In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-15-00112-CR

JEROME LYDALE ANDERSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 71st District Court
Harrison County, Texas
Trial Court No. 12-0427X

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

Based on a tip from an unidentified confidential informant, Lynn Ames, an officer with the Marshall Police Department Narcotics Division, executed a search warrant on Jerome Lydale Anderson's residence, yielding several drugs, including 429.91 grams of cocaine, counting adulterants or dilutants. In a non-jury trial, the trial court convicted Anderson of possession of 400 or more grams of cocaine, sentenced him to fifteen years' imprisonment, and ordered him to pay a $10,000.00 fine. Anderson's appeal complains of the admission of his custodial interrogation into evidence, the denial of his motion for continuance, and an alleged failure to disclose exculpatory information.[1]

We affirm the trial court's judgment because (1) admitting Anderson's custodial interrogation into evidence was not an abuse of discretion, (2) denying Anderson a continuance was not an abuse of discretion, and (3) no *Brady* violation has been shown.

(1) Admitting Anderson's Custodial Interrogation Was Not an Abuse of Discretion

During his video-recorded custodial interrogation, Anderson admitted that the drugs found in his home belonged to him. In an attempt to exclude his inculpatory statements, Anderson filed

[1]As labelled in the "Issues Presented" section of his brief, Anderson's last point of error claims that the trial court erred by not requiring the State to identify the confidential informant who supplied police officers with the information used to obtain a warrant to search his home. However, the substantive portion of Anderson's brief on this point focuses entirely on an alleged *Brady* violation, which we address in section (3) of this opinion. *See Brady v. Maryland*, 373 U.S. 83 (1963).

An appellate brief must contain "a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). To the extent that Anderson intended to assert error regarding lack of disclosure of the confidential informant's identity, Anderson has wholly failed to brief the issue. Since we need not make Anderson's arguments for him, we find that Anderson's assertion regarding nondisclosure of the informant's identity presents nothing for our review. *See Jackson v. State*, 424 S.W.3d 140, 155 (Tex. App.—Texarkana 2014, pet. ref'd).

a motion to suppress his recorded confession on the ground that he did not unequivocally waive his rights under Article 38.22 of the Texas Code of Criminal Procedure and *Miranda*.[2]

Incorporating the requirements set forth by *Miranda*, Article 38.22 of the Texas Code of Criminal Procedure provides, "No 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 is provided with the following warnings and "knowingly, intelligently, and voluntarily waives any rights set out in the [following] warning[s]":

> (1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;
> (2) any statement he makes may be used as evidence against him in court;
> (3) he has the right to have a lawyer present to advise him before and during any questioning;
> (4) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him before and during any questioning; and
> (5) he has the right to terminate the interview at any time. . . .

TEX. CODE CRIM. PROC. ANN. art. 38.22, §§ 2(a), 3(a) (West Supp. 2015); *see Miranda*, 384 U.S. at 444.

At the hearing on Anderson's suppression motion, Joe Bounds, an investigator with the Harrison County District Attorney's Office, testified that he was present during the interrogation and that Anderson was provided with the warnings required by Article 38.22. Bounds further testified that he believed Anderson understood and voluntarily waived his rights before making his confessions.

[2]*See Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

At the conclusion of the hearing, the trial court indicated that it would review the recorded interrogation and would provide a ruling on Anderson's motion at the earliest opportunity, but failed to do so. During the bench trial, Bounds again testified that Anderson voluntarily waived his rights and agreed to speak with Brody West, an investigator with the Marshall Police Department, and him. When the State sought to admit the confession, Anderson again objected to its admission on the ground that he had not clearly waived his rights. The trial court stated, "I'm going to watch the video and brief it, and if I determine that it's not admissible, then I won't consider that." Before sentencing, the trial court cited to the fact that Anderson had a college education and concluded that he had entered a knowing and intelligent waiver of his rights before speaking with Bounds and West.[3] Anderson argues that the trial court's decision was erroneous.

Trial courts have broad discretion in admitting and excluding evidence. *McClure v. State*, 269 S.W.3d 114, 119 (Tex. App.—Texarkana 2008, no pet.); *see Ellison v. State*, 86 S.W.3d 226, 227 (Tex. Crim. App. 2002). We do not reverse such a decision unless it is demonstrated that the trial court abused its discretion. *McClure*, 269 S.W.3d at 119. An abuse of discretion has not occurred if the trial court's decision falls within the zone of reasonable disagreement. *Id.* (citing *Green v. State*, 934 S.W.2d 92, 102 (Tex. Crim. App. 1996); *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op. on reh'g)).

Before a person in custody is questioned, he or she must be warned that he or she "has a right to remain silent, that any statement he [or she] does make may be used as evidence against

[3]Ames testified that Anderson had been a student at Wiley College, a fact confirmed by Anderson during his interrogation.

him [or her], and that he [or she] has a right to the presence of an attorney." *Miranda*, 384 U.S. at 444. Under both *Miranda* and the Texas statutes, information learned in a custodial interrogation cannot be used in evidence unless the State establishes that proper warnings were given and the accused affirmatively waived his or her rights. *Lampkin v. State*, 470 S.W.3d 876, 891 (Tex. App.—Texarkana 2015, pet. ref'd); *see Carter v. State*, 309 S.W.3d 31, 35–36 (Tex. Crim. App. 2010) (failure on either warnings or waiver requires exclusion). Here, it is undisputed that Anderson was given the warnings required by *Miranda* and Article 38.22, Section 2 of the Texas Code of Criminal Procedure. The question is whether Anderson waived his rights. He contends that he "did not clearly or affirmatively assert his understanding of those rights, and he did not waive those rights." We disagree.

Waivers of rights need not be in any particular form, but can be found from actions and words of the accused. *Joseph v. State*, 309 S.W.3d 20, 24 (Tex. Crim. App. 2010); *Lampkin*, 470 S.W.3d at 892. An express waiver is not required in words. *Joseph*, 309 S.W.3d at 25; *Lampkin*, 470 S.W.3d at 892. The real question is whether a waiver occurred that was knowing, intelligent, and voluntary. *Joseph*, 309 S.W.3d at 25; *Lampkin*, 470 S.W.3d at 893–94. "To answer this question, we must determine (1) whether '"the relinquishment of the right . . