

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTOINE MARIO MCKINNEY,

Defendant-Appellant.

UNPUBLISHED

August 17, 2004

No. 228530

Wayne Circuit Court

LC No. 99-010892

ON REMAND

Before: Jansen, P.J., and Zahra and Meter, JJ.

JANSEN, P.J. (*dissenting.*)

I respectfully dissent as I again believe that the trial court erred in finding that defendant's arrest was not illegal. I strongly believe that defendant's inculpatory statements were product of an illegal arrest and of an unreasonable five-day delay between the arrest and the arraignment.

The facts of the present case are adequately presented in my prior dissenting opinion in *People v McKinney*, 251 Mich App 205, 214-219; 650 NW2d 353 (2002) (Jansen, J., dissenting), as follows:

This case involves the fatal shooting of Zawadie Walker and the nonfatal shooting of Tamika Beard during the early morning hours of October 4, 1999, in the city of Detroit. Walker and Beard were in Walker's vehicle, sometime between 3:00 a.m. and 4:00 a.m., when they were shot. Walker ultimately died of his wounds, while Beard survived, although she was shot in the back of the head and spent about a month in the hospital. Beard testified at trial that she knew defendant and, in fact, was dating defendant's twin brother. According to Beard, she and Walker fell asleep in the car and she heard six or seven gunshots. Walker fell over into Beard's lap, and Beard heard "a lot of arguing" and then more gunshots that were not fired at the car. Beard stated that she saw a man, identified as "B. B.," standing next to the car, but she did not see defendant. Beard testified that B. B. shot her because she had seen him with a gun. She acknowledged, however, that someone else also had a gun, but she did not know who.

There were no eyewitnesses who actually named defendant as the shooter. Karriem Respress testified that during the evening of October 3, Walker pulled up

in his car with "J. J." and "Wee-Wee" while Respress and defendant were outside Respress' house. Respress went inside his house while defendant remained outside. A few minutes later, defendant was banging on the door and Respress' mother let defendant in. According to Respress, defendant then "dropped his stuff on the ground" and said, "I am going to kill those niggers, . . . they jumped on me." Respress later testified that defendant also said "something about I [defendant] am going to call B. B." Respress' mother then looked out the door, but no one was there, and she told defendant to go home.

Police officers recovered six spent shell casings from the scene. It was determined that there were two different weapons used (both nine-millimeter guns), each firing three shots.

Before trial, defendant moved to suppress his statements, given to the police on October 7, 1999. A *Walker*¹ hearing was conducted on January 5, 2000, and February 23, 2000. Investigator James Fisher, who was assigned to the case on the morning of October 4, 1999, was the first to testify. Later in the day of October 4, Investigator Fisher had contact with Richard Ward, who stated that defendant might be involved in the homicide. Investigator Fisher then found and spoke with defendant's mother. At about 8:30 p.m., defendant arrived at the police station with his parents. Defendant stated that, on the basis of what Investigator Fisher and Investigator Barbara Simon told him, he believed that he would be able to give the police a statement and then could go home.

Investigator Simon, after informing defendant of his *Miranda*² rights, took his statement at about 9:20 p.m. Defendant denied being involved in the shooting, but named several people who might be involved. Investigator Fisher acknowledged at the hearing that defendant was not free to leave after he gave the statement to Investigator Simon and that defendant was placed under arrest because he was a suspect in the crime and so that the police could conduct more investigation as needed. Indeed, Investigator Fisher admitted that the police did not have probable cause at that time to seek an arrest warrant. After defendant gave his statement, Investigators Fisher and Simon took defendant to the neighborhood to point out some houses to the officers where the people named were living. Defendant was then returned to the police station and locked up. Investigator Fisher located the three individuals identified by defendant, interviewed them, and determined that their statements conflicted with defendant's statement.

