IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
April 10, 2001 Session

STATE OF TENNESSEE v. TERRY NORRIS

Direct Appeal from the Criminal Court for Shelby County
No. 97-08293 James C. Beasley, Jr., Judge

No. W2000-00707-CCA-R3-CD - Filed May 21, 2002

A Shelby County jury found the Defendant guilty of second degree murder, and the trial court sentenced him to twenty-one years incarceration. The Defendant now appeals his conviction, arguing that he received ineffective assistance of counsel at trial because (1) his counsel failed to file a motion to suppress his confession based upon a violation of the Defendant's Fourth Amendment rights; and (2) his counsel argued a theory of defense to the jury that was contrary to the Defendant's wishes and testimony. We conclude that the Defendant's trial counsel were not ineffective for failing to base the motion to suppress the Defendant's confession on a violation of the Defendant's Fourth Amendment rights. We further conclude that although the Defendant's counsel did not comply with the Defendant's wish to proceed at trial under a theory of self-defense, any error in this regard was harmless in light of the record as a whole. We therefore affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JOE G. RILEY and JOHN EVERETT WILLIAMS, JJ., joined.

Robert C. Brooks, Memphis, Tennessee (on appeal); Michael Johnson and Garland Erguden, Assistant Public Defenders, Memphis, Tennessee (at trial), for the Appellant, Terry Norris.

Paul G. Summers, Attorney General and Reporter; Kim R. Helper, Assistant Attorney General; William L. Gibbons, District Attorney General; and Karen Cook, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

In July 1997, the Shelby County Grand Jury indicted the Defendant, Terry Norris, for one count of second degree murder. Following a trial, the Defendant was convicted of the offense

charged. The trial court subsequently sentenced him to twenty-one years in the Tennessee Department of Correction.

In this appeal as of right, the Defendant argues (1) that his counsel were ineffective for failing to move for suppression of the Defendant's confession based upon a violation of his Fourth Amendment rights; and (2) that his counsel were ineffective for arguing a defense theory to the jury that was inconsistent with both the wishes and testimony of the Defendant. Having reviewed the record, we conclude that the Defendant's confession was not obtained in violation of his Fourth Amendment rights and, thus, that his counsel were not ineffective for failing to file a motion to suppress his statement based on the delay between the time of his arrest and the judicial determination of probable cause. We further conclude that any error by defense counsel concerning the choice of defense strategy did not result in prejudice to the Defendant. We therefore affirm the judgment of the trial court.

I. FACTS

On March 10, 1997, nineteen-year-old victim Keith Milem was found shot to death outside the home where he lived with his uncle. On the evening of March 11, 1997, the Defendant was taken into custody by police and questioned about the crime. On March 13, 1997, the Defendant confessed to shooting the victim. The Defendant informed police of the location of the murder weapon, a nine-millimeter semiautomatic pistol, and police recovered the gun and submitted it for testing. Results of tests performed on the gun indicated that the fatal shots had indeed been fired from the Defendant's gun.

At trial, Lakendra Lavonne Mull testified that she and the Defendant were roommates at the time of the crime, and she reported that at that time, the Defendant was dating her cousin, Lateeska Newberry. Mull explained that the victim was also her distant cousin, and she stated that Newberry and the victim had known one another since attending elementary school together. Mull characterized the victim and Newberry as her "best friends."

Mull testified that on March 10, 1997, the victim, Newberry, and a third friend named Tim visited her apartment during the afternoon. Mull stated that the Defendant was present at their apartment when the victim initially arrived, and she reported that the Defendant spoke to the victim briefly upon the victim's arrival. Approximately two hours after the victim arrived at the apartment, the Defendant left and later returned with his brother. At the time the Defendant returned, the victim, Newberry, Tim and Mull were engaged in conversation, and the victim and Tim were drinking alcoholic beverages. Mull testified that the Defendant and his brother stayed only ten minutes upon their return to the apartment before departing a second time. Mull testified that the Defendant subsequently telephoned her to tell her that he had left his gun at the apartment, and he soon returned to pick up the gun. Mull explained that her young daughter lived with them, and the Defendant generally did not leave the gun in the apartment with Mull's daughter. After picking up the gun, the Defendant left for a final time.

Mull recalled that approximately three hours after the Defendant picked up his gun, she drove the victim home. Mull testified that the victim was "kind of staggering because he had been drinking." However, she maintained that the victim "probably was more sleepy than full of alcohol" because he had not drunk "all that much" while at her apartment. Mull recalled that when she left her apartment at approximately 9:55 p.m., she saw the Defendant parked across the street from their apartments in his "burgundy or maroon" 1993 Grand Am. She stated that when she pulled out of the apartment complex, she saw the Defendant begin to follow her car without his lights on, and she testified that the Defendant followed her car to the victim's home, a drive which Mull testified took three to four minutes. Mull reported that after she dropped the victim off in front of his home and turned her car around, the Defendant flashed his "high beams" at her car. Mull stated that she last saw the victim standing at the door to his home as she drove away.

