IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JULY 1996 SESSION

STATE OF TENNESSEE,	)	
	)	
APPELLEE,	)	
	)	No. 03-C-01-9604-CC-00152
	)	
	)	Cocke County
v.	)	
	)	J. Kenneth Porter, Judge
	)	
	)	(Aggravated Robbery and
	)	Aggravated Kidnapping)
BILLY ALLEN REED,	)	
	)	
APPELLANT.	)	

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OPINION FILED:_____

AFFIRMED

Joe B. Jones, Presiding Judge

O P I N I O N

The appellant, Billy Allen Reed, was convicted of aggravated robbery and aggravated kidnapping, both Class B felonies, by a jury of his peers. The trial court found the appellant to be a multiple offender and imposed a Range II sentence consisting of confinement for twenty (20) years in the Department of Correction in both cases. In this Court, the appellant contends that the facts in this case do not support a separate conviction for aggravated kidnapping and the trial court committed error of prejudicial dimensions by permitting the state to introduce identification evidence which was impermissibly suggestive. After a thorough review of the record, the briefs submitted by the parties, and the law that controls the issues presented for review, it is the opinion of this Court that the judgment of the trial court should be affirmed.

On the morning of June 13, 1990, the appellant entered the Northport Grocery, a neighborhood convenience store in Newport, Tennessee. He walked to the rear of the store and began playing "a game machine." During the course of the morning, the appellant would come to the front of the store or go outside, and then return to the game room. Charles D. Gregg, a lifelong friend of the appellant, entered the store. The appellant spoke to Gregg and Gregg returned the greeting. Gregg purchased a package of cigarettes and left the store.

When the appellant went outside the store, the victim, who owned the store, went outside and swept in front of the store. The appellant reentered the store before the victim, went to a rack and obtained a pair of gloves, and put the gloves on his hands. When the victim entered the store, he gave her the price tag. When the victim opened the cash register to obtain change, she noticed that the appellant had a pistol. He told the victim: "I want your money and I want it all." The victim gave him the money in the cash register. He then told the victim: "Now go to the cooler." When she went to the cooler, the appellant told her to walk to the end of the cooler and remain there. The appellant used a hammer to break into the coin boxes of the game machines and took money from the machines. He also went to other areas of the store and stole items. One of the items taken was a pistol kept under the front counter.

When the appellant was satisfied that he had obtained every item of value in the

store, he went to the cooler and asked the victim for her car keys. She told him the keys were in her purse and where the purse was located. The appellant could not find the keys. He threw the victim's purse inside the cooler and told her to find the keys. She retrieved the keys and gave them to the appellant. He then left the store, got into the victim's car, and fled from the store. The vehicle was located later that day where the appellant had abandoned it.

The victim went to the Newport Police Department and viewed a book containing numerous photographs. The victim picked the appellant's photograph, but stated that she was not positive. An officer prepared an array of photographs and presented them to the victim. She chose the appellant's photograph and stated that she was positive this was the person who had robbed her. She also made a courtroom identification of the appellant. Gregg testified the appellant was the person inside the store the morning that he purchased a package of cigarettes.

The victim was described as an "elderly woman." This is the only evidence that describes the victim.

I.

The appellant contends that the evidence contained in the record does not support a separate conviction for aggravated kidnapping. He argues that the "confinement and detention of [the victim] was essentially incidental to the robbery." He predicates his argument on State v. Anthony, 817 S.W.2d 299 (Tenn. 1991). The State of Tennessee argues that the facts in this case support a separate conviction for aggravated kidnapping. The state relies on this Court's decision in State v. Rolland, 861 S.W.2d 840 (Tenn. Crim. App.), per. app. denied (Tenn. 1992).

This case is factually distinguishable from Anthony. Here, the victim was confined to the "cooler" while the appellant took his time breaking into game machines and scouring the store for items of value. In other words, the appellant did not simply enter the store, take the money at gunpoint, and leave the store. His activities inside the store were rather lengthy. Furthermore, the appellant enhanced the risk of injury to the victim, an "elderly woman," by requiring her to remain in the cold environment of the cooler.

