In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00219-CR

KEVIN LEE WILLIAMS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 09-12-12140 CR

MEMORANDUM OPINION

Kevin Lee Williams pled guilty to committing aggravated robbery, and a jury assessed a sentence of thirty years in prison. In his appeal, Williams contends the trial court erred by failing to suppress his videotaped statement and by failing to instruct the jury on the law pertaining to his statement. *See* Tex. Code Crim. Proc. Ann. arts. 38.22, 38.23 (West 2005). We affirm the trial court's judgment.

Background

In October 2009, Williams was arrested in connection with an armed robbery that occurred at a convenience store in Montgomery County. Detective John Schmitt of the Montgomery County Sheriff's Department interviewed Williams on the date the robbery occurred. Near the beginning of the interview, Detective Schmitt informed Williams about his constitutional rights. After Williams was advised that he could terminate the interview at any time, Williams requested that he be shown the videotape of the robbery made by the convenience store, and he denied having been involved in the robbery.

At the beginning of the trial, Williams pled guilty to committing aggravated robbery and elected that a jury assess his punishment. Before the trial, Williams filed a motion to suppress all statements that he gave the police, arguing that they had not been voluntary. The trial court denied Williams's motion to suppress. When the State, during the punishment phase of the trial, offered Williams's videotaped statement, Williams objected; he argued that his statement should be suppressed because he did not knowingly waive his right to remain silent.

Outside the jury's presence, Williams testified about the circumstances that led him to give his statement to the police. According to Williams, the detective who questioned him advised him of his rights, including his rights to an attorney and to terminate the interview at any time; Williams explained that he did not exercise those rights because it had not occurred to him to do so. Although Williams acknowledged the

detective told him that he could terminate the interview at any time, he explained he did not terminate the interview because "I didn't know I could stop then."

In the jury's presence, Detective Schmitt testified that he had advised Williams of his constitutional rights before conducting the interview with Williams. According to Detective Schmitt, Williams appeared to understand his rights and talked freely. While Detective Schmitt was on the stand, the State offered Williams's videotaped statement into evidence. After allowing the jury to view a portion of the videotape, the trial judge, during a bench conference with the attorneys, overruled Williams's objection to the admission of the statement, stating that Williams had voluntarily waived his rights, and the trial court instructed the jury to consider only the defendant's actual statements and not to consider "any statements the detective makes in questioning [] the defendant." The videotape of the interview confirms that warnings were given to Williams.

After the State rested, Williams told the jury how he became involved in the robbery. Williams explained that he was under the influence of marijuana and Xanax when committing the robbery; however, he never testified that he was still under the influence of drugs when he was later arrested or when interviewed by the police. With respect to the robbery, Williams explained that he put on a ski mask and gloves, grabbed a gun, and entered the convenience store. After entering the store, Williams hit the cashier, and when the cashier fell to the ground, Williams kicked and pistol-whipped him. Williams testified that he then grabbed the drawer from the register, dumped it on the

floor, and he acknowledged that he took money from the store. After he took the money from the store, Williams ran outside to a waiting SUV. As they were driving away from the store, one of the SUV's occupants mentioned that they were being followed. According to Williams, someone, but not him, shot at the vehicle following them. At that point, the police arrived and began chasing them; in an effort to evade the police, the SUV's driver crashed into a fence, wrecked in a field, and Williams ran away. The police captured Williams several hours later at a car-repair shop. At the conclusion of the trial, the jury found Williams guilty of aggravated robbery, assessed a sentence of thirty years in prison, and additionally assessed a $10,000 fine.

Motion to Suppress

Williams contends that he did not voluntarily give his videotaped statement to the police, and he argues that it should have been suppressed. According to Williams, given his age (seventeen), his lack of a high school education, and having acted under the influence of drugs, and because the police never specifically asked whether he wished to waive his rights, the trial court erred when it concluded that he knowingly, voluntarily, and intelligently gave his statement to the police.

In response to his argument that his statement was not voluntary, the State contends that "Texas law does not require an express verbal waiver, and a waiver of rights may be inferred from the totality of the circumstances." The State also argues that neither Williams's age nor Williams's claim that he was under the influence of drugs

when committing the robbery required the trial court to find that his statements were made involuntarily.

We review a trial court's ruling on a motion to suppress for abuse of discretion, using a bifurcated standard. *See Guzman v. State*, 955 S.W.2d 85, 88-89 (Tex. Crim. App. 1997). Generally, with respect to a suppression ruling the trial court's findings of historical fact supported by the record, as well as mixed questions of law and fact that turn on an evaluation of credibility and demeanor, are given "almost total deference[.]" *Id.* at 89. A *de novo* standard is applied to a trial court's determination of the law and its application of law to the facts that do not turn upon an evaluation of credibility and demeanor. *Id.* We will uphold a trial court's ruling on a motion to suppress if the ruling is reasonably supported by the record, and the ruling is correct under any theory of law applicable to the case. *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006).

Texas law, as codified in article 38.22 of the Texas Code of Criminal Procedure, restricts the use of statements given by defendants to the police in custodial interrogations, and provides that "[n]o oral . . . statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding unless . . . the accused knowingly, intelligently, and voluntarily waives any rights set out in the warning[.]" Tex. Code Crim. Proc. Ann. art. 38.22 § 3. To satisfy the requirements of article 38.22, the State must prove by a preponderance of the evidence that an accused knowingly, intelligently, and voluntarily waived his rights when making the statement.

Berghuis v. Thompkins, 130 S.Ct. 2250, 2261, 176 L.Ed.2d 1098 (2010); *Joseph v. State*, 309 S.W.3d 20, 24 (Tex. Crim. App. 2010).

To prove that a defendant waived his rights, we note that

> [t]he waiver inquiry "has two distinct dimensions": waiver must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."

Berghuis, 130 S.Ct. at 2260 (quoting *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)). "Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Burbine*, 475 U.S. at 421 (quoting *Fare v. Michael C.*, 442 U.S. 707, 725, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979)); *Joseph*, 309 S.W.3d at 25. "The 'totality-of-the-circumstances approach' requires the consideration of 'all the circumstances surrounding the interrogation,' including the defendant's experience, background, and conduct." *Joseph*, 309 S.W.3d at 25 (quoting *Fare*, 442 U.S. at 725).

Here, Williams does not argue that his statements were obtained through intimidation or coercion. Instead, the videotape shows that Williams affirmatively nodded his head each time Detective Schmitt asked Williams if he understood his rights. Although Williams testified that he was under the influence of marijuana and Xanax during the robbery, Williams did not testify that he was still under the influence of the

drugs when he was interviewed by the police, and the interview occurred several hours after the robbery occurred. Additionally, Detective Schmitt testified that Williams appeared to understand his rights and talked freely.

With respect to William's argument that the drugs rendered his waiver involuntary for Fifth Amendment purposes, the record shows that any tendency that the drugs may have had to overbear his will to resist waiving his *Miranda* rights was not due to the actions of the police. *See Leza v. State*, No. AP-76,157, 2011 Tex. Crim. App. LEXIS 1372, at *10 (Tex. Crim. App. Oct. 12, 2011) ("Although the record demonstrates that the police were told shortly after the interrogation began that the appellant had 'shot up' with heroin just before he was arrested, any tendency that the influence of heroin may have had to overbear his will to resist waiving his *Miranda* rights was due to no causative action on the part of the police, and therefore cannot serve to undermine the voluntariness of his subsequent statements for Fifth Amendment purposes."). "Before it may be said that a waiver of a *Miranda* right is involuntary, however, there must be some element of official intimidation, coercion, or deception." *Id.* at *7.

Based on the record before us, we see no evidence of any official action that could be characterized as intimidation, coercion, or deception. Even if the trial judge accepted Williams's claim that he had ingested drugs on the day of the robbery, a claim the trial judge was not required to believe, a defendant's voluntary choice to take drugs does not

undermine the voluntariness of his statement for Fifth Amendment purposes. *See id.* at *10.

Williams also argues that the drugs impacted the voluntariness of his waiver with respect to his statutory rights under article 38.22. We note that, unlike a Fifth Amendment claim, "a claim that a purported waiver of the *statutory* rights enumerated in Article 38.22 is involuntary 'need not be predicated on police overreaching.'" *See Leza*, 2011 Tex. Crim. App. LEXIS 1372, at **15-16 (quoting *Oursbourn v. State*, 259 S.W.3d 159, 172 (Tex. Crim. App. 2008)). The Court of Criminal Appeals has recently explained that "[c]ircumstances unattributable to the police that nevertheless impact an accused ability's to resist reasonable police entreaties to waive his statutory rights, such as intoxication, are 'factors' in the voluntariness inquiry, though they 'are usually not enough, by themselves, to render a statement inadmissible under Article 38.22.'" *Id.* at 16 (quoting *Oursbourn*, 259 S.W.3d at 173).

Here, Detective Schmitt testified that Williams appeared to understand his rights and talked freely. Moreover, the trial judge viewed the videotape of Williams's statement and could measure the opinion offered by Detective Schmitt, and reached a rational conclusion by concluding that Williams's drug use, if any, was "not so acute" to overcome his capacity to resist reasonable tactics by the police to persuade him to waive his statutory rights. *Id.* at 16-17.

Williams also argues that his statement was not voluntary because he did not understand his rights. While a defendant's voluntary drug use may be irrelevant to a voluntariness inquiry, Williams's alleged use of marijuana and Xanax might be relevant to whether his decision to waive his *Miranda* rights was done in a knowing and intelligent manner. *See Leza*, 2011 Tex. Crim. App. LEXIS 1372, at *11.

The videotape demonstrates that after being advised of his constitutional rights, Williams did not exercise them. Detective Schmitt testified that Williams appeared to understand his rights and talked freely, which the trial court was entitled to believe. *See id.* at **11-12. By viewing Williams's videotaped statement, the trial court was in a position to make its own determination that Williams could comprehend his rights and chose to waive them. *See id.* After reviewing the videotaped statement, as well as the totality of the circumstances, we agree with the trial court's determination that under both federal law and article 38.22, Williams possessed a sufficient ability to knowingly, voluntarily, and intelligently waive his *Miranda* rights. *See Burbine*, 475 U.S. at 421; *Joseph*, 309 S.W.3d at 25.

Williams also argues that he did not expressly waive his rights, but an express waiver is not required. The Court of Criminal Appeals has held that "'neither a written nor an oral express waiver is required.'" *Joseph*, 309 S.W.3d at 24 (quoting *Watson v. State*, 762 S.W.2d 591, 601 (Tex. Crim. App. 1988)). The United States Supreme Court has held that the prosecution need not show that a defendant expressly waived his rights.

See Berghuis, 130 S.Ct. at 2261. "Where the prosecution shows that [warnings were] given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." *Id.* at 2262. "'[W]aiver can be clearly inferred from the actions and words of the person interrogated.'" *Joseph*, 309 S.W.3d at 24-25 (quoting *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979)). While implied waivers are not preferred, it is within the trial court's discretion to rely upon an implied waiver whenever the totality of the circumstances supports the trial court's finding that the defendant agreed to waive his rights. *Leza*, 2011 Tex. Crim. App. LEXIS 1372, at *18 (citing *Joseph*, 309 S.W.3d at 25-26 n.7; *id.* at 28-30 (Cochran, J., concurring)).

The videotape shows that Detective Schmitt read Williams his rights and that Williams indicated his understanding of them by affirmatively nodding when asked if he understood each individual right. The videotape shows that Williams willingly participated in the interview, and it does not show improper conduct on the part of the police. During the interview, Williams never asked for an attorney. Because the videotape shows that Williams decided to participate in the interview after being advised of his right to decline the requested interview, the record supports the trial court's conclusion that Williams's course of conduct indicates that Williams made the decision to waive his rights. *See Leza*, 2011 Tex. Crim. App. LEXIS 1372, at *18. We conclude

the trial court did not abuse its discretion in admitting Williams's videotaped statement. *See id.* We overrule issue one.

Jury Charge

Williams also argues that disputed fact issues regarding whether his statements were voluntarily given required the trial court to give the jury a voluntariness instruction with respect to considering his videotaped statement. *See* Tex. Code Crim. Proc. Ann. arts. 38.22, 38.23. Article 38.22, section 6 states that:

> [u]pon the finding by the judge as a matter of law and fact that the statement was voluntarily made, evidence pertaining to such matter may be submitted to the jury and it shall be instructed that unless the jury believes beyond a reasonable doubt that the statement was voluntarily made, the jury shall not consider such statement for any purpose nor any evidence obtained as a result thereof.

Id. art. 38.22 § 6.

Although Williams's claims the trial court failed to give the jury an instruction regarding whether it should consider his statement, the charge contains a general voluntariness instruction. The charge given in Williams's case states:

> You are instructed that unless you believe from the evidence beyond a reasonable doubt that the alleged confession or statement introduced into evidence was freely and voluntarily made by the defendant without compulsion or persuasion, or if you have a reasonable doubt thereof, you shall not consider such alleged statement or confession for any purpose nor any evidence obtained as a result thereof.

We conclude the jury did receive an instruction to disregard Williams's statement unless it determined that it was freely and voluntarily made. To the extent Williams's argument relies on article 38.22, we hold that it is without merit.

Relying on article 38.23 of the Texas Code of Criminal Procedure, Williams argues the trial court failed to instruct the jury concerning the parties' dispute over whether the videotaped statement was lawfully obtained. *See Contreras v. State*, 312 S.W.3d 566, 573 (Tex. Crim. App. 2010) (citing *Oursbourn*, 259 S.W.3d at 173-74). Article 38.23(a) states that:

> (a) No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or law of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.
>
> In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

Id. art. 38.23(a). According to Williams, the trial court should have given an article 38.23 instruction because a fact issue exists regarding whether Williams understood his rights.

The Court of Criminal Appeals has stated that

> [t]he trial court has a duty to give an article 38.23 instruction sua sponte if three requirements are met: (1) evidence heard by the jury raises an issue of fact, (2) the evidence on that fact is affirmatively contested, and (3) the contested factual issue is material to the lawfulness of the challenged conduct in obtaining the statement claimed to be involuntary.

Contreras, 312 S.W.3d at 574 (footnotes *Oursbourn*, 259 S.W.3d at 177, 180-81)). "A statement is obtained in violation of constitutional due process only if the statement is

causally related to coercive government misconduct." *Id.* (citing *Colorado v. Connelly*, 479 U.S. 157, 163-64, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986)). Coercive government misconduct renders a confession involuntary if a defendant's "'will has been overborne and his capacity for self-determination critically impaired.'" *Id.* (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)). This is determined by assessing the "'totality of all the surrounding circumstances,'" which includes "'the characteristics of the accused and the details of the interrogation.'" *Id.* (quoting *Scheckloth*, 412 U.S. at 226)).

Williams, in his brief, does not identify any coercive conduct that he contends the police used to obtain his statement, and the videotape demonstrates that Williams was advised of his rights before making the statement at issue. Instead of pointing to coercive conduct by state officials, Williams argues that "the evidence raises a fact issue as to whether [Williams] understood his rights." In *Contreras*, the Texas Court of Criminal Appeals explained that "*Miranda* or article 38.22, not article 38.23, is the vehicle for excluding statements obtained in violation of the *Miranda* guidelines." 312 S.W.3d at 583.

An article 38.23 instruction is required "only if there is a factual dispute as to how the evidence was obtained." *Balentine v. State*, 71 S.W.3d 763, 773 (Tex. Crim. App. 2002). Here, there is no factual dispute concerning how the police obtained Williams's statement, and the voluntariness of the statement was addressed through an instruction

that the trial court provided to the jury. On the record before us, we conclude the trial court was not required to give the jury an article 38.23 instruction. *See Contreras*, 312 S.W.3d at 574.

We overrule all of Williams's issues, and we affirm the trial court's judgment.

AFFIRMED.

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HOLLIS HORTON
Justice

Submitted on September 15, 2011
Opinion Delivered December 14, 2011
Do Not Publish

Before McKeithen, C.J., Gaultney and Horton, JJ.