

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

SEPTEMBER 1995 SESSION

FILED
June 28, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
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 APPELLEE,)
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 v.)
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 GEORGE CAMPBELL, JR.,)
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)
 APPELLANT.)

No. 02-C-01-9408-CR-00165
Shelby County
Joseph B. Brown, Jr., Judge
(Felony Murder and Aggravated Assault)

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OPINION FILED: _____

AFFIRMED

Joe B. Jones, Judge

OPINION

The appellant, George Campbell, Jr. (Campbell), was convicted of felony murder and aggravated assault by a jury of his peers. The jury sentenced the appellant to confinement for life in the Department of Correction for the felony murder. The trial court found that the appellant was a multiple offender and imposed a Range II sentence of confinement for ten (10) years in the Department of Correction. The trial court ordered that the two sentences be served consecutively.

Four issues are presented for review. The appellant contends that (1) the state failed to provide him with the McGary statement which contained exculpatory evidence and the trial court committed prejudicial error by (2) denying his pretrial motion for a copy of the McGary statement and to dismiss on speedy trial grounds, (3) failing to strike the state's proffer of a photograph depicting a blue truck, and (4) denying his motion for judgment of acquittal at the conclusion of the state's case in chief.

The judgment of the trial court is affirmed.

Campbell, Vander Moore, and Lontina McGary conspired to commit robberies in Memphis and the surrounding area. Campbell master-minded the scheme. He investigated and chose the location of the robbery, he furnished transportation to and from the site of the robbery, he supplied the handguns used by Moore and McGary during the commission of the robberies, and they returned the guns to Campbell after the robbery. Campbell also told Moore and McGary how they should commit the robberies.

On the afternoon of April 22, 1991, Campbell called McGary and told her that they had a "hit," meaning a robbery. They agreed to meet at the Southland Mall, which is located in southwest Memphis. When McGary arrived at the mall, Campbell and Moore had already arrived. They left the mall in Campbell's truck. Campbell gave Moore and McGary the handguns, he explained what they were to do and how they were to gain access to the residence, and he drove by the residence, located in Shelby County, so that Moore and McGary could see it. They exited the truck, obtained a package of speakers from the bed of the pickup truck, and went to the front door of the residence. The residence was occupied by Anthony Bean, his sister, Phyllis Ann Dodson, his girlfriend,

Markette Marsh, and Bean's minor son. Bean's nephew who also lived in the residence was not at home. The victim, Kevin McConico, owned an entertainment newspaper and had gone to the residence to discuss a new advertisement for a beauty supply business owned by Bean and Dodson.

When Moore and McGary rang the front door bell, Bean told them that the front door was stuck and directed them to the side door. Bean became suspicious. He asked his girlfriend, Markette D. Marsh, to answer the side door. Bean went to a bedroom located on the second floor, retrieved his handgun, and waited. When Ms. Marsh opened the side door, McGary stated that the box had been delivered to McGary's home by mistake. As McGary passed the box to Ms. Marsh, both Moore and McGary drew the handguns and ordered Ms. Marsh and the victim to lay on the floor. Marsh complied with the request. The victim retrieved his briefcase and began running to the rear of the residence. Moore grabbed him, they wrestled, and Moore maneuvered him into the foyer near the front door. As McGary and Bean exchanged gunfire, Moore shot the victim in the head over his left eye. Thereafter, Moore and McGary left the residence, ran to Campbell's truck, and left the neighborhood.

An autopsy was performed on the victim's body. It revealed that the projectile fired from Moore's gun penetrated the victim's skull and passed completely through his brain. There was stippling of the skin around the point where the projectile penetrated the skull. This meant that Moore was holding the handgun very close to the victim's head when he fired the fatal shot. The victim died the following day as a result of the gunshot wound.

When Moore and McGary entered the house, Campbell returned to his truck and drove to the intersection of Afternoon Lane, where the Bean residence was located, and Trout Valley. He pulled to the curb and left the motor running. Two people who lived near the intersection saw the pickup truck. One witness said it was occupied by an African-American. Both witnesses described the truck as being an older model. One witness thought it was a General Motors product, but he did not know the make of the truck. Photographs of the pickup truck were shown to the witnesses. Both witnesses said the pickup truck depicted in the photographs was consistent with the pickup truck that was stopped at the intersection. Later, one of the witnesses saw two African-Americans run

to the pickup truck. These individuals got inside the pickup truck and the truck drove away.

The state established that a pickup matching the description given by the two witnesses was registered to Campbell. The license plate on the pickup truck depicted in the photographs matched the license plate registered to Campbell.

I.

Campbell filed a pleading entitled "Motion to Compel the State to Turn Over Prior Statements of Codefendant Prior to Trial." The statement sought was "the thirty-five (35) page type written statement of the codefendant, Lontina McGary as well as the tape recording of the said statement. . . ." The motion states in part:

Your defendant would further show that the defendant's constitutional rights as set forth in the Sixth Amendment of the Constitution of the United States guaranteeing his(sic) the right to effective assistance of counsel would be violated if defense counsel was (sic) not furnished with the codefendant's statement prior to trial.

When defense counsel argued this motion, he predicated his argument on the denial of the effective assistance of counsel theory. He subsequently stated: "This is not a Rule-16 issue. And I want the record to be clear, this is a [S]ixth [A]mendment right to effective assistance of counsel. . . ."

In the motion for a new trial, the issues pertaining to receipt of McGary's statement prior to trial are based on the theory that the statement constituted exculpatory evidence within the meaning of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). He further contends that the statement was discoverable before trial pursuant to Rule 16, Tenn. R. App. P. The appellant argues the exculpatory evidence theory in his brief.

This issue is waived. First, the appellant does not tell this Court in the argument portion of the brief where the motion can be found in the technical record, where the argument can be found in support of the motion, where the state suppressed this statement or how he was prejudiced by the failure to receive this statement prior to trial. Tenn. R. App. P. 27(a)(7) and (g); Tenn. Ct. Crim. App. R. 10(b); State v. Killebrew, 760

S.W.2d 228, 233-34 (Tenn. Crim. App.), per. app. denied (Tenn. 1988); State v. Smith, 735 S.W.2d 859, 862 (Tenn. Crim. App. 1987). Second, the appellant changed his theory regarding the statement in mid-stream. As noted, the motion was based on the Sixth Amendment right to the effective assistance of counsel, and the argument made in support of the motion was also predicated on the Sixth Amendment right to counsel. The first argument asserting a due process right appears in the motion for a new trial. See State v. Matthews, 805 S.W.2d 776, 781 (Tenn. Crim. App.), per. app. denied (Tenn. 1990); State v. Aucoin, 756 S.W.2d 705, 715 (Tenn. Crim. App. 1988), cert. denied, 489 U.S. 1084, 109 S.Ct. 1541, 103 L.Ed.2d 845 (1989); State v. Dobbins, 754 S.W.2d 637, 641 (Tenn. Crim. App.), per. app. denied (Tenn. 1988). Finally, the appellant has not included the statement in the appellate record for this Court to review.

This Court parenthetically notes that if this issue were addressed on the merits, Campbell would not be entitled to relief. The state furnished defense counsel with a copy of the statement after McGary testified, and defense counsel used the statement to cross-examine McGary. In essence, he received the maximum benefit from the statement. This was the only manner in which this statement could be used. Campbell fails to establish how he was prejudiced by not receiving the statement prior to trial. This Court finds no prejudice.

Campbell was not entitled to McGary's statement prior to trial pursuant to Rule 16, Tenn. R. Crim. P. McGary entered a plea of guilty. Moore was tried separately. Moreover, McGary was not a co-defendant as that term is used in Rule 16. It appears that McGary and Moore were indicted jointly. The indictment in this case only names Campbell.

Rule 16(a)(1)(A), Tenn. R. Crim. P., provides in part: "Upon a determination by the State to place co-defendants on trial jointly, the State shall promptly furnish each defendant who has moved for discovery under this subdivision will all information discoverable under this subdivision as to each co-defendant." Based upon the facts in this case, Campbell was clearly not entitled to McGary's statement prior to trial.

This issue is without merit.

II.

Campbell contends that the trial court "erred when [it] denied Defendant's pre-trial motion to dismiss because of the denial of his right to speedy trial as well as his pre-trial motion for the prosecution to produce McGary's 29-page statement." This issue has not been briefed. He states that he "has sufficiently presented the case law in support of this ground in his discussion of the first ground for a new trial."

This issue cannot be considered by the Court. First, the record is insufficient for this Court to review this issue. The record contains a motion to dismiss for preaccusation delay. Campbell contends in the motion that the twenty (20) months between the killing of the victim and the return of the indictment against him resulted in prejudice to his defense. The minutes of the trial court reflect that the trial court took the motion under advisement, but the record does not reflect that the trial court ruled upon the merits of the motion. The hearing on this motion was not included in the record. The record is not sufficient for appellate review of this issue. See State v. Banes, 874 S.W.2d 73, 82 (Tenn. Crim. App. 1993), per. app. denied (Tenn. 1994); State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App.), per. app. denied (Tenn. 1988). Also, this issue has not been briefed. There is no authority cited and there are no references to where these events can be found in the record. See Killebrew, 760 S.W.2d at 231-32; State v. Smith, 735 S.W.2d at 862; State v. Arnold, 719 S.W.2d 543, 550 (Tenn. Crim. App.), per. app. denied (Tenn. 1986).

This Court parenthetically notes that if this issue was considered on the merits, Campbell would not be entitled to relief. Preaccusation delay is treated differently than delay occurring after an indictment or presentment has been returned by the grand jury. See United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971); State v. Gray, 917 S.W.2d 668 (Tenn. 1996).

III.

Campbell contends that the trial court committed error of prejudicial dimensions in denying "Defense Counsel's oral motion for court (sic) to suppress admission of a blue truck." The argument in support of this issue is disjointed, fragmented, and, quite frankly, incomprehensible. The argument vacillates between discussions of the truck, the sufficiency of the evidence, and the admissibility of photographs.

A trial objection to the introduction of evidence is a far cry from a motion to suppress evidence. The purpose of a motion to suppress evidence is to prevent the state from introducing evidence that was obtained by violating a constitutional right of the accused. If this Court was to address the issue as the denial of a motion to suppress, the issue would be summarily denied. A motion to suppress as to the truck was not filed prior to trial. Tenn. R. Crim. P. 12(f). The motions to suppress that were filed do not conform to Rule 47, Tenn. R. Crim. P., and did not warrant an evidentiary hearing. See State v. Burton, 751 S.W.2d 440, 445 (Tenn. Crim. App.), per. app. denied (Tenn. 1988).

The only issue this Court can discern from the appellant's argument is an objection based on a lack of foundation for entering the photograph of the truck into evidence. This Court finds that the proper predicate was laid for the introduction of the photographs depicting Campbell's pickup truck. Two disinterested witnesses were shown photographs of an older, blue pickup truck. Both witnesses testified that the truck was consistent with the truck they saw at the intersection of Afternoon Lane and Trout Valley on the date in question. One witness testified that an African-American was sitting in the truck. Both witnesses saw two individuals running from the direction of the situs of the killing, get into the truck, and the truck drive away. One of the witnesses stated these two individuals were also African-Americans. The state also introduced the registration of the pickup truck into evidence. It was registered to George Campbell, Jr., the appellant in this proceeding.

It has long been established that the admission of photographs rests within the sound discretion of the trial court. State v. Van Tran, 864 S.W.2d 465, 477 (Tenn. 1993), cert denied, _____ U.S. _____, 114 S.Ct. 1577, 128 L.Ed.2d 220 (1994); State v. Bowers, 744 S.W.2d 588, 590 (Tenn. Crim. App. 1987), per. app. denied (Tenn. 1988). An

appellate court will not interfere with the exercise of this discretion absent clear abuse on the face of the record. Van Tran, 864 S.W.2d at 477; State v. Barnard, 899 S.W.2d 617, 623 (Tenn. Crim. App.), per. app. denied (Tenn. 1994). The trial court did not abuse its discretion by permitting the state to introduce the photographs into evidence. The photographs of the pickup truck were highly relevant, and the probative value of the photographs far outweighed any danger of unfair prejudice. Tenn. R. Evid. 403; State v. Banks, 564 S.W.2d 947, 951 (Tenn. 1978).