Defendant remained in the police lock-up and Investigator Fisher conducted a second interview at about 9:00 p.m. on October 5. Investigator Fisher again advised defendant of his constitutional rights, and defendant again

¹ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

² *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

denied any involvement in the shooting, although this second statement was inconsistent with the first statement. While Investigator Fisher conducted further investigation into the shooting, defendant was held in the police lock-up.

On the morning of October 7, at about 10:00 a.m., defendant underwent a polygraph examination performed by Investigator Andrew Sims. Investigator Sims advised defendant of his constitutional rights and, after completing his polygraph examination, told defendant that he was not being truthful. Defendant indicated that he would be truthful and tell Detective Sims exactly what happened. Defendant then wrote an inculpatory statement while Investigator Sims left the room to speak with another investigator. Later in the day, on October 7, Investigator Simon took the fourth and final statement from defendant at about 4:00 p.m. after advising defendant of his constitutional rights. Defendant admitted shooting the two victims. In this statement (defendant's most comprehensive statement), defendant's version was that he was outside when Walker drove up in his car and the two were talking. Defendant told Walker that he was going to start selling drugs for B. B., but Walker told defendant that he "was not going to sell in his hood." They began to argue and fight and two other men (J. J. and Wee-Wee) jumped defendant. After speaking with Respress, defendant left and retrieved his nine-millimeter handgun from the backyard of his house. Defendant later saw Walker in his car, and defendant shot at him. Defendant claimed that he never saw Beard in the car and did not mean to shoot her. Defendant stated that he fired four or five shots at the car and ran across the street to an alley, where he put his gun in a trash can behind an apartment building.

After the October 7 statement was given to Investigator Simon, Investigator Fisher typed the arrest warrant information and submitted it. The felony warrant in the record is actually dated October 8, 1999, as is the felony complaint. Defendant was arraigned before a magistrate on October 9, 1999.

At the conclusion of the testimony at the *Walker* hearing, defense counsel argued that the five-day delay between the arrest and the arraignment was unreasonable and that defendant's arrest for an investigation was illegal. The trial court did not address the issues of defendant's arrest or of the prearraignment delay, but merely found that the police informed defendant of his *Miranda* rights and that the statements were voluntary. Thus, the trial court denied defendant's motion to suppress his confessions, determining that they were voluntary.

Defendant was eventually convicted of second-degree murder, MCL 750.317, assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. In a previous opinion, *McKinney, supra*, the majority of this panel affirmed defendant's convictions, and I dissented based on my position that defendant's inculpatory statements were the product of an illegal arrest and the product of an unreasonable five-day delay between arrest and arraignment. The Supreme Court remanded this case to the Wayne Circuit Court for further fact finding regarding whether defendant's statements should have been suppressed as the product of an illegal arrest. I disagree with the trial court's finding the

probable cause existed to arrest defendant, and further believe the statements that resulted from that arrest should be suppressed.

We review for clear error a trial court's factual findings regarding a motion to suppress and its ultimate decision is reviewed de novo. *People v Kaslowski*, 239 Mich App 320, 323; 608 NW2d 539 (2000). In *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998), this Court provided the following regarding an arrest without a warrant and probable cause:

A police officer may arrest an individual without a warrant if a felony has been committed and the officer has probable cause to believe that the individual committed the felony. MCL 764.15(c); *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). In reviewing a challenged finding of probable cause, an appellate court must determine whether the facts available to the arresting officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected individual has committed the felony. *People v Oliver*, 417 Mich 366, 374; 338 NW2d 167 (1983); *People v Russo*, 439 Mich 584, 603-604; 487 NW2d 698 (1992); *People v Sloan*, 450 Mich 160, 168; 538 NW2d 380 (1995).

On remand, the trial court conducted a hearing, and found that there was probable cause to arrest “right from the get-go, within the twenty-four hour period, there was more than enough probable cause to detain and/or arrest this particular defendant.” And, the trial court blamed any delays in the case on defendant for sending the police on “wild goose chases.” I do not believe that probable cause existed to arrest defendant until, at best, on the evening of October 5, 1999, when defendant had already been arrested and detained for approximately twenty-four hours.

Investigator Fisher interviewed Ward who told him that defendant and Walker had fought earlier over a dog, and that it must have been defendant who shot or had Walker shot. Ward had no knowledge as to who shot Walker, but implicated defendant because of the prior altercation. And, defendant in his first statement to the police did acknowledge that he and Walker had a fight over a dog. Contrary to the majority opinion, I would find there was clearly no probable cause to arrest defendant based on his first statement and the statement from Ward. At best, the culmination of the two showed motivation. That fact that defendant and Walker had an argument earlier in the day does not establish probable cause. This at best establishes some sort of motive, but not probable cause to arrest defendant as it does not “justify a fair-minded person of average intelligence in believing that the suspected individual has committed the felony.” *Kelly, supra* at 631. Even Investigator Fisher admitted that there was not probable cause to seek a warrant at the time of defendant’s initial statement.³ And, Investigator Fisher acknowledged that defendant was not free to leave as he was under arrest so further investigation could be conducted because defendant was a suspect. At the remand hearing, Investigator Fisher

³ It is noted that an officer's characterization of an arrest is not determinative of its legality. *Kelly, supra* at 633. But it certainly is not insignificant as the majority suggests. See *Brown v Illinois*, 422 US 590; 95 S Ct 2254; 45 L Ed 2d 416 (1975).

indicated that probable cause for a warrant did not exist until after defendant's second statement was given the evening of October 5, 1999.

In addition, the trial court's statements which indicate that defendant sent the police officers on "wild goose chases" and that defendant caused any delay, is completely irrelevant to probable cause to arrest defendant. The fact that defendant gave a statement to the police implicating another individual, requiring police investigation, does not establish probable cause to arrest defendant. And, the fact the police are required to investigate defendant's statements prior to arraignment actually supports that probable cause did not yet exist to arrest defendant. If defendant did indeed give a false statement to the police that is a crime in and of itself, but it in no way establishes probable cause for murder.

As stated above, Investigator Fisher took Ward's statement on October 4, 1999 at 6:15 p.m. At 8:30 p.m. that same day defendant arrived and gave a statement at approximately 9:20 p.m., which indicated that Respress may have shot Walker and Beard. At this point, Investigator Fisher admitted that there was not probable cause to seek a warrant. But Investigator Fisher acknowledged that defendant was not free to leave as he was under arrest so further investigation could be conducted because defendant was a suspect. At 5:20 p.m. on October 5, 1999, a statement was taken from Respress, and Respress indicated that defendant told him he was going to kill "them niggers," and Respress thought he was referring to Walker amongst others. Then, at around 9:10 p.m. that same day, defendant acknowledged that his prior statement was not accurate, and stated that B. B. had done the shooting but he had witnessed B. B. and another male shooting into a car. Subsequently, on the morning of October 7, 1999, defendant underwent the polygraph and later in the day defendant gave an inculpatory written statement and a statement taken by Investigator Simon, which are discussed above.

The police may not detain a suspect for questioning when there is insufficient probable cause for arrest. *Brown v Illinois*, 422 US 590, 605; 95 S Ct 2254; 45 L Ed 2d 416 (1975); *Kelly*, *supra* at 633-634. The general rule is that a "confession that results from an illegal arrest is inadmissible." *People v Richardson*, 204 Mich App 71, 78; 514 NW2d 503 (1994). But "the mere fact of an illegal arrest 'does not per se require the suppression of a subsequent confession.'" *Kelly*, *supra* at 634, quoting *People v Washington*, 99 Mich App 330, 334; 297 NW2d 915 (1980). Suppression is only required if there is a causal nexus between the illegal arrest and the confession, where the "unlawful detention has been employed as a tool to directly procure any type of evidence from a detainee." *People v Mallory*, 421 Mich 229, 243 n 8; 365 NW2d 673 (1984); *People v Spinks*, 206 Mich App 488, 496; 522 NW2d 875 (1994). "Intervening circumstances can break the causal chain between the unlawful arrest and inculpatory statements, rendering the confession" sufficiently voluntary to purge the taint of the illegal arrest. *Kelly*, *supra*; see also *Brown*, *supra* at 602, quoting *Wong Sun v United States*, 371 US 471, 486, 83 S Ct 407, 9 L Ed 2d 441 (1963). Factors to be considered in determining whether a causal nexus exists include: (1) the time that elapsed between the arrest and the statement, (2) the flagrancy of police misconduct, (3) any intervening circumstances, and (4) events occurring before the arrest. *Spinks*, *supra*; *People v Malach*, 202 Mich App 266, 274; 507 NW2d 834 (1993).

I would find that the illegal arrest and unlawful detainment was used "as a tool to directly procure any type of evidence from a detainee," *Mallory*, *supra* at 243 n 8; *Spinks*, *supra* at 496, and there is not even a question as to this because Investigator Fisher acknowledged that

defendant was being detained to conduct further investigation. Defendant was arrested without probable cause, and was entitled to suppression of his two inculpatory statements. In *Brown, supra*, officers testified that they arrested the defendant for the purpose of questioning him as part of their investigation of a murder. The United States Supreme Court condemned this type of conduct, noting that the officers "virtually conceded" the impropriety of the arrest "when they repeatedly acknowledged, in their testimony, that the purpose of their action was 'for investigation' or for 'questioning.'" *Id.* at 605. This is the problem in the present case. Citing *Brown, supra*, this Court has also noted its "emphatic disapproval" of similar police conduct in *Washington, supra* at 335.

In the present case, Investigator Fisher acknowledged that the police did not have probable cause to arrest defendant after his initial statement. At the remand hearing, Investigator Fisher indicated that probable cause did not exist until after defendant's second statement was procured. Recognizing, an officer's characterization of an arrest is not determinative of its legality, *Kelly, supra* at 633, I would find that probable cause did not exist until at the very earliest following defendant's second statement and no intervening circumstance rendered the later confession voluntary, *Kelly, supra*. The circumstances of this case indicate that defendant's statements were the result of an illegal arrest and his illegal arrest was employed as a tool to directly procure his confession. *Spinks, supra*. The police misconduct was flagrant; there were egregious circumstances apart from the mistaken determination of probable cause. This was a case where defendant was arrested solely for the purpose of investigation, *People v Martin*, 94 Mich App 649, 653-654; 290 NW2d 48 (1980), and for the purpose of obtaining a confession, *Mallory, supra*. And, the record indicates that the investigation and arrest were carried out in such a manner as "to cause surprise, fear, and confusion." *Brown, supra* at 605. The trial court erred in finding that the police had sufficient probable cause to arrest defendant, and that his two inculpatory statements were therefore not the product of an unlawful arrest. Accordingly, defendant's statements should have been suppressed as they were procured in violation of the Fourth Amendment. Without admission of the two inculpatory statements the "wholly untainted" evidence would not likely have resulted in a conviction. See *United States v Crews*, 445 US 463, 474, 63 L Ed 2d 537, 100 S Ct 1244 (1980). For the above reasons, I would find that the trial court erred in failing to suppress defendant's two inculpatory statements.

I would also find that defendant's inculpatory statements, in particular his confession, were a product of unreasonable delay between defendant's arrest and arraignment. The delay in arraignment obviously was because the police were putting together a case. It was five days. Investigator Fisher acknowledged that defendant was being held for further investigation because probable cause for arrest did not exist. Reviewing the totality of the circumstances I would find that defendant's statements were not given voluntarily; as the statements were given as a result of the delay and the police conduct. It is unclear from the record why defendant was not arraigned shortly after his second statement, which was estimated to be twenty-four hours after his arrest; as Investigator Fisher claims there was probable cause for arrest by this time. This improper delay resulted in defendant's confession.

In *Gerstein v Pugh*, 420 US 103, 43 L Ed 2d 54, 95 S Ct 854 (1975), the Supreme Court provided that, "whatever procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest." *Id.*

at 124-25 (footnotes omitted). Subsequently, in *County of Riverside v McLaughlin*, 500 US 44, 55; 111 S Ct 1661; 114 L Ed 2d 49 (1991), the Supreme Court answered the question of what is "prompt" under *Gerstein*, *supra*. The Supreme Court held that a jurisdiction which "provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*." *Id.* at 56. And, the Supreme Court noted that examples of unreasonable delay were "delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake." *Id.* Defendant was arraigned more than 48 hours after detained and the delay appears to have been motivated by the need to gather evidence. See *McLaughlin*, *supra*. As this Court aptly pointed out in *People v Whitehead*, 238 Mich App 1, 4; 604 NW2d 737 (1999):

We emphasize to police authorities across Michigan the importance of securing a judicial determination of probable cause within forty-eight hours of an arrest without a warrant in all but the most extraordinary situations. Finally, this decision provides a warning that statements made by an accused person during a longer detainment may well be found inadmissible for purposes of securing a conviction at trial.

And, the record indicates that defendant's inculpatory statements, at least defendant's confession, were a result of his being arraigned more than 48 hours after being detained.

Unnecessary delay, standing alone, is not a sufficient basis to justify the suppression of an otherwise voluntary confession. *United States v Christopher*, 956 F2d 536, 538 (CA 6 1991). The delay in arraignment is only one factor to be considered evaluating voluntariness of a confession, the "test of voluntariness should be whether, considering the totality of all the surrounding circumstances, the confession is 'the product of an essentially free and unconstrained choice by its maker,' or whether the accused's 'will has been overborne and his capacity for self-determination critically impaired . . .'" *People v Cipriano*, 431 Mich 315; 429 NW2d 781 (1988) quoting *Culombe v Connecticut*, 367 US 568, 602; 81 S Ct 1860; 6 L Ed 2d 1037 (1961). And, our Supreme Court in *Cipriano*, *supra*, provided the following regarding the voluntariness of a confession:

In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. See *Culombe*, *supra*; *United States ex rel Mattox v Scott*, 372 F Supp 304, 309-310 (ND Ill, 1974), *aff'd* in part and *rev'd* in part 507 F2d 919 (CA 7, 1974). See also *Schneckloth v Bustamonte*, 412 US 218; 93 S Ct 2041; 36 L Ed 2d 854 (1973).

The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. Unnecessary delay is one factor to consider in reaching this conclusion, the focus being not just on the length of delay, but rather on what occurred during the delay and its effect on the accused.

With regard to voluntariness, a delay between arrest and arraignment of more than forty-eight hours is presumptively unreasonable. *People v Manning*, 243 Mich App 615, 631, 643; 624 NW2d 746 (2000). The presumption has not been rebutted.

The findings of the trial court judge are not supported by the record and, therefore, are unreasonable. Reviewing the entire record, I would find that defendant's confession was not reasonable as it resulted from an arrest without probable cause, and the delay was five days between arrest and arraignment. The delay in arraignment was for further investigation to establish probable cause. Clearly, the confessions contributed to the conviction and, thus, the error was not harmless. See *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994) (prosecutor must prove beyond a reasonable doubt that there was no reasonable possibility that the erroneously admitted evidence contributed to the conviction); *People v Whitehead*, 238 Mich App 1, 7-8; 212 NW2d 953 (1999) (the prosecutor must show that in the absence of the evidence, there was no reasonable possibility that the factfinder would have acquitted). For the above reasons, defendant was entitled to have his inculpatory statements suppressed, and should be granted a new trial. See *Gerstein, supra* at 119.

I would once again order that defendant's confessions be suppressed and remand for a new trial.

/s/ Kathleen Jansen