IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MAY 1996 SESSION

FILED

July 23, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 03C01-9512-CC-00390**
Appellee,	)	
	)	**HANCOCK COUNTY**
VS.	)	
	)	**HON. JAMES E. BECKNER,**
VENICE GLOVER COLLINS,	)	**JUDGE**
	)	
Appellant.	)	(Possession of contraband in a penal institution)

FOR THE APPELLANT:

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was indicted for knowingly possessing marijuana while in a penal institution, in violation of T.C.A. § 39-16-201(a)(2). He was found guilty by a jury of the same offense. The defendant now appeals as of right contending that the trial court erred when it denied his pretrial motion to suppress his confession and that the statute under which he was indicted was not violated because the contraband was never within an area of the jail "where prisoners are quartered or under custodial supervision." The defendant also challenges the sufficiency of the evidence. After a review of the record, we affirm the judgment below.

On December 20, 1994, the defendant was incarcerated in the Hancock County jail. On this day his sister, Cathy Johnson, brought to the jail some personal hygiene supplies, including a bottle of shampoo, for delivery to the defendant. She took these supplies to the dispatcher's office and asked the dispatcher if the shampoo bottle had to be "see-through." The dispatcher replied that the bottles were not required to be "see-through," at which point Johnson requested the dispatcher to check with the guards about the bottle type. This request made the dispatcher suspicious, but she took the items, put them in an envelope and filled out the necessary paperwork. The chief jailer subsequently took the items, opened the shampoo bottle, and poured the contents into a Styrofoam cup. Included with the shampoo were two plastic bags containing marijuana.

Following the discovery of the bags, Investigator Teddy Collingsworth met with the defendant and advised him of his rights. The defendant responded that he did not want to make any statements until he had spoken with an attorney. The defendant was then placed in the "drunk tank," an isolated cell that had no phone and no mattress. Although the defendant was apparently not given any explanation as to why he was placed here instead of taken back to his cell, the sheriff testified that he had been placed

there to keep him from calling his sister to inform her of the discovery, and to enable them to search his cell.

After the defendant had been in the isolation cell for approximately twenty minutes, he indicated that he wanted to talk. He was taken to Collingsworth who did not readminister the defendant's Miranda rights or obtain his signature on a waiver of rights form. Rather, Collingsworth simply said, "I'm listening." The defendant then told Collingsworth that he had sent money to Johnson and told her how to bring the marijuana in via a shampoo bottle.

The defendant first contends that the trial court should have suppressed his confession because he had been coerced into making it. He argues that being placed in the "drunk tank" amounted to punishment for requesting a lawyer. Accordingly, he asserts, his waiver of his right to counsel was not voluntary.

A waiver, to be valid, must be "made voluntarily, knowingly and intelligently." Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1601, 16 L.Ed.2d 694 (1966). The issue of waiver must be decided based on the totality of the circumstances surrounding each particular case. State v. Benton, 759 S.W.2d 427, 431-32 (Tenn. Crim. App. 1988). The question in this case is "whether the conduct of the law enforcement officers was such [as] to undermine the [defendant's] free will and critically impair his capacity for self-determination so as to bring about an involuntary confession." State v. Crump, 834 S.W.2d 265, 271 (Tenn. 1992). The findings of the trial court will not be disturbed on review unless the evidence preponderates against those findings. State v. Kelly, 603 S.W.2d 726, 728-29 (Tenn. 1980).

The trial court, after hearing testimony from the sheriff and Collingsworth, but not from the defendant, found "under all [the] circumstances that the statement was

voluntarily made, Miranda rights were waived, and that it's not a violation of his invocation to right to counsel, and it's admissible." The defendant has not carried his burden of demonstrating that the evidence preponderates against these findings. The proof does not support a conclusion that twenty minutes in the drunk tank were so frightening or intimidating as to "undermine the [defendant's] free will and critically impair his capacity for self-determination." State v. Crump, 834 S.W.2d at 271. We assume that, since he was able to communicate his desire to speak with the investigator, the defendant would likewise have been able to communicate his desire to call an attorney. Had he done so, it is logical to assume that he would have been told he had to wait some period of time, or that he would have been permitted to make such a call from a supervised phone.

Even if we construe his refusal to give a statement until he had an attorney as a request to call one, we do not think the delay in this case was such as to render his statement inadmissible. Cf. State v. Claybrook, 736 S.W.2d 95, 103 (Tenn. 1987) ("The failure to afford to a defendant the phone call required by [T.C.A. § 40-7-106 following an arrest] is but one factor to be considered in determining the voluntariness of the defendant's statement and whether the conduct of the officers has overcome the will of the accused. Automatic suppression of the statement is not called for.") Accordingly, we affirm the trial court's denial of the defendant's motion to suppress. We do, however, point out that the jailer's subjective and unvoiced reasons for placing the defendant in the drunk tank are irrelevant with respect to determining the defendant's state of mind and whether his free will had been overcome.

Nor is it significant that Collingsworth did not "re-Mirandize" the defendant before he made his statement. The defendant is correct that, after an accused invokes his or her right to counsel, the police may not resume interrogation until an attorney is present. Miranda v. Arizona, 384 U.S. 436, 473-74 (1966). However, the accused may make a subsequent statement without the presence of counsel where the accused

himself initiates the conversation. Edwards v. Arizona, 451 U.S. 477, 485 (1981). Here, the defendant initiated the subsequent conversation with Collingsworth. Collingsworth did not engage in any interrogation during this second meeting, but said simply, "I'm listening." The defendant had been read his Miranda rights just twenty minutes before. Collingsworth's failure to read them to the defendant again, when no new interrogation was taking place, does not render the defendant's statement inadmissible.

In his second issue the defendant argues that he should not have been convicted of the indicted offense because the marijuana never made it into a portion of the penal institution in which "prisoners are quartered or under custodial supervision." Rather, the marijuana was intercepted in the dispatcher's office, an area to which the prisoners have no access. The office is, however, located within the same building as the prisoners' cells.

The defendant bases his argument on a tortured reading of the statute under which he was convicted which provides:

> It is unlawful for any person to: [k]nowingly possess [marijuana] while present in any penal institution where prisoners are quartered or under custodial supervision without the express written consent of the chief administrator of the institution.

T.C.A. § 39-16-201(a)(2) (1995 Supp.). According to the defendant, this statute is not violated unless the contraband is possessed within an area of the jail in which prisoners are quartered or under custodial supervision. We disagree. Contrary to the defendant's assertion that statutes which criminalize behavior must be strictly construed in favor of the defendant, we are required to construe the provisions of our criminal code "according to the fair import of their terms, . . . to promote justice, and effect the objectives of the criminal code." T.C.A. § 39-11-104 (1991 Repl.). The fair import of the language used in the instant statute is that possession of contraband is illegal in penal institutions which

house or custodially supervise prisoners: not that it is illegal in those areas of penal institutions which house or custodially supervise prisoners.

The defendant's reliance on State v. Hicks, 835 S.W.2d 32 (Tenn. Crim. App. 1992), is misplaced. That case makes clear that the entire jail facility surrounded by the fence is "the secure area." Obviously, any dispatcher's office contained within the building surrounded by the fence would be a part of this secure area. This issue is without merit.

Finally, the defendant attacks the sufficiency of the evidence used to convict him. He was charged with only one offense, knowingly possessing marijuana while in a penal institution, a violation of Tennessee Code Annotated § 39-16-201(a)(2). It is undisputed that the defendant never gained actual possession of the drugs. However, it is also undisputed that his sister brought the marijuana into the jail without the consent of the chief administrator. Thus, on the record before us, she was in violation of the statute under which the defendant was indicted. While the defendant alleges that his sister could not have been guilty of possession of contraband within the meaning of the statute because she was never in an area of the jail in which the prisoners were quartered or under custodial supervision, we have rejected this argument as set forth above.

The defendant confessed that he had requested Johnson to deliver the marijuana to the jail. "A person is criminally responsible for an offense committed by the conduct of another if: Acting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense[.]" T.C.A. § 39-11-402 (2) (1991 Repl.). The defendant is therefore criminally responsible for Johnson's conduct. Moreover, it was proper for the defendant to have been charged with and convicted of

the principal offense, rather than of the offense of being criminally responsible for Johnson's conduct. "A person is criminally responsible as a party to an offense if the offense is committed . . . by the conduct of another for which the person is criminally responsible," and "may be charged with commission of the offense." T.C.A. § 39-11-401 (1991 Repl.) (emphasis added).

The evidence was sufficient to support the defendant's conviction. The defendant's issues being without merit, the judgment of the court below is affirmed.

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JOHN H. PEAY, Judge

CONCUR:

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JERRY L. SMITH, Judge

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JOHN K. BYERS, Senior Judge