This issue is without merit.

IV.

Campbell contends that the trial court committed error of prejudicial dimension by denying his motion for judgment of acquittal because the evidence introduced by the state was insufficient, as a matter of law, to support a conviction for felony murder or aggravated assault. The argument in support of this issue does not tell us whether he is addressing the motion for judgment of acquittal made at the conclusion of the state's case in chief or post-trial. See Tenn. R. Crim. P. 29.

This issue has been waived. The brief does not tell this Court where the facts recited in the argument supporting the issue can be found. Nevertheless, this Court will consider the issue on the merits.

A motion for judgment of acquittal raises a question of law for the determination of the trial court. State v. Adams, 916 S.W.2d 471, 473 (Tenn. Crim. App. 1995); State v. Hall, 656 S.W.2d 60, 61 (Tenn. Crim. App.), per. app. denied (Tenn. 1983). In resolving this question, the trial court's only concern is the legal sufficiency of the evidence. Hall, 656 S.W.2d at 61. The trial court is not permitted to weigh the evidence in reaching its determination. Adams, 916 S.W.2d at 473.

In determining whether the evidence is sufficient to sustain a conviction, the trial court must consider the evidence in the light most favorable to the State of Tennessee. State v. Thompson, 549 S.W.2d 943, 946 (Tenn. 1977); Adams, 916 S.W.2d at 473; Hall, 656 S.W.2d at 61; State v. Stowe, 634 S.W.2d 674, 675 (Tenn. Crim. App. 1982). In

addition, the trial court must afford the State of Tennessee all reasonable and legitimate inferences that may be drawn from the evidence adduced in favor of the state's theory. Thompson, 549 S.W.2d at 946; Hall, 656 S.W.2d at 61; Stowe, 634 S.W.2d at 675. The trial court must also disregard any countervailing evidence that the accused may have introduced during the trial. As this Court said in State v. Hall: "[I]f . . . there is any dispute as to any material determinative evidence, or any doubt as to the conclusion to be drawn from the evidence of the State, the trial judge should . . . overrule the motion. . . ." 656 S.W.2d at 61.

On appeal, this Court must apply the same standard as the trial court when resolving issues predicated upon the grant or denial of a motion for judgment of acquittal. Adams, 916 S.W.2d at 473. This Court will now resolve this issue based upon the foregoing legal principles.

There is ample evidence contained in the evidence to support a conviction for felony murder and aggravated assault. Campbell, as an aider and abettor of these crimes, is just as guilty as Moore and McGary. The only real bone of contention is whether the testimony given by McGary, an accomplice, was sufficiently corroborated. This Court is of the opinion that McGary's testimony was sufficiently corroborated.

The witnesses saw the appellant's pickup truck sitting at the intersection of Afternoon Lane and Trout Valley with the motor running. A witness described the pickup truck as an old, blue truck. Campbell's truck was in fact an old, blue pickup truck. Another witness could tell that an African-American was operating the pickup truck. Campbell is an African-American. The two witnesses testified that the pickup truck was consistent with the truck that they saw on the evening in question. One witness saw two people running from the situs of the murder and get inside the pickup truck. The witnesses said the two people running were African-Americans. Both Moore and McGary are African-Americans. The state introduced the registration for the license number affixed to the pickup truck. The registration stated that it was an older blue truck, and it was registered to George Campbell, Jr., the appellant.

This evidence was more than sufficient to corroborate McGary's testimony. These facts coupled with McGary's testimony are sufficient to support Campbell's convictions for

felony murder and aggravated assault beyond a reasonable doubt.

This issue is without merit.

JOE B. JONES, JUDGE

CONCUR:

JOSEPH M. TIPTON, JUDGE

JOHN K. BYERS, SENIOR JUDGE