Mull reported that the Defendant did not return home on the night of the murder, but she stated that the Defendant called her once that night. She recalled that at approximately 6:00 a.m. the following morning, the Defendant returned to their apartment to pick up clothes.

Mull testified that the Defendant normally carries a gun. Mull further testified that approximately a week prior to the homicide, she saw the Defendant put mercury covered with candle wax on the tips of bullets. When she asked him what he was doing, the Defendant explained that the mercury "makes the bullet explode when it enters something."

On cross-examination, Mull acknowledged that she told police she believed the Defendant thought that his girlfriend, Lateeska Newberry, was in her car on the night of the murder. She explained to police that she thought the Defendant was jealous after seeing the victim and Newberry together at her apartment earlier in the evening. She stated that she had known the Defendant to be jealous "[o]ver [Newberry]." However, she stated that while the victim was at her apartment on the day of the murder, the victim and Newberry were not affectionate and were "sitting across the room from each other."

Charles Edward Milem, the victim's uncle, testified that the victim was living with him at the time of his death. Milem testified that he was in his bedroom when the victim was shot. Milem recalled that from his bedroom window, he saw the victim get out of Mull's car and walk to the front porch of their home. As Mull's car pulled away, Milem saw another car immediately pull up on "the wrong side of the street." Milem next heard the victim ring the doorbell, and he then heard voices calling the victim. Milem testified, "One voice said, hey. My nephew repeated, who [sic] there, who [sic] there. And another voice immediately said, come here." Following this, Milem heard three gunshots, which he claimed came from the car that had pulled up after the victim was dropped off. At this point, he could no longer see the victim standing in the street. Milem rushed to the door, saw the victim lying in the street, and saw a car pull away. Milem stated that the car from which the shots were fired "looked white up under the street lights" and "sound[ed] like a Cutlass." When Milem approached the victim, he noticed that the victim's hands were still in his pockets.

Byron Braxton of the Memphis Police Department testified that he was called to the crime scene on March 10, 1997. He recalled that when he arrived at the scene, paramedics were already there. Braxton testified that he saw the victim lying face-down in the middle of the street, and when the paramedics rolled him over, Braxton saw that the victim's hands were still in his pockets. He stated, "[T]he shooter wasn't there to our knowledge. The consensus of the witnesses were that they saw a white box-type Chevy headed toward [a nearby street]. It was occupied by two to three male blacks. But they really couldn't give a description on the individual." Officers recovered three nine-millimeter shell casings from the scene. They also found a bullet lodged in the door of a house near the home in which the victim lived.

The State introduced the Defendant's March 13, 1997 statement through the testimony of Memphis Police Sergeant Dwight Woods. Woods participated in taking the Defendant's statement, which including the following:

Q. Terry, do you know Keith Milem?
A. Yes.

Q. Are you aware that Keith Milem was shot and killed on Monday, March 10, 1997 at approximately 10:00 PM in front of 610 Loraine Drive?
A. Yes.

Q. Did you shoot Keith Milem?
A. Yes.

Q. What did you shoot Keith Milem with?
A. A Smith and Wesson 9mm Automatic.

Q. How many times did you shoot Keith Milem?
A. I don't know.

Q. Why did you shoot Keith Milem?
A. Because he attacked me and hit me in the face and grabbed my arm.

Q. Terry, tell me in your own words exactly what occurred before, during and after the shooting?
A. Well from a couple of days before the shooting I heard my roommate Kim and my girlfriend Ranata talking about their cousin Keith or "Black" which is what they called him and I was suspicious about him the whole time and the day of the shooting he came to my home at 1104 Craft Road #1 (Southern Hills Apartments). I came home at about 9:00 that evening and saw him and my girlfriend talking. He was on the couch and she was on the love seat directly in front of him talking. So, I left[,] . . . thinking that they may be having a relationship, I was mad.

I left my apartment and when I returned I saw my roommates [sic] car leaving the apartments and I thought my girlfriend was in the car also so I followed them to talk to my girlfriend but when they got to Keith's house Ranata was not in the car so I stopped to talk to Keith. I called Keith to the car and asked him what was up and he asked what was I talking about and I asked was him and Ranata in a relationship and he told me that it wasn't my business so I told him that it was my business and it seems as if he saw my gun on the seat and looking at the gun, he hit me on the left side of my face and like dove into the car. I grabbed my gun, he grabbed my arm and I snatched away from him and pointed my gun at him and pulled the trigger. When I saw him fall, I took off. After I left I went to the Kings Gate Apartments and got into a fight with a young man and then I went to Orange Mound where I hid my gun in abandoned apartment building on Arbra.

Q. Terry, when you were following Kim and Keith, did you have your lights on or off?
A. I had my lights on but I turned them off when we got to the corner of Tulane and Shelby Drive to see who was in the car but I could not.

Q. Terry, what direction did you leave after you shot Keith?
A. East on Loraine towards Tulane, I turned left and went north on Tulane to Shelby Drive. Turned right on Shelby Drive and went east.

Q. Terry, describe your car that you drive?
A. I drive a burgundy Pontiac Grand AM, 1993, 2-door SE.

Q. Terry, does your car have fog lights on it?
A. Yes sir, it has white fog lights.

Q. Terry, do you know if Keith was drinking or drunk?
A. Yes. He was drinking a gallon of wine with a friend in my home when I left. When I left and came back, he was still drinking some of the wine a while later.

Q. Terry, were you drinking or using any type drugs?
A. No sir.

Q. Terry, did you recently put the mercury out of a thermometer into the end of the bullets that were in your gun and cover the ends with candle wax?
A. Yes sir[,] . . . I did that but not recently. It was when I first moved in to [sic] the apartment.

Q. Terry, when you first encountered Keith, was it your intention to shoot him?

A. No.

Q. Terry, is there anything else you can add to this statement that would aid in this investigation?
A. Yes sir, I'm sorry for what happened. I wish I could take it back.

Q. Did you give this statement of your own free will without any promises, threats or coercion?
A. Yes.

Q. Were you advised of your rights before you gave this statement?
A. Yes.

The Defendant testified on his own behalf at trial. He claimed that on one of the occasions while he was away from his apartment on the afternoon prior to the murder, he received a page from his girlfriend, who was at his apartment with Mull and the victim. The Defendant stated that as he drove back to his apartment in response to the page, he passed Mull's car on the road. He testified that he believed his girlfriend was in the car with Mull, and he therefore "blinked" his lights at Mull's car. The Defendant maintained that when Mull didn't stop, he blew his horn and flashed his lights a second time. He then followed her. The Defendant maintained that he turned off his lights in order to see who was in Mull's car. He explained, "I couldn't see because her car . . . had been in an accident. It was real . . . crushed up on one side, and I couldn't see in it." The Defendant stated that he followed Mull's car, continuing to try to get her attention, but eventually lost the car after he turned around.

The Defendant testified that after losing sight of Mull's car, he saw the victim standing in the yard of his uncle's home. The Defendant recalled that he "called [the victim] over" to his car. When the victim approached, according to the Defendant, the two men engaged in an argument about the Defendant's girlfriend. The Defendant described the victim as angry and stated that the victim's speech was slurred. The Defendant maintained that during the argument, the victim hit him, and he tried to "fend [the victim] off." The Defendant claimed that the victim then "dove in[to]" his car, while still hitting the Defendant, and attempted to grab the Defendant's gun, which was in plain view. According to the Defendant, he tried to push the victim out of the car, and as he pushed the victim away, he raised his gun and shot the victim.

The Defendant admitted that at the time he shot the victim, he was "enraged." The Defendant also admitted that on the night of the murder, he was "suspic[ious]" that the victim and Newberry, his girlfriend, were starting a relationship. He testified that on the day of the shooting, he and Newberry were in "a fight" and were not really speaking. The Defendant recalled that he was "upset at [his] girlfriend."

The Defendant testified that on the day of the shooting, he retrieved his gun from the apartment that he shared with Mull because of Mull's "under-age daughter and just for safety

reasons." He admitted to putting mercury on the tips of bullets, stating that "if [the mercury] got into a person . . . it would make the wound more severe." However, the Defendant maintained that he altered his bullets solely "for protection."

A videotaped deposition of Dr. O.C. Smith, an assistant medical examiner for Shelby County and Deputy Chief Medical Examiner for western Tennessee, was admitted into evidence. In his deposition, Smith stated that he performed the autopsy on the victim in this case. He stated that the victim died of multiple gunshot wounds. Smith specified that three bullets entered the Defendant's body, two of which exited the victim's body. Smith stated that one of the bullets which entered the victim's body severed the victim's spinal cord, rendering him incapacitated with "no voluntary control over his extremities."

Dr. Smith retrieved a "plastic property material" from the interior of one of the victim's bullet wounds that he concluded was "consistent with candle-wax." Smith explained that "some people will [put candle wax on the tip of a bullet] to cause a bullet to behave more like a full-metal jacket." He stated that a "full-metal jacket" is a bullet "that does not deform or fragment, and therefore . . . does not cause increase[d] suffering." He further explained that "[t]here's a concept out in the community, especially in the media industry, that if a hollow-point bullet is filled with metallic liquid mercury and that liquid mercury would be held in place by some devise [sic], that if that bullet contacts the body at high speed it will cause an almost explosive effect on the tissue."

Smith also noted a "pre-death" injury to the victim's "ring finger on his left hand that is a[n] evulsive type or a tearing type of laceration that peeled the skin down towards the finger-tip." He explained that "something snagged the skin with sufficient force to peel the skin down." Smith further noted "what is known in layman's terms . . . as powder burns, or a stipple type pattern on the inside of [the victim's] left wrist." Smith stated that "stipple will mark the skin out to about twenty-four inches, for most handguns." Finally, Smith noted an injury on the back of the victim's head comprised of "a large area of bruising[,] . . . some skin scraping and . . . some skin tearing." He explained, "It's an injury due to contact with a broad, blunt object. Certainly a fall to the ground can cause something like that."

II. ANALYSIS

The Defendant contends that he received ineffective assistance of counsel at trial. A defendant alleging ineffective assistance of counsel on direct appeal bears the burden of proving factual allegations by clear and convincing evidence. State v. Burns, 6 S.W.3d 453, 461 n.5 (Tenn. 1999). A trial court's factual findings are subject to a de novo review by this Court; however, we must accord these factual findings a presumption of correctness, which is overcome only when a preponderance of the evidence is contrary to the factual findings. State v. Keith, 978 S.W.2d 861, 864 (Tenn. 1998). A trial court's conclusions of law, such as whether counsel's performance was deficient or whether that deficiency was prejudicial, are subject to a purely de novo review by this Court, with no presumption of correctness. Ruff v. State, 978 S.W.2d 95, 96 (Tenn. 1998); State v. Davis, 940 S.W.2d 558, 561 (Tenn. 1997).

The right of a criminally accused to representation is guaranteed by both the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution.

Burns, 6 S.W.3d at 461; Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). This right to representation includes the right to "reasonably effective" assistance. Burns, 6 S.W.3d at 461.

In reviewing a claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. Baxter, 523 S.W.2d at 936. To prevail on a claim of ineffective assistance of counsel, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness," Strickland v. Washington, 466 U.S. 668, 688 (1984), and that this performance prejudiced the defense, resulting in a failure to produce a reliable result. Id. at 687; Cooper v. State, 849 S.W.2d 744, 747 (Tenn. 1993). To satisfy the requirement of prejudice, a petitioner must show a reasonable probability that, but for counsel's unreasonable error, the fact finder would have had reasonable doubt regarding the petitioner's guilt. Strickland, 466 U.S. at 695. This reasonable probability must be "sufficient to undermine confidence in the outcome." Id. at 694; see also Harris v. State, 875 S.W.2d 662, 665 (Tenn. 1994).

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney's performance within the context of the case as a whole, taking into account all relevant circumstances. Strickland, 466 U.S. at 690; State v. Mitchell, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court must evaluate the questionable conduct from the attorney's perspective at the time. Strickland, 466 U.S. at 690; Cooper, 849 S.W.2d at 746; Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). In doing so, the reviewing court must be highly deferential and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462. Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. Williams v. State, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980).

A. SUPPRESSION OF DEFENDANT'S CONFESSION

The Defendant first argues that his counsel were ineffective for failing to file a motion to suppress his confession based upon a violation of his Fourth Amendment rights. The record reveals that defense counsel did file a motion to suppress the Defendant's confession, in which counsel raised two issues for the trial court's consideration. In the motion, counsel first alleged that officers refused to give the Defendant medication for epilepsy, a condition from which the Defendant suffered, until he gave a statement to police. Counsel also alleged that by refusing to sign a waiver of rights form, the Defendant effectively invoked his right to counsel during questioning. The motion was heard, taken under advisement by the trial court, and subsequently overruled. In his motion for new trial and on appeal, however, the Defendant presents a third basis for exclusion of his confession. He argues that the confession was obtained as a result of an illegal detention, in violation of his Fourth Amendment rights. He contends that the delay between the time of his illegal arrest and the judicial determination of probable cause was unreasonable and that he was detained unlawfully for the purpose of gathering additional evidence to justify the arrest.

At the hearing on the motion to suppress the Defendant's statement, the evidence revealed that the Defendant was taken into police custody for questioning without a warrant on the evening of March 11, 1997. Officers transported the Defendant to the Memphis Police Department Homicide Office for a formal interview. There, he was advised of his rights. According to officers, the Defendant refused to sign a waiver of rights form, but agreed to talk to the officers. At the time, the Defendant denied any involvement in the death of the victim. At 8:20 p.m. on March 11, 1997, the Defendant was allowed to telephone his mother. Officers then booked the Defendant into jail. The Defendant's "arrest ticket" indicated that the Defendant was arrested at 8:45 p.m. on March 11, 1997.[1]

An officer who participated in questioning the Defendant testified that on March 13, 1997, the Defendant was again advised of his rights, and he signed a waiver of rights form at 4:05 p.m. The Defendant then told officers that he did not wish to make a statement until he spoke to his mother, and the officers therefore allowed the Defendant to telephone his mother at 6:50 p.m. At 7:20 p.m., the Defendant made a statement to the officers, in which he confessed to shooting the victim. At 8:20 p.m., the Defendant signed the typewritten statement that he made to police. The officers then allowed the Defendant to make another phone call at 8:23 p.m. According to one officer, during the Defendant's interview on March 13, the officers fed him a meal.

"The Fourth Amendment requires a prompt judicial determination of probable cause as a prerequisite to the extended detention of an individual after a warrantless arrest." State v. Carter, 16 S.W.3d 762, 765 (Tenn. 2000) (citing Gerstein v. Pugh, 420 U.S. 103, 114, 125 (1975)). Generally, a judicial determination is considered "prompt" if it is made within forty-eight hours of the detainee's arrest. Id. "[T]he issuance of a valid arrest warrant satisfies the requirement that there must be a judicial determination of probable cause for extended detention." Id. at 766.

In State v. Huddleston, 924 S.W.2d 666 (Tenn. 1996), the Tennessee Supreme Court determined that "the exclusionary rule should apply when a police officer fails to bring an arrestee before a magistrate within" forty-eight hours. Id. at 673. In addition, the Tennessee Supreme Court concluded that a "'fruit of the poisonous tree' analysis [should be employed] in determining whether or not a statement obtained during an illegal detention must be suppressed." Id. at 674. Thus, when an arrestee confesses after being detained for more than forty-eight hours following an arrest without a warrant and without a judicial determination of probable cause, the confession should be excluded unless the prosecution establishes that the confession "'was sufficiently an act of free will to purge the primary taint of the unlawful invasion.'" Id. at 674 (quoting Brown v. Illinois, 422 U.S. 590, 598 (1975)) (emphasis in original); see also Carter, 16 S.W.3d at 766. The court set forth four factors to consider when determining whether such a confession should be suppressed: "(1) the presence or absence of Miranda warnings; (2) the temporal proximity of the arrest and the confession; (3) the presence of intervening circumstances; and finally, of particular significance, (4) the purpose and

[1]Although Sergeant A. J. Christian discussed an "arrest ticket" during his testimony at the hearing on the motion to suppress, we find nothing in the record concerning the admission into evidence of such an item or a copy thereof.

flagrancy of the official misconduct." Id. at 674-75. The prosecution bears the burden of proving by a preponderance of the evidence that the challenged evidence is admissible. Id. at 675.

However, a probable cause determination does not "'pass[] constitutional muster simply because it is provided within 48 hours.'" Id. at 671-72 (quoting County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991)). Such a hearing may be unconstitutional "'if the determination was delayed unreasonably. Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake . . . .'" Id. at 672 (quoting McLaughlin, 500 U.S. at 56). In Brown v. Illinois, 422 U.S. 590 (1975), the United States Supreme Court concluded that defendant Brown's arrest was illegal, in part because it was "both in design and in execution, . . . investigatory." Id. at 605. The Court emphasized that "[t]he detectives embarked upon [an] expedition for evidence in the hope that something might turn up," id., and noted that "[t]he manner in which Brown's arrest was affected gives the appearance of having been calculated to cause surprise, fright, and confusion." Id.

In this case, the Defendant was arrested at 8:45 p.m. on March 11, 1997, and he confessed to the crime at 8:20 p.m. on March 13, 1997. An arrest warrant was obtained on March 14, 1997. Thus, although the Defendant was detained without a warrant and without a judicial determination of probable cause, he was not held for more than forty-eight hours prior to his confession. As our supreme court has noted, "if the statement was given prior to the time the detention ripened into a constitutional violation, it is not the product of the illegality and should not be suppressed." Huddleston, 924 S.W.2d at 675. However, the Defendant, citing Brown v. Illinois, 422 U.S. 590 (1975), argues that his confession was "the tainted fruit of the poisonous tree of an illegal arrest."

