IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MAY 1995 SESSION

FILED

November 26, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	No. 03C01-9403-CR-00110
	)	
vs.	)	Cumberland County upon change of
	)	venue from Warren County
	)	
J. B. McCORD**,**	)	Honorable John A. Turnbull, Judge
	)	
Appellant.	)	(Second degree murder)
	)	

For the Appellant:

Dale Clement Potter
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OPINION FILED: _____

AFFIRMED

Joseph M. Tipton,
Judge

O P I N I O N

The defendant, J. B. McCord, appeals as of right from his judgment of conviction for second degree murder, a Class A felony. The Cumberland County Circuit Court imposed a sentence of thirty-eight years to be served in the Department of Correction as a Range II, multiple offender. In this appeal, the defendant presents the following issues:

> 1. whether the evidence presented at trial is sufficient to sustain beyond a reasonable doubt defendant's conviction for second degree murder;
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> 2. whether the defendant was legally competent to stand trial;
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> 3. whether the trial court should have suppressed defendant's statement because the police officers failed to honor the defendant's right to remain silent; and
>
> 4. whether the trial testimony of an attorney violated the defendant's attorney-client privilege;

After a thorough review of the record on appeal and upon careful consideration of the applicable law, we affirm the judgment of the trial court.

FACTS

Early on the morning of November 6, 1987, in McMinnville, Tennessee, Betty Coleman arrived a few minutes late for her job at Robert Bonner's law office. A legal secretary, Ms. Coleman had worked for Mr. Bonner for more than twenty years. When she entered the small front office, she noticed that the door to Mr. Bonner's private office was closed. A few moments later, as she moved around the office preparing to begin work, she observed a bullet hole in his door. When Mr. Bonner did not respond to her call, she tried to open the door. When she could move it only far enough to see Mr. Bonner's bloodstained hand and a dark spot on the carpet, she ran across the street to the courthouse for help. When the police arrived a few moments later, they found Robert Bonner's body lying face down on the carpet. He had been shot multiple times.

A certified public accountant whose office was nearby told the investigating agents that he had observed a man leaving Bonner's office around 8:00 a.m. The man was about 6'1" and wearing a baseball-type cap and a jacket. As the man came out the door, he stuck something in his waistband, and then drove away in a two-tone green truck. As a result of this description and other information, the officers identified the defendant as a possible suspect. McMinnville police officers and the Warren County sheriff, as well as other deputies and investigators, drove to the defendant's rural home. The defendant's wife and brother were in the yard when the police arrived, but they were taken across the road to a neighbor's house. A two-tone green truck was parked in the yard. The defendant was inside the house and refused, at first, to come out. He was armed with a rifle and fired shots at officers who attempted to approach the house from the rear. Finally, he agreed to surrender to his friend, Sheriff Kenneth Taylor. Unarmed, he left the house and was immediately arrested. Investigator Larry Ross read the defendant his rights, and then other officers transported him to the station in McMinnville. With Mrs. McCord's consent, the police searched the McCord residence and recovered bloodstained clothing, including a jacket and a baseball-type cap, and a nine-millimeter pistol.

Shortly after arriving at the police station, the defendant, in a tape-recorded statement, told police that Robert Bonner had represented him in an unsuccessful action against a neighbor over a boundary dispute. He said that he had been very dissatisfied with Bonner's representation and had consulted several other attorneys who confirmed that Bonner had "messed up the case." The defendant explained that on the morning of the murder, he went to town to see Bonner. According to the statement, Bonner became furious when the defendant told him what the other attorneys had said. He came out from behind the desk shouting. The defendant, who was seventy years old at the time and completely disabled by a spinal injury, stated that he believed Bonner was attacking him. The defendant pulled a nine-millimeter pistol

from his jacket pocket and shot Bonner five times at close range. He then reloaded the weapon and, as he left the office, he stuck the pistol in his waistband, climbed into his truck, and drove home to tell his wife what had happened. He described how he had hidden the pistol under a mattress and asked Sheriff Taylor to retrieve the weapon.

On November 10, 1987, a Warren County Grand Jury indicted the defendant for first degree murder, and the state sought the death penalty. In 1989, a Warren County jury found the defendant guilty of first degree murder and sentenced him to death. However, when portions of the trial were found not to have been recorded due to faulty equipment, the trial court set aside the verdict and granted the defendant's motion for a new trial.[1]

Before the second trial date was set, defense counsel sought and received permission to withdraw from the case because the defendant refused to communicate with them and displayed great animosity toward them. New counsel was appointed, and the prosecution filed a new notice of its intent to seek the death penalty. In April 1992, the trial court granted the defendant's motion for change of venue and ordered that the case be heard in Cumberland County. The prosecution withdrew its death penalty notification a month before the second trial began.

The trial court, sua sponte, held a competency hearing on the first morning of the second trial. After listening to testimony from both defense and state expert witnesses and the defendant, the trial court found the defendant competent to stand trial. Specifically, the trial court found that the defendant had the capacity to understand the nature and object of the proceedings, the ability to consult with counsel and to assist his attorneys, and an appreciation of the charges and the possible

[1] Judge Gerald Ewell signed the order for a new trial. Judge John A. Turnbull presided at the defendant's second trial.

punishment. However, because the defendant expressed great mistrust for the public defender, the trial court relieved the public defender's office of its responsibilities at trial and directed Isaiah Gant, a Nashville attorney who had been appointed as co-counsel, to act as single counsel.

The case then proceeded to trial. The state presented several witnesses who testified to the defendant's anger at the victim over the outcome of the boundary dispute case. These witnesses included an attorney the defendant had consulted after losing the lawsuit. The accountant described the man he saw leaving the victim's office moments before Ms. Coleman discovered the body. The jury heard testimony about the brief standoff at the defendant's residence and viewed the bloodstained clothing and the nine-millimeter pistol found in the house. A firearms expert testified about the bullets recovered from the body and the empty casings and bullets found at the crime scene. The medical examiner described the wounds Bonner suffered. The jury heard the defendant's taped statements in which he admitted killing Bonner and claimed self-defense. Defense witnesses testified to the defendant's state of mind the day before the killing, his physical disabilities resulting from World War II wounds, and his long history of mental impairment. A crime lab investigator described traces of gunshot residue on the defendant's hands. The defendant did not testify.

On July 2, 1992, after receiving the charge of the trial court, the jury received the case and thereafter returned a verdict of guilty of second degree murder. After the sentencing hearing, the trial court sentenced the defendant to serve thirty-eight years in the Department of Correction as a Range II, multiple offender pursuant to T.C.A. § 40-35-106(a)(2).[2] The defendant raises no challenge to his sentence in this appeal.

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[2] The defendant had been convicted of first degree murder in 1965.

I. SUFFICIENCY OF THE EVIDENCE

The defendant contends that the evidence presented at trial is insufficient to sustain a conviction for second degree murder. Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). This means that we may not reweigh the evidence, but must presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

On November 6, 1987, second degree murder was defined in conjunction with first degree murder. Specifically, any murder that was not murder in the first degree was deemed to be murder in the second degree. T.C.A. § 39-2-211(a) (1982) (repealed and replaced by T.C.A. § 39-13-210). To establish second degree murder, the state was required to prove beyond a reasonable doubt that the defendant "upon a sudden impulse of passion without adequate provocation and disconnected with any previously formed design to kill, killed another willfully and maliciously." State v. Estes, 655 S.W.2d 179, 183 (Tenn. Crim. App. 1983); Gordon v. State, 478 S.W.2d 911, 916 (Tenn. Crim. App. 1971). Malice is an essential element of the offense. State v. Martin, 702 S.W.2d 560, 563 (Tenn. 1985). Malice has been defined as an intent to do injury to another, State v. Keels, 753 S.W.2d 140, 143 (Tenn. Crim. App. 1988), and may be inferred from the use of a deadly weapon. Martin, 703 S.W.2d at 563.

In this case, the evidence is sufficient to prove the elements of second degree murder beyond a reasonable doubt. There is no question that the defendant shot and killed Robert Bonner. The defendant admitted the killing. A man fitting his description and driving a truck similar to his was seen leaving the office near the time of the murder. The police found bloodstained clothing and the weapon the defendant identified as the murder weapon in his home. The evidence shows that Bonner was unarmed. Several witnesses testified to the defendant's anger at Bonner. The jury declined to believe that the defendant committed a premeditated and deliberate murder; likewise though, they had no doubt that he did not kill in self-defense. The evidence in the record is sufficient to support the jury's verdict that the defendant willfully and maliciously killed Robert Bonner.

II. COMPETENCY OF THE DEFENDANT

A criminal prosecution of a person is prohibited if the person lacks the capacity to understand the nature and object of the proceedings against him and the ability to consult with counsel and to assist in preparing his defense. Drope v. Missouri, 420 U.S. 162, 171, 95 S. Ct. 896, 903 (1975); Mackey v. State, 537 S.W.2d 704, 707 (Tenn. Crim. App. 1975). The prohibition is fundamental to our adversary system of justice in that a mentally incompetent defendant, though physically present in the courtroom, has no real opportunity to defend himself. Drope, 420 U.S. at 171, 95 S. Ct. at 903. The conviction of an accused person while he is legally incompetent violates due process. Pate v. Robinson, 383 U.S. 375, 378, 86 S. Ct. 836, 838 (1966).

In Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788 (1960), the United States Supreme Court described the standard under which a trial court determines the competency of a defendant to stand trial. The Court stated that finding that a defendant is oriented to time and place and has some recollection of events is insufficient to declare a defendant competent to stand trial. A trial court must decide

> . . . whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him.

Id. at 402, 80 S. Ct. at 789. Tennessee courts have implicitly adopted the Dusky standard. State v. Black, 815 S.W.2d 166, 174-175 (Tenn. 1991); Mackey v. State, 537 S.W.2d at 707. The defendant must establish his incompetency to stand trial by a preponderance of the evidence. State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991).

The trial court, in this case, ordered on its own motion that a competency hearing be held after receiving the report of Dr. Pamela Auble. Before the hearing, the court ordered that the defendant be examined by Plateau Mental Health Center. Both Dr. Auble and Dr. B. L. Freeman, director of Plateau Mental Health Center, testified at the competency hearing. The defendant also testified and was questioned extensively by the trial court.

Evidence presented at the hearing demonstrates that the defendant is of low average intelligence and has had a limited education. Although he can read, his ability to express himself in writing is poor. He has a long history of anxiety and abuse of alcohol. Medical records from the Veteran's Administration indicate that he may have suffered a stroke. As a result of his alcohol addiction and possible stroke, Dr. Auble concluded that the defendant had suffered organic damage to the right side of his brain which affected his ability to relate to people.

Both experts agreed that the defendant was extremely suspicious of lawyers and was particularly mistrustful of the public defender.[3] They also agreed that the defendant had sufficient understanding of the nature of the charges and the

[3] In his testimony, the defendant told the trial court that Mr. Potter was working for the prosecution and that the jail was full of people that the public defender had failed to defend adequately.

proceedings and that on factual matters he would be able to consult with his attorneys. Dr. Auble concluded that the defendant's view of his attorneys was so warped by his delusions and mistrust that he would be unable to participate with an attorney in planning a rational legal strategy, and that his rambling, tangential response to questions prevented him from communicating effectively with counsel. Dr. Freeman agreed that the defendant's willingness to cooperate with the public defender was doubtful, but he believed that the defendant had the ability to assist in the preparation of his defense if he chose to do so. However, Dr. Freeman considered the defendant's willingness to assist in his own defense "iffy," given his mistrust of the legal system. The defendant testified that he acted as legal help in prison, that he was aware of the possible sentence if he were convicted, and that, although he did not trust either Dr. Auble or Mr. Potter, he did trust Mr. Gant. The defendant also expressed the opinion that the trial judge was a fair-minded man who would give him a fair trial.

Based on his personal observation of the defendant and the testimony of the expert witnesses, the trial court found that the defendant had the ability to think, reason, and communicate. The trial court also found that the defendant had the factual and rational ability to assist in his own defense, to manage his behavior, and to relate to and cooperate with Mr. Gant. Although the defendant had a tendency to ramble, the trial court found that he was able to focus on the question and make an appropriate response when required to do so. Based on these factual findings, the trial court ruled that the defendant was competent to stand trial, noting that neither general irascibility nor mistrust of attorneys rendered a person legally incompetent to stand trial. However, concerned that the defendant's deep mistrust of the public defender would hinder the defense, the trial court relieved Mr. Potter of trial duties.

We have considered the trial court's factual findings and the entire record. We have applied the standard set forth in Dusky and Mackey, and we conclude that the

evidence does not preponderate against the trial court's finding of competence. The testimony of both experts as well as the defendant's testimony demonstrate that the defendant had the capacity to understand the nature and object of the proceedings against him and that he was able to consult with counsel and to assist in the preparation of his defense. Although his animosity toward the public defender and Dr. Auble was unreasonable and his mistrust of them unfounded, the defendant met the legal standard for competence.

