

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

SEPTEMBER 1996 SESSION

FILED

December 13, 1996

**Cecil W. Crowson
Appellate Court Clerk**

STATE OF TENNESSEE,

*

C.C.A. # 01C01-9511-CC-00389

Appellee,

*

WILLIAMSON COUNTY

VS.

*

Honorable Donald P. Harris, Judge

HORACE C. GADDIS,

*

(Aggravated Burglary; Theft Over \$500.00)

Appellant.

*

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For Appellee:

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OPINION FILED: _____

AFFIRMED

GARY R. WADE, Judge

OPINION

The defendant was convicted of aggravated burglary and theft over \$500.00. The trial court imposed concurrent, range I sentences, six and two years, respectively. In this appeal of right, the defendant presents the following issues for review: (1) whether the trial court erred by ruling that the defendant's confession to the police was not the fruit of an unlawful arrest, and (2) whether the trial court erred by ruling that the delay in the prosecution did not deny the defendant a speedy trial.

We find no error and affirm the judgment of the trial court.

On April 6, 1993, the victim, Kelly Little, returned to her home to find a burglary in progress. As she pulled into her driveway, she saw a primer-gray pickup truck parked by her door. She described the truck as an older-model, GMC pickup. The GMC trademark on the tailgate was a distinct red with raised lettering. There was a temporary Tennessee license tag taped in the back window; the expiration date was April 18.

Upon her arrival, the victim saw one of two male burglars get into the passenger seat of the truck. A second man ran from the back door of her residence to the driver's side of the vehicle. The vehicle was then driven through the victim's back yard and out to the street. The victim followed them in her mini-van for a short while; the truck, however, was driven at a high rate of speed and was soon out of her sight.

Police, who arrived at the scene shortly after the burglary, were unable to find any evidence that would help identify the burglars. The victim, who claimed

to have a better view of the driver, gave police a general description of the passenger: white male, between the age of nineteen and twenty-two, with a medium to dark complexion, and dark, stringy hair, cut short in front and longer in back. She recalled that he wore a dark bandana around his head, a dark colored T-shirt, and perhaps blue jeans. Based upon this description, the defendant was subsequently apprehended and gave a statement detailing his participation in the crimes.

I

The defendant claims in this appeal that the trial court should have suppressed the confession as acquired incident to an unlawful arrest. Because, however, the issue was not presented in advance of trial and not included in the motion for new trial, it has been waived for purposes of appeal. A criminal defendant may make an appeal of right if the issue "was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived." Tenn. R. App. P. 3(e). Even if the ground could have been addressed, however, it would not have merit.

The defendant argues his arrest was unlawful thus tainting any confession he made afterward. The state insists that the police had probable cause. At the suppression hearing, it was established that some three days after the burglary, in response to a traffic violation, Nashville Metro police stopped the defendant and a companion in Davidson County at a Kwik Sak Convenience Market. The officer then realized the two men fit the description of suspects in a Williamson County crime unrelated to the burglary of the victim's residence and contacted a Detective Boner. When the detective arrived at the scene, he

determined that these men and their vehicle fit the descriptions provided by James Pettit.

Detective Boner then contacted Detectives Barrett and Campsey, who he knew were investigating the Pettit burglary. When they arrived at the scene of the arrest, they noticed that the bed of the pickup truck was primer-gray and that the GMC trademark on the tailgate was raised with black lettering. A scratch on the "G" revealed red paint underneath. A temporary Tennessee license tag was taped in the back window with an expiration date of April 18, 1993.

About two and a half hours after the initial stop, Detectives Barrett and Campsey took the defendant and his companion into custody and transported them to the Brentwood police station. While there, the defendant was read his Miranda rights twice. The defendant signed a waiver, gave a statement, and was photographed and fingerprinted.

The defendant does not challenge the propriety of the conduct of the Nashville Metro Police, who originally detained him. Nor does he challenge the conduct of Detective Boner. At the suppression hearing, the defendant did not question the validity of the stop by Davidson County officers. The defendant only challenges the conduct of Detectives Barrett and Campsey who made the arrest for the Pettit burglary. In our view, the record establishes that the arresting officers acted upon probable cause.

The fact that an accused has been unlawfully arrested only becomes relevant when any evidence tainted thereby is sought to be introduced by the state. An illegal warrantless arrest or an arrest made under the color of an invalid warrant

has no adverse effect upon an indictment or a presentment returned by a grand jury subsequent to the arrest. Jones v. State, 332 S.W.2d 662, 667 (Tenn. 1960); Nelson v. State, 470 S.W.2d 32 (Tenn. Crim. App. 1971). Even if an arrest is illegal, a confession which follows might often be purged of the primary taint. Dunaway v. New York, 442 U.S. 200 (1979); Brown v. Illinois, 422 U.S. 590 (1975); State v. Chandler, 547 S.W.2d 918 (Tenn. 1977).

If the officers had probable cause to arrest the defendant then the confession would not be tainted. If they lacked probable cause, the confession is not necessarily a fruit of an illegal arrest and it requires further analysis. If the arrest was illegal, pretextual, or based upon inadequate probable cause, the rule of the poisonous tree doctrine applies. Wong Sun v. United States, 371 U.S. 471 (1963). However, an incriminating statement may be admitted anyway if voluntary and "sufficiently an act of free will to purge the primary taint." Id. at 486. Miranda warnings, standing alone, do not always purge the taint of an illegal arrest. See State v. Chandler, 547 S.W.2d 918 (Tenn. 1977).

Probable cause has been defined as follows:

[W]hether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed ... an offense.

Beck v. Ohio, 379 U.S. 89, 91 (1964).

The minimum standard for arrests is found in Tenn. Code Ann. § 40-7-103 (3), which provides that an officer may make a warrantless arrest for a felony when "he has reasonable cause for believing the person arrested ... committed [the crime]." Our courts make little, if any, distinction between the terms "reasonable

cause" and "probable cause" in determining whether there exists a basis for an arrest. See State v. Melson, 638 S.W.2d 342 (Tenn. 1982), cert. denied, 459 U.S. 1137 (1983). "If there is 'reasonable cause' under the statute or 'probable cause' under either art. I, § 7 of the Tennessee Constitution or the fourth amendment to the United States Constitution, the arrest is lawful" Draper v. United States, 358 U.S. 307, 310-11 (1959); State v. Tays, 836 S.W.2d 596, 598-99 (Tenn. Crim. App. 1992). In 1975, our supreme court defined reasonable or probable cause for arrest:

In dealing with probable cause, one deals with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.

State v. Jefferson, 529 S.W.2d 674, 689 (Tenn.1975).

Once Detectives Barrett and Campsey arrived at the scene, they concluded that the defendant fit the victim's description of the passenger in the pickup truck. His vehicle was an older-model truck and had a temporary Tennessee license plate with the identical temporary expiration date given by the victim in this offense. The truck, black when first observed by the arresting officers, appeared to have a fresh, quick coat of paint; the bed of the pickup was primer-gray. These circumstances, in our view, established reasonable and probable cause for arrest on the Pettit burglary. In our opinion, the officers had reasonable cause under our statute and probable cause under either constitution to make the arrest. Because officers had probable cause for the warrantless arrest, there is no merit to the argument that the confession is the fruit of an illegal arrest.

The second issue, that he was denied a speedy trial, has also been waived. The defendant failed to include his claim in his motion for new trial. Tenn. R. App. P. 3(e). We have decided, however, to address this issue anyway.

The preliminary hearing was continued three times. While the defendant testified that he attended every setting, the warrant indicates he may have failed to appear for the June date. At the final preliminary hearing, on September 22, 1993, the prosecution entered a voluntary dismissal. Fifteen months later, the grand jury for Williamson County returned presentments for aggravated burglary and theft over \$500.00.

Before an accused is entitled to relief based upon the delay between the offense and the initiation of adversarial proceedings, the accused must prove that (a) there was a delay, (b) the accused sustained actual prejudice as a direct and proximate result of the delay, and (c) the state caused the delay in order to gain tactical advantage over or to harass the accused. State v. Dykes, 803 S.W.2d 250, 256 (Tenn. Crim. App.), app. denied (Tenn. 1990).

The right to a speedy trial is founded in the constitution of Tennessee, art. 1 § 9. This same right has been codified by Tenn. Code Ann. § 40-14-101 which provides: "In all criminal prosecutions, the accused is entitled to a speedy trial" In State v. Bishop, 493 S.W.2d 81 (Tenn.1973), the Tennessee Supreme Court adopted a four-factor test for determining whether one has been denied his right to a speedy trial. Adopting a test first established in Barker v. Wingo, 407 U.S. 514 (1972), our court identified the factors as

- (1) the length of the delay;
- (2) the reason for the delay;

(3) whether the defendant asserted his right to a speedy trial; and

(4) the prejudice which accrued to the defendant as a result of the delay.

Bishop, 493 S.W.2d at 84 (citing Barker v. Wingo, 407 U.S. at 530).

In Barker, the United States Supreme Court held that "[t]he length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." Barker, 407 U.S. at 530. Here, the defendant was arrested on April 9, 1993. His indictment was in December of 1994 and his trial was the following May. The defendant presented no evidence, other than his own testimony, that he was present for the preliminary hearings. There is little which suggests the state was responsible for the delay. No reason has otherwise been shown. That factor would also weigh against the defendant.

The defendant asserted his right to speedy trial only six days before trial. This was approximately five months after the return of the indictment. This factor also weighs against the claim of the defendant.

Prejudice, the most important of the considerations, is assessed in the light of three interests to the defendant:

(1) to prevent oppressive pretrial incarceration;

(2) to minimize anxiety and concern of the accused; and

(3) to limit the possibility that the defense will be impaired.

Barker, 407 U.S. at 532.

The defense provided no proof that the defendant was incarcerated for an excessive amount of time in advance of the trial. To the contrary, the arrest warrant indicates he was able to meet his conditions of pretrial release. There has been no showing of anxiety other than that which might have naturally evolved from the defendant's other pending charges.

The defendant claimed that he was prejudiced by the delay because he was unable to serve the present sentence concurrently with his other sentences. This claim is untrue. The defendant was on parole on a Texas felony when arrested in this state. The record indicates the defendant was arrested for an unrelated theft eight days before his arrest in this case. The defendant was arrested on another aggravated burglary December 24, 1992, four months before these charges. On November 11, 1994, he was charged with still another burglary. All three arrests led to convictions.

Tenn. Code Ann. §40-20-111(b) provides as follows:

In any case in which a defendant commits a felony while such defendant was released on bail ... and the defendant is convicted of both such offenses, the trial judge shall not have discretion as to whether the sentences shall run concurrently or cumulatively, but shall order that such sentences be served cumulatively.

(Emphasis added). The defendant did not qualify for a concurrent sentence on the 1992 charge. He may not have qualified for concurrent sentences on the 1994 charge. Thus, there is little to suggest any delay in this prosecution bore any relationship to the imposition of concurrent sentences. Because the defendant was not prejudiced by the delay, no other compelling factors would suggest otherwise, his right to a speedy trial was not violated.

Accordingly, the judgment is affirmed.

Gary R. Wade, Judge

CONCUR:

Paul G. Summers, Judge

L.T. Lafferty, Special Judge