At the hearing on the motion for new trial, the trial court made specific findings concerning this issue. We note that although the Defendant's trial counsel did not address this issue prior to trial, the Defendant's appellate counsel, who was appointed to represent the Defendant at the hearing on the motion for new trial, raised this issue at the hearing. At the conclusion of the hearing, the trial court made the following comments:

> With regard to the Huddleston issues[,] . . . again, my recollection is, even under the circumstances in the argument, that the 48 hours had not expired at the time the officers charged [the Defendant].
>
> And, again, my recollection of the facts, and the record[] will obviously speak for [itself], was that he was talked to briefly on the night that he first came in. And the next day the officers did some work on the case, and then the next day he came in midday or mid afternoon, and they talked with him, and he gave a statement, and he was subsequently charged.
>
> And I don't find that there [were] any Huddleston violations or any Fourth Amendment violations. And frankly, I don't think . . . there was any basis for making that kind of an argument. I think based on the testimony and the statement given by . . .
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> . . . .

> . . . [Lakendra Lavonne] Mull. She saw the defendant; he was in an upset mood; that he's hiding in the shadows; that he follows her with his lights out. He's seen going down the cove where the victim lives. This is obviously where words were spoken between somebody out there.
>
> I think the officers had reasonable suspicion to bring [the Defendant] in to question him about the case. I don't think that there was any ruse on their part. . . .
>
> In my opinion, the officers were doing a good investigative job by bringing [the Defendant] in and questioning him. And I don't find that they kept him too long or that they in any way violated his rights. So I find that that ground has no basis.

"[A] trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). However, the determination by the trial court that the Defendant's Fourth Amendment rights were not violated is a conclusion of law, and as such is subject to de novo review. See Ruff, 978 S.W.2d at 96; Davis, 940 S.W.2d at 561. Although the trial court found "the officers had reasonable suspicion to bring the Defendant in to question him," it did not address whether they had probable cause to arrest the Defendant.

This Court has recently suppressed a confession in a case where the officers initially took a defendant into custody without probable cause to believe that the defendant had killed the victim and illegally detained the defendant for fifty-three hours prior to the defendant's confession. See State v. Larico S. Ficklin, No. W2000-01534-CCA-R3-CD, 2001 Tenn. Crim. App LEXIS 663, at *13-14, *28 (Tenn. Crim. App., Jackson, Aug. 27, 2001). In Ficklin, the initial "seizure" of the defendant occurred because the defendant had been at the crime scene and later left the crime scene, causing a police officer to become "suspicious" that the defendant was involved in the killing. Id. at *9-10, *21-22. Because the initial seizure of Ficklin for interrogation was illegal, the Ficklin court conducted a "fruit of the poisonous tree" analysis and determined that Ficklin's confession was tainted and inadmissable. See id. at *13-29.

In this case, our review of the circumstances surrounding the initial seizure of the Defendant yields a different result. The testimony of Sergeant A. J. Christian and Lieutenant Ernie K. McCommon at the hearing on the motion to suppress the Defendant's statement and the testimony of Captain Charles E. Logan at the motion for new trial indicate that the officers had probable cause at the time of the Defendant's initial seizure for believing that the Defendant killed Keith Milem. The police were aware immediately after the crime that the victim had died from multiple gunshot wounds. Lakendra Lavonne Mull and Charles Edward Milem provided statements to the police prior to the initial seizure of the Defendant on March 11, 1997 which placed the Defendant, armed with a handgun, at the scene of the crime when it occurred. These statements were consistent with trial testimony by both Mull and Milem. It can be reasonably inferred from Mull's statement that the Defendant, who was jealous about a possible relationship between the victim and the Defendant's girlfriend, followed Mull and the victim to the scene of the crime. Based upon these facts and circumstances and the trial court's findings of fact, we conclude as a matter of law that the officers had probable cause to arrest the Defendant. Because the police officers had probable cause to take

the Defendant into custody by arrest on March 11, 1997, it is unnecessary for us to conduct a "fruit of the poisonous tree" analysis.

We conclude that the trial court did not err by determining that the Defendant's confession was not obtained in violation of his Fourth Amendment rights and that it therefore was admissible at trial. We thus conclude that the Defendant's trial attorneys were not ineffective for failing to file a motion to suppress the Defendant's statement based on the length of time he was held in police custody without a warrant.

B. THEORY OF DEFENSE

The Defendant next argues that his counsel were ineffective for pursuing a theory of defense that was contrary to the Defendant's testimony and wishes. The Defendant contends that despite his desire to argue to the jury that he acted in self-defense when he shot the victim, his counsel insisted on focusing on a defense of voluntary manslaughter. In his brief, he states, "It was inappropriate for counsel to act contrary to the wishes of [the Defendant], and to present a different defense than that desired by the [Defendant], despite [counsel's] good intentions in doing so."

At the hearing on the motion for new trial, one of the Defendant's two trial attorneys, an Assistant Public Defender, testified concerning her representation of the Defendant. She testified that she "sat second chair" for the Defendant's trial. She stated that based on counsel's discussions with the Defendant and based on "information in the [Defendant's] file," counsel initially decided to pursue a theory of self-defense. However, she recalled that during cross-examination by the State, the Defendant admitted that he followed Mull's car to the victim's home and stated that he had a gun that was "cocked and ready to go, and basically that it was on the ready to shoot" the victim. Because of this testimony, counsel concluded that "at best it was a voluntary manslaughter situation" and therefore "switched" to a voluntary manslaughter defense. Counsel stated that as best she could recall, a defensive wound on the victim's hand supported this theory. She further testified that the Defendant's attorneys discussed their strategy with the Defendant "on numerous occasions."

The lead counsel for the Defendant's case, also an Assistant Public Defender, testified as follows with regard to this issue:

> Basically what we did talk about when we were talking about the facts of the case is that we talked about self-defense, but I explained to [the Defendant] that what our theory would have to be is to attempt to say it was a voluntary manslaughter that happened in the heat of passion of this argument.
>
> And the reason I felt this way very strongly was actually a couple of reasons. No. 1, there was only one gun involved; and No. 2, obviously, Mr. Norris brought that gun to the scene.
>
> No. 3, I met with Dr. Smith on two occasions preparing this trial . . . and we talked . . . at length about the stipple. And again, I forget which hand it was, but the stipple on the deceased[']s body and what that meant obviously [was] that . . . his hand was within two feet of the discharge of the weapon, but the rest of his body was

not, and the cut on the finger and also the effects that the bullet – I believe one of the shots obviously immediately severed the spinal cord which would disallow him from moving any further – any voluntary bodily movements.

. . . [T]hose facts made it very difficult, even though . . . I knew . . . [the Defendant] was going to have to testify about the struggle of the gun, and obviously he mentioned that in his statement. To argue consistently with his statement, which I felt was very important – and, frankly, it was the truth. To argue consistently with that, we would have to argue a voluntary [manslaughter] . . . .

As I mentioned in my closing argument . . . at that time that we were discussing jury instructions, my mind was so involved in the voluntary [manslaughter defense] being our objective and being the issue that I even talked about not wanting a self-defense instruction. . . .

But . . . I did argue to the jury about the fact that there were elements of self-defense in that, according to our theory.

And obviously [the Defendant] was the only witness . . . who could testify to what happened between the two of them and . . . I frankly thought, and I was very certain about this, that if I tried to argue self-defense in light of all the proof in this case we would lose, and I would lose credibility with the jury. I felt that the only way to convince this jury to come back with something other than second [degree murder] was to argue that it was the heat of passion.

[The Defendant] was angry because he was in a fight, and this guy attacked him. They struggled over the gun; he pushed him aside, and that was the theory that it was a voluntary [manslaughter]. It wasn't second degree murder. He didn't go over there to kill him . . . even though he had a gun with him.

. . . [T]o say it's self-defense, therefore he's not guilty, that in my opinion professionally just would not work. . . .

. . . I mentioned this to my client when he was out of custody at the time that we're talking about the case and also talking about the motion to suppress that I felt that our strategy and all points that I talked about, the voluntary manslaughter, was what we were trying to achieve, if we didn't . . . succeed on the motion to suppress.

When asked what facts weighed against mounting a defense of self-defense, the Defendant's lead counsel responded,

> the fact that [the Defendant] followed them over there; the fact that he brought a gun to the scene; the fact that he's the one that brought the gun over . . . . He had the gun in the car next to him seated there; the fact that he's the one that called [the victim] over to the car; . . . and the liquid at the tips of [the bullets] . . . . The fact that . . . at the time [the victim] was shot, he was some distance from [the Defendant], based on the testimony of Dr. Smith.

Finally, the attorney stated that his co-counsel was mistaken when she testified that the initial defense theory was one of self-defense.

Following lead counsel's testimony, his co-counsel was recalled to the stand. She stated that she had previously misunderstood what she was being asked when she testified that defense counsel

initially proceeded with a self-defense theory. She testified that initially, counsel considered a theory of self-defense because that was what the Defendant wanted. She maintained that counsel hoped the jury would conclude that the Defendant acted in self-defense, stating, "[I]f everything went super, and he testified as well as I hoped he would, we might get lucky." She stated, however, that "all . . . hope went out the window as the trial unfolded."

At the hearing on the motion for new trial, the Defendant maintained that he was defending himself during the entire confrontation with the victim. He testified that he engaged in some discussion with his attorneys about proceeding under a theory of self-defense, and he stated that he objected to proceeding under the defense of voluntary manslaughter. The Defendant stated, "That was my stand. . . . I was defending myself."

At the conclusion of the hearing, the trial court made the following comments:

> As to the issue of self-defense versus voluntary manslaughter, I have often wondered at the predicament that defense lawyers find themselves in when they kind of come in conflict with their client, as to . . . going with a particular direction or not going with a particular direction.
>
> And generally speaking, with all due respect to [the Defendant], the lawyers usually do have a better handle on where to go than the defendants do. Now, I know a defendant has certain perspectives and ways they [sic] want to go, but usually lawyers look at it with a different perspective, in light of trial experience and what juries generally do.
>
> And I think that whether self-defense would have been a viable argument or voluntary manslaughter would have been a viable argument, I frankly did not see the fallacy of [lead counsel's] twist on the case and the argument that he made in front of the jury.
>
> I can understand [the Defendant's] position with regard to the self-defense issue. Frankly, I think they were both put in front of the jury. Whether that was announced as our theory of the case or not, the jury had the right to accept the fact that [the Defendant] felt attacked; [the Defendant] felt justified in striking back.
>
> And I feel that if they had felt that way, they would have returned a verdict of voluntary manslaughter. Obviously they didn't feel that way. They heard those issues. They heard that he was hit first, but they also heard that he started the argument, and they heard that he came over there with a gun. They heard that he put mercury in the bullet heads; not necessarily to kill the victim in this case, but that it was done to cause specific damage. And knowing that, he loads his gun with that, and he rides around with his gun in the car at all times, as I remember him testifying to.
>
> . . . .
>
> And I can't say that [counsel's] approach of arguing voluntary manslaughter affected the outcome of this case. Had he gone with the self-defense argument, in light of those facts, I don't think he would have been successful. I think a more reasonable and rational argument is voluntary manslaughter. The jury didn't buy that

> either, but I don't think that that showed that [lead counsel] was ineffective in the way he represented [the Defendant]. Frankly, I felt [counsel], throughout the motion to suppress and throughout the trial, did a very good job of representing [the Defendant].

In Zagorski v. State, 983 S.W.2d 654 (Tenn. 1998), the Tennessee Supreme Court addressed the issue of "whether a lawyer should follow the lawful demands of his client when those demands may cause detriment to the client's case." Id. at 658. The court concluded that "[w]hen a competent defendant knowingly and voluntarily chooses a lawful course of action or defense strategy, counsel is essentially bound by that decision." Id. at 658-59. Relying upon Tennessee Supreme Court Rule 8, the court stated, "Generally, the client has exclusive authority to make decisions about his or her case, which are binding upon the lawyer if made within the framework of the law." Id. at 658. In reaching its conclusion, the court emphasized that a criminal attorney's role is to assist his or her client in making a defense and to represent the client in court. Id. The attorney must ensure that the defendant is "fully advised of his her rights, the available defense strategies, and the consequences of pursuing one strategy over another." Id. However, the court concluded that "[u]ltimately . . . the right to a defense belongs to the defendant." Id.

The record here indicates that counsel adequately informed the Defendant of the available defense strategies and of the possible consequences of pursuing a self-defense strategy over the defense of voluntary manslaughter. However, although the level of conflict prior to trial between the Defendant and his attorneys concerning this issue is somewhat unclear from the record, it appears that despite being fully informed of the consequences of his actions, the Defendant continued to wish to pursue a self-defense strategy. Under such circumstances, according to our supreme court, a lawyer must defer to the wishes of his client, regardless of the consequences.

Nevertheless, we conclude that any error on counsel's part in not allowing the Defendant to pursue the defense of his choice was harmless in this case. See Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a). We conclude, as did the trial court, that the Defendant suffered no prejudice as a result of his attorneys' decision to pursue a defense of voluntary manslaughter. At trial, the Defendant was allowed to testify that after he called the victim to his car, the victim initiated an argument with him, acting "in an angry manner" and "cuss[ing]" the Defendant. The Defendant also testified that the victim began to hit him while he tried to "fend [the victim] off" and that the victim "dove" into the Defendant's car, all the while hitting the Defendant, in an attempt to grab the Defendant's gun. Following this testimony, defense counsel asked the Defendant, "Why did you shoot him? He never had the gun." The Defendant responded, "I was already mad. I was like enraged. And the fact of him hitting me just made me more mad." Thus, evidence supporting both the defense of self-defense and the defense of voluntary manslaughter was placed before the jury. Furthermore, we note that the jury was instructed on both self-defense and voluntary manslaughter. The jury apparently considered and rejected both theories in reaching it verdict of second degree murder.

Accordingly, we AFFIRM the judgment of the trial court.

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ROBERT W. WEDEMEYER, JUDGE