III. SUPPRESSION OF DEFENDANT'S STATEMENTS

Within four hours of the murder, the defendant gave two statements to the police. In those statements, he described how he killed Robert Bonner and explained that he had shot the victim in self-defense. The defendant contends that the trial court should have suppressed these statements because he was not given the Miranda warnings contemporaneously with the interrogation and because the record contains no indication that he voluntarily, knowingly and intelligently waived his rights. We disagree.

The record of the suppression hearing shows that Officer Ross, the investigator for the District Attorney General's office, advised the defendant in detail of his rights at the moment of his arrest, although the officers made no attempt to interrogate him at that time. However, they immediately took him to the police station in McMinnville. Sheriff Taylor, the man who the defendant trusted and considered a friend, was present at all times during the interrogation. After a general conversation, Officer Frank Floied reminded the defendant that he had been advised of his rights, and the defendant acknowledged that he remembered and understood those rights, but Officer Floied did not repeat the standard Miranda warnings. The defendant's response to Officer Floied indicated that he "knew he was being treated fairly." At no time did anyone explicitly ask the defendant if he waived his rights.

During this preliminary discussion, the officers had no tape recorder in the room. One officer went to find a recorder. When he returned, the defendant was telling the officers about his lawsuit against Martha Hill. The officer inadvertently turned on the recorder and part of the interrogation was recorded. At the time, no one in the room was aware that a record was being made. Shortly thereafter, the defendant gave a formal statement that was recorded in its entirety. In this statement, he retold his version of the murder. On the first tape, Officer Floied once again referred to the fact that the defendant had been advised of his rights "out there." The statements contain no other mention of the Miranda warnings nor do they contain any explicit waiver of the right to remain silent or the right to an attorney.

After hearing the testimony and arguments of counsel, the trial court found that the defendant received the required Miranda warnings at the time of his arrest and that he understood those warnings, that the officers had not readvised the defendant at the time of the actual interrogation, and that the officers had conducted the actual interrogation in a friendly, completely nonthreatening manner. The trial court acknowledged that it is better practice to readvise a suspect immediately before interrogation even if he was warned at the time of arrest and that it is desirable for the record to contain an explicit waiver of rights. However, based on the totality of the circumstances, the trial court concluded that the defendant had knowingly and intelligently waived his right to remain silent and his right to an attorney. In fact, the trial court noted that it was apparent from the testimony and the statements that the defendant wanted to talk to the officers and that it would have been difficult to prevent him from doing so. Therefore, the trial court ruled that the defendant's statements were admissible and denied the motion to suppress.

When a trial court makes findings of fact at the conclusion of a suppression hearing, those facts may be overcome on appeal only if the evidence in the record preponderates against the trial court's findings. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). The evidence in this record does not preponderate against the findings of the trial court. For the reasons discussed below, we agree that the defendant's statements were properly admitted into evidence.

Miranda mandates that "a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time." Miranda v. Arizona, 384 U.S. 436, 469, 86 S. Ct. 1602, 1625 (1966). In this case, the defendant was advised of his rights at the time of his arrest and then immediately transported to the station where the interrogation began. The police did not repeat the Miranda warnings contemporaneously with the interrogation.

Investigator Ross thoroughly advised the defendant of his rights shortly before the interrogation began. There was no significant lapse of time between the warning and the commencement of questioning and no improper or even questionable police conduct. During the interrogation, Officer Floied reminded the defendant twice of the earlier warnings and ascertained that the defendant understood his rights.

In State v. Pride, 667 S.W.2d 102 (Tenn. Crim. App. 1983), the defendant was given the Miranda warnings, which he waived and after which he gave a statement. He was then arrested and taken to the station where he gave a second statement after an oral reminder of his right to counsel. This court held that he had been adequately warned before the first statement and that his previous waiver carried over to the second. Id. at 104-05. Under the circumstances in the present case, the failure to

readvise the defendant was inconsequential for constitutional purposes as it was in Pride.

A suspect or accused cannot give a voluntary and knowing confession or other statement without a sufficient understanding of his constitutional rights and a voluntary waiver of those rights. A waiver of constitutional rights is valid once it is determined that a suspect was aware of his rights and the state's intention to use his statements against him and that the decision not to invoke those rights was uncoerced. Moran v. Burbine, 475 U.S. 412, 422-23, 106 S. Ct. 1135, 1141 (1986). The record supports a conclusion that the defendant was aware of the nature of his constitutional rights and had an adequate understanding of their importance. There is no indication of any police misconduct.

