, 405 (Ky. 2006). Custodial interrogation "has been defined as questioning initiated by law enforcement after a person has been taken into custody or otherwise deprived of freedom of action in any significant way." Id. "The inquiry for making a custodial determination is whether the person was under formal arrest or whether there was a restraint of his freedom or whether there was a restraint on freedom of movement to the degree associated with formal arrest." Id. "Custody does not occur until police, by some form of physical force or show of authority, have restrained the liberty of an individual" with the test being "considering the surrounding circumstances, a reasonable person would have believed he or she was free to leave." Id. This Court, following the lead of federal courts, has determined the standard of review for an "in custody" determination is *de novo*. Id.

In Taylor, this Court recognized there is no rule that the use of handcuffs by police automatically turns a temporary detention into "custody" for purposes of Miranda. In Taylor, this Court noted the defendant in that case "was not in custody for Miranda purposes simply because he was handcuffed and detained in order to prevent his flight until the investigation was completed." 182 S.W.3d at 524. That is, this Court refused to equate a temporary detention (with handcuffs) with custody for Miranda purposes when the purpose of that detention

was to temporarily restrict the defendant's movement while a brief investigation was completed.

Similarly, in Turner v. State, 252 S.W.3d 571, 580 (Tex. App. 2008), the Texas Court of Appeals recognized "the placing of handcuffs on a defendant does not, in and of itself, automatically mean he is in custody." In Turner, the defendant was handcuffed, put in a police cruiser, and told he was not under arrest and the handcuffs were for safety purposes. Id. According to the officer who handcuffed the defendant, he routinely handcuffed persons put in his cruiser since there was no cage between the front and back seats. Id. These handcuffs were later removed once the defendant had been transported to the police station. Id. Based on the "totality of the circumstances" the Texas appellate court concluded "handcuffing appellant based on customary safety concerns, and only for the duration of transport in a car lacking a safety cage, does not show custodial status." Id.

Here, when Appellant made the "drugs in my pocket" statement in her bedroom she was handcuffed solely for the type of security concerns which motivated the police officers in handcuffing the suspect in the Taylor case and, it appears, in Turner. Indeed, during the suppression hearing the issue of security was mentioned over and over again. For example, Detective Gootee testified officers made a "dynamic entry" into Appellant's house; there is always a 50-50 chance of weapons being present when serving a narcotics warrant; officers must always assume weapons are present due to the fact that weapons are so often found in narcotics cases; and "we do handcuff everybody, you know, for safety purposes when we do do these entries." (VR6; 03/20/06; 11:38:05–11:42:15.)

Similarly, Sergeant Gentry testified during the execution of search warrants she used handcuffs as "temporary restraints" with the idea being to secure the scene at the outset for

safety purposes (in case the police are outnumbered). (VR1; 03/29/06; 10:58:30–10:59:00.) Consistent with this "temporary" theme, she testified that after securing the scene, the persons secured would be taken to a central location, the handcuffs would be removed, and officers would proceed with the search and investigation. (VR1; 03/29/06; 11:07:40–11:09:20.) In this situation, Sergeant Gentry testified that when Appellant was secured she was not under arrest and the point of securing her was to make sure everyone was safe. (VR1; 03/29/06; 10:56:35–10:59:00.)

As for the intention that the use of "temporary restraints" be temporary, it bears emphasizing that Appellant was not the only one handcuffed during the chaotic scene that was the "dynamic entry" into Appellant's house. One of Appellant's daughters was handcuffed at the outset, but those restraints were removed very quickly once it was determined, presumably, that she was not a safety issue. (VR1; 03/29/06; 13:15:20.) In light of this, it stands to reason that had Appellant not been in possession of drugs, and under arrest as a result, her handcuffs would have been removed fairly quickly as well.

Consequently, the fact that Sergeant Gentry placed Appellant in handcuffs for security purposes as the officers made their initial sweep to secure weapons and contraband does not mean Appellant was "in custody" when she admitted having drugs in her pocket. Since she was not in custody, Miranda warnings were not required at that point.

In making her ruling, the trial judge found Appellant was handcuffed as part of police efforts to secure the scene for safety purposes. (VR2; 03/30/06; 10:26:00–10:29:20.) In the Taylor decision, the trial court found the police had a sufficient basis for stopping the suspect "and securing him for his protection as well as their own . . . ." 182 S.W.3d at 522-523. Appellant, like the suspect in Taylor, was not in custody simply because she was placed in

handcuffs for safety purposes, i.e., for her protection as well as that of the officers, and the trial judge correctly found that for this reason there was no Miranda violation which would have rendered Appellant's statement inadmissible. The Court of Appeals properly heeded the guidance of Taylor and affirmed the trial judge's decision.

3. The Public Safety Exception Was Applicable.

Should this Court agree Appellant was not "in custody" for Miranda purposes she argues, in the alternative, that the public safety exception set forth in New York v. Quarles, 467 U.S. 649 (1984), should not apply. (AB, 27-35.) In Quarles, the Supreme Court carved out an exception to the Miranda rule for those situations "where concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in Miranda." 467 U.S. at 653. Specifically, when officers ask "questions necessary to secure their own safety or the safety of the public" as opposed to "questions designed solely to elicit testimonial evidence from a suspect," no Miranda warnings are necessary. Id. at 659. Further, the availability "of that exception does not depend upon the motivation of the individual officers involved":

> In a kaleidoscopic situation such as the one confronting these officers, where spontaneity rather than adherence to a police manual is necessarily the order of the day, the application of the exception which we recognize today should not be made to depend on post hoc findings at a suppression hearing concerning the subjective motivation of the arresting officer.

Id. at 656. While this case was pending, this Court recognized and applied Quarles in Henry v. Commonwealth, 275 S.W.3d 194 (Ky. 2008).

Relying on Quarles, the Court of Appeals found "*Miranda* does not preclude questions regarding the location of contraband, especially in situations such as in this case *sub*

judice where a suspect is detained but is not in custody." (CA Opinion, 6.) The panel also observed,

> It would have been plainly unreasonable, if not inept police work, for the officers herein to have simply allowed Smith to wander about without at least cursory questioning regarding contraband considering the circumstances under which the officers came to be present in her home, that is, in order to execute a search warrant.

(CA Opinion, 6-7.) Citing United States v. Luker, 395 F.3d 830 (8th Cir. 2005), the panel also noted, "[t]his so-called 'safety exception' to *Miranda* has been extended to include questioning about illegal drugs where officers are concerned about evidence thereof which might be uncovered in a search." (CA Opinion, 6 (footnote omitted).)

Before this Court, Appellant takes issue with the Court of Appeals's application of the Quarles exception, arguing Sergeant Gentry's questioning "was clearly 'designed solely to elicit testimonial evidence from a suspect' and was not justified under the public safety exception." (AB, 29.)

In making this argument, Appellant overlooks a couple of things. First, with there being probable cause to believe crack cocaine was in the home, with there also being probable cause to believe that the suspect would attempt – perhaps in some irrational fashion – to dispose of the drug evidence, with children in the home, and with the officers aware of the ever-present possibility that weapons might be at hand, the police here faced legitimate safety concerns in the execution of the search warrant. In this regard, the Commonwealth submits the "dynamic entry" made here constitutes the sort of "kaleidoscopic situation" outlined in Quarles "where spontaneity rather than adherence to a police manual is necessarily the order of the day."

Second, while Luker involved concerns about "needles or substances associated with" methamphetamine use, and this case involved suspected crack cocaine activities, the application of the Quarles safety exception in Luker underscores the principal that "police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect." Quarles, 467 U.S. at 658-59. Here, the consistent suppression hearing testimony of the officers was that they were securing the house for safety purposes when Sergeant Gentry encountered Appellant, handcuffed her, and asked her about drugs and weapons. There was no indication the inquiry was motivated by any desire to "elicit testimonial evidence."

Third, if there was ever any doubt as to why Sergeant Gentry asked the question about drugs, she erased that doubt when at trial she testified, "I'm very careful, I don't want to get stuck with needles or anything of that sort" before sticking her hands in a suspect's pockets. (VR3; 03/31/06; 11:33:15–11:37:50)

In light of the foregoing, the Court of Appeals correctly ruled that Sergeant Gentry's questioning fell within the Quarles exception to the Miranda rule. (CA Opinion, 6-7.)While undoubtedly Sergeant Gentry could have been more articulate with her question based on her concern about "needles or anything of that sort," and perhaps even asked whether Appellant had any sharps, needles, razors, broken crack pipes, or other hazardous substance or object that could harm a person not expecting to touch same, no court can legitimately expect an officer facing such a "kaleidoscopic situation" to be such a word-smith.

B. The Living Room Statements.

In its opinion, the Court of Appeals rejected the Appellant's argument the two statements made in the living room should have been suppressed. (CA Opinion, 7-9.) That is, the three-judge panel affirmed the trial judge's decision that the statements "her daughters 'knew what was going on' and actually expected the police to some day come by" and "that she was not a big drug dealer, but only sold small quantities 'to get by,'" should not be suppressed. (CA Opinion, 7.) Like the trial judge, the Court of Appeals, citing Rhode Island v. Innis, 446 U.S. 291 (1980), determined that although Appellant was in custody for Miranda purposes by the time she was in the living room, she was not subject to interrogation and, therefore, no Miranda warnings were necessary.[2] (CA Opinion, 7-9.)

As the Court of Appeals hinted, "[t]he concern of the Court in *Miranda* was that the 'interrogation environment' created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination." Innis, 446 U.S. at 299. Naturally, the nation's high court refined its Miranda ruling by noting not "all statements obtained by the police after a person has been taken into custody are to be considered the product of interrogation." Id. Rather, per the Supreme Court's Innis decision, "the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent":

> That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police

---

[2] On this point, the Court of Appeals ruled, in pertinent part, "Det. Gootee testified Smith's statements were in response to his inquiry as to whether there was a different location her children could be taken during the execution of the search warrant. In no way can we perceive how such an innocuous question could be interpreted as an attempt to elicit an incriminating response. The mere fact that Smith's responses were self-incriminating does not somehow transform Det. Gootee's simple inquiry into an interrogation." (CA Opinion, 8.)

> should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.

Id. at 300-301 (footnotes omitted). The Supreme Court further clarified this exception to the Miranda requirement as follows:

> A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.

Id. at 301-302 (footnotes omitted). Since Innis, this Court has cited and applied it on multiple occasions. E.g., Watkins v. Commonwealth, 105 S.W.3d 449, 451 (Ky. 2003) ("A *Miranda* warning is not required when a suspect is merely taken into custody, but rather when a suspect in custody is subject to interrogation"); Wells v. Commonwealth, 892 S.W.2d 299, 302 (Ky. 1995).

In her brief, Appellant focuses exclusively on the testimony of Detective Gootee as demonstrating she was subject to interrogation since Detective Gootee "should have known that his comments were likely to elicit an incriminating response from [her]." (AB, 36-40.) Even assuming the trial judge was correct to find Appellant was not read her Miranda warnings (once taken to the living room), Appellant's focus is too narrow and she mis-interprets the detective's testimony.

Looking to the testimony quoted by Appellant, she conveniently over-looks the fact Detective Gootee could not, three years later, be certain what spurred her to make her statement. For example, Detective Gootee testified "I'm not sure that led to it"; "What I exactly asked her I don't remember"; "I just don't know what was said"; "I can't recall if I asked her a question that led her to the statement or not"; and "I'm not 100% sure because it's been

three years ago." (VR6; 03/20/06; 11:42:15– 11:44:15 & 11:58:50–12:00:20.) At trial, the detective repeated that he could not recall what he said. (VR3; 03/31/06; 15:40:25–15:41:55.) Looking at the words he used and the way in which he spoke about this point, it was clear from Detective Gootee's testimony that he could not recall what caused Appellant to make the two statements at issue.

What Detective Gootee could recall, however, was significant. During the suppression hearing he confirmed Appellant's statements were made both in the presence of her two children and while speaking about them. (VR6; 03/20/06; 12:00:20–12:01:10.) This is significant because it is consistent with the testimony of Detective Parks who testified she heard Appellant say she had talked with her children, they knew what was going on, and the children knew it was a possibility the police would come one day. (VR1; 03/29/06; 13:53:40–13:55:00.) According to Detective Parks, this statement was prompted by an inquiry by officers about where her children could be taken since one of them was terribly upset, i.e., screaming, crying, and yelling. (Id.)

In an effort to negate the significance of Detective Parks's testimony, Appellant argues Detective Gootee "acknowledged that it was his actions that probably led Cassandra to make such statements." (AB, 38.) As a basis for this, Appellant looks to the exchange between the prosecutor and the detective in which the prosecutor asked, "When she started saying these things, was it in response to anything that you had said, had you asked her a question?" and he responded, "I'm sure I did that led to it . . . ." (AB, 38.) This does not offer any help for Appellant, however, as Detective Gootee did nothing more than recall he said something that caused the statements but, again, he went on to testify he could not recall what he said. This gap in Detective Gootee's memory was, of course, filled by Detective Parks and

her recollection that Appellant's statements were made in the context of addressing the needs of her children.

That Appellant made incriminating, non-responsive statements to inquiries made by officers expressing concern for her children does not mean Appellant was subjected to interrogation. Both the trial judge and the Court of Appeals correctly concluded that regardless of whether Appellant was advised of her Miranda rights (in the living room), the record did not support the conclusion that her statements in the living room were made in response to any police inquiry "reasonably likely to elicit an incriminating response." The suppression hearing record shows uniformly that there was no interrogation, that Appellant's statements were not elicited by any interrogation, and that no Miranda violation occurred. This is what the trial judge found, and what the Court of Appeals affirmed, and that finding was supported by substantial evidence. Hence, the motion to suppress was correctly denied.

II.

THE TRIAL JUDGE PROPERLY EXCLUDED EVIDENCE OF A. PERRY'S FELONY DRUG CONVICTIONS.

For her second assignment of error, Appellant claims the trial judge "committed reversible error by precluding [her] from introducing evidence concerning [her husband's] felony drug convictions." (AB, 40-44.)

As Appellant notes in her brief her husband, A. Perry, refused to testify at trial. (VR1; 03/29/06; 15:05:45–15:09:30.) In an effort to support her theory that A. Perry put the drugs in question in her pocket (with her thinking it was money), Appellant sought to introduce, under KRE 404(b), evidence of A. Perry's prior felony drug convictions, including convictions for possession and trafficking in controlled substances. (AB, 41.) Both the trial judge and Court of Appeals rejected Appellant's efforts. (E.g., CA Opinion, 9-11.)

For the following four reasons, this Court should reject Appellant's claim that reversible error occurred.

First, KRE 404(b), by its plain language, prohibits the admission of evidence "of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." Here, the reason Appellant wanted to introduce this evidence was to prove A. Perry's character as a drug dealer and "show action in conformity therewith." In her brief Appellant all but admits this by arguing the following:

> However, evidence that Armon Perry had previously been convicted of trafficking in a controlled substance and possession of a controlled substance was relevant to show that he was involved in the drug trade, making it likely that he could obtain illegal drugs while out on work release and making it more probable than not that he put the cocaine into Cassandra's pocket, without her knowledge, before returning to jail.

(AB, 42.) That is, Appellant wanted to show that because her husband had been convicted of drug crimes, he must have placed cocaine in his wife's pocket, as that neatly conformed with his prior bad drug-related acts. In sum, Appellant wanted to portray A. Perry as once a drug dealer, always a drug dealer. The plain language of KRE 404(b) does not permit such evidence to be admitted unless it falls within an exception to this rule.

Second, this proposed evidence does not fit within the exception to the prohibition set forth in KRE 404(b). Evidence of A. Perry's prior drug-related convictions do not in any way show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" on his part to put drugs in his wife's pocket (without her knowledge). While Appellant will surely argue to the contrary in her reply brief, the only reason she wanted to introduce evidence of her husband's prior drug-related felony convictions is to show these convictions prove (1) he is a drug possessor and dealer and (2) he put cocaine in his wife's pocket in conformity with his past drug-related behavior. Despite Appellant's efforts

to disguise her intentions, she wanted nothing more than to introduce character evidence as to her husband. The trial judge and Court of Appeals properly determined this was impermissible.

Third, evidence of A. Perry's past drug convictions is not relevant to whether his wife knowingly possessed cocaine on April 24, 2003. That A. Perry had been convicted of more than one drug crime in the past is simply not relevant to whether Appellant knew she had cocaine in her pocket that day. The Court of Appeals correctly affirmed the trial judge's denial of Appellant's efforts to introduce this evidence. (CA Opinion, 9-11.)

Fourth, even if the trial judge erred, this error was harmless. The test for harmless error is whether "there is any reasonable possibility that, absent the error, the verdict would have been different." Taylor v. Commonwealth, 995 S.W.2d 355, 361 (Ky. 1999). A harmless error is "any error or defect in the proceeding that does not affect the substantial rights of the parties." RCr 9.24.

Here, Appellant was able to establish A. Perry was in prison, he was on work release on the day in question, he stopped by her house on the day in question, he put something in her pocket, and she never checked what her husband put in her pocket. Had the trial judge admitted the evidence at issue, the result would not have been different. The jury obviously did not buy Appellant's story that she truly believed A. Perry put money in her pocket and said, "Here's something for you." (VR4; 04/03/06; 16:11:25–16:15:45.) What law-abiding husband shoves money in his wife's pocket under these circumstances rather than just handing it to her? Appellant's story makes no sense, and the jury rejected it. Had the jury known A. Perry was a convicted drug possessor and dealer, there is not any possibility – let alone

a reasonable possibility – the result would have been different. If error occurred, it was harmless.

CONCLUSION

For these reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted

JACK CONWAY
Attorney General of Kentucky

JEFFREY A. CROSS
Assistant Attorney General
Office of Criminal Appeals
Attorney General's Office
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204
Phone: (502) 696-5342

Counsel for Appellee