In Rolland, where the victims were forced into a walk-in freezer, this Court held that separate convictions for aggravated kidnapping were warranted. This Court opts to follow Rolland. Consequently, the appellant's conviction for aggravated kidnapping is affirmed.

II.

The appellant contends that the "identification of the defendant by the victim is unreliable due to the impermissible suggestiveness of the police procedures used." The State of Tennessee contends that the appellant has waived this issue. In the alternative, the state argues that the identification procedure was not suggestive.

The record reflects that defense counsel prepared and filed a motion to suppress the identifications made by the victim on the ground that the procedures utilized by the police were impermissibly unfair and suggestive. However, the record does not establish that this motion was brought to the attention of the trial court. Apparently, the motion was abandoned by the appellant. Furthermore, the record contains neither a transcript of a suppression hearing nor the array of photographs that the appellant argues was impermissibly unfair and suggestive. The photographs were marked as an exhibit during the trial.

When the accused files a pre-trial motion, the accused has the duty to bring the motion to the attention of the trial court, have the trial court rule upon the merits of the motion, and see that the record memorializes that these events occurred. See State v. Locke, 771 S.W.2d 132, 138 (Tenn. Crim. App. 1988), per. app. denied (Tenn. 1989); State v. Kinner, 701 S.W.2d 224, 227-28 (Tenn. Crim. App.), per. app. denied (Tenn. 1985); State v. Burtis, 664 S.W.2d 305, 310 (Tenn. Crim. App.), per. app. denied (Tenn. 1983). As this Court said in Kinner: "The filing of a motion with the clerk without presenting it to the trial court for determination is of no effect." 701 S.W.2d at 227.

If a pre-trial motion is not brought to the attention of and ruled upon by the trial court, the accused is deemed to have abandoned the motion; and any issue raised by the motion will be deemed waived for appellate purposes. State v. Alexander, 711 S.W.2d 609, 611 (Tenn. Crim. App.), per. app. denied (Tenn. 1986); Burtis, 664 S.W.2d at 310. In this case,

the appellant failed to pursue the motion to suppress the identification evidence. He is deemed to have abandoned the motion, and this Court deems the issue raised by the motion waived.

Assuming arguendo that the issue has not been waived, this Court cannot address the issue on the merits because the record does not contain a transcript of the suppression hearing or the photographs which the police officer presented to the victim. As the Supreme Court said in State v. Ballard, 855 S.W.2d 557, 560-61 (Tenn. 1993):

> When a party seeks appellate review there is a duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues forming the basis of the appeal. State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983). Where the record is incomplete and does not contain a transcript of the proceedings relevant to an issue presented for review, or portions of the record upon which the party relies, an appellate court is precluded from considering the issue. State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988). . . .

This rule is applicable to issues involving pre-trial motions to suppress evidence. See State v. Banes, 874 S.W.2d 73, 82 (Tenn. Crim. App. 1993), per. app. denied (Tenn. 1994); State v. Johnson, 854 S.W.2d 897, 900-01 (Tenn. Crim. App.), per. app. denied (Tenn. 1993); State v. Locke, 771 S.W.2d 132, 137-38 (Tenn. Crim. App. 1988), per. app. denied (Tenn. 1989); State v. Eldridge, 749 S.W.2d 756, 757 (Tenn. Crim. App.), per. app. denied (Tenn. 1988).

This Court is precluded from considering this issue. Instead, this Court must conclusively presume that the ruling of the trial court on the motion to suppress was correct. State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App.), per. app. denied (Tenn. 1988); State v. Burton, 751 S.W.2d 440, 450-51 (Tenn. Crim. App.), per. app. denied (Tenn. 1988).

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JOE B. JONES, PRESIDING JUDGE

CONCUR:

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DAVID G. HAYES, JUDGE

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WILLIAM M. DENDER, SPECIAL JUDGE