As previously noted, the record does not contain an express waiver, either written or oral, by the defendant. However, an explicit statement of waiver is not always necessary to support a finding that a defendant waived the right to remain silent. North Carolina v. Butler, 441 U.S. 369, 374-75, 99 S. Ct. 1755, 1758 (1970). The fact that mere silence is not enough to support waiver, see Miranda, 384 U.S. at 475, 86 S. Ct. at 1628, does not mean that "a defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights." Butler, 441 U.S. at 373, 99 S. Ct. at 1757. Although courts must presume constitutional rights have not been waived, waiver can be inferred from the actions and words of the person interrogated. Id.

Tennessee law recognizes that the lack of an explicit waiver of the right to remain silent or the right to counsel does not per se require the exclusion of a confession if Miranda warnings were given and if a waiver can be found from the facts and the surrounding circumstances. State v. Elrod, 721 S.W.2d 820, 823 (Tenn. Crim.

App. 1986). After giving the required warnings and ascertaining that the defendant understood his rights, the interrogating officers never asked him whether he was willing to waive those rights. However, there is no indication that the defendant was the least bit reluctant to give a statement. In fact, the trial court concluded that the defendant was anxious to tell his story to the police. The facts and circumstances of this case support the trial court's conclusion that the defendant waived his right to remain silent. See State v. Samuel T. Cravens, No. 86-33-III, Fentress County (Tenn. Crim. App. Nov. 7, 1986).

IV. ATTORNEY-CLIENT PRIVILEGE

Larry Stanley, a Warren County attorney, testified at trial about the details of a conversation he had with the defendant. The defendant had consulted with Stanley about a possible appeal in his boundary dispute action and expressed such animosity toward the victim that Stanley warned the victim and his secretary. The defense objected to the admission of this testimony asserting that it was protected by the attorney-client privilege. In a pretrial hearing, the trial court found that although an attorney-client relationship had existed with the defendant and the communications between them were confidential, the defendant waived the privilege when he disclosed the substance of those communications to the police. In our view, this ruling is correct.

By statute and common law, Tennessee recognizes an evidentiary privilege which protects the confidentiality of attorney-client communications. T.C.A. § 23-3-105 provides:

> Privileged communications. - - No attorney . . . shall be permitted, in giving testimony against a client, or person who consulted the attorney . . . professionally, to disclose any communication made to the attorney . . . as such by such person, during the pendency of the suit, before or afterwards, to the person's injury.

T.C.A. § 23-3-105. The relationship between attorney and client is a mainstay of our system of justice, and the purpose of the privilege is to protect that relationship by

fostering the free flow of communication in an atmosphere of mutual trust and confidentiality. See Bryan v. State, 848 S.W.2d 72, 79 (Tenn. Crim. App. 1992). The object of the rule is to protect the professional communications between attorney and client "by profound secrecy." Id. (quoting from McMannus v. State, 39 Tenn. 213, 215-16 (1858)).

However, the privilege is not absolute. Not only must the communication occur within the bounds of the attorney-client relationship, it must be made with the intent that the communication be kept confidential. Bryan, 848 S.W.2d at 80. The privilege is designed to protect the client, and because it belongs to the client, the client may waive the privilege. Smith County Educ. Assoc. v. Anderson, 676 S.W.2d 328, 333 (Tenn. 1984). The client waives the right to keep attorney-client communications secret when he divulges the communications he seeks to protect. Taylor v. State, 814 S.W.2d 374, 377 (Tenn. Crim. App. 1991).

The trial court found that the defendant waived his right to the privilege when he disclosed relevant portions of the privileged communications to the police. The record supports the trial court's finding of waiver. The admission or exclusion of testimony is within the discretion of the trial court. State v. Brimmer, 876 S.W.2d 75, 79 (Tenn. 1994); Echols v. State, 517 S.W.2d 18, 23 (Tenn. Crim. App. 1974). A trial court's decision to admit testimony cannot be disturbed on appeal unless there is a clear showing that the trial court has abused its discretion. Brimmer, 876 S.W.2d at 79; Taylor, 814 S.W.2d at 378; Echols, 517 S.W.2d at 23. We conclude that the defendant waived his right to invoke the attorney-client privilege in this instance, and hold that the trial court did not abuse its discretion in admitting the attorney's statement.

In consideration of the foregoing and the record as a whole, the judgment of conviction entered by the trial court is affirmed.

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Joseph M. Tipton, Judge

CONCUR:

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Gary R. Wade, Judge

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Cornelia A. Clark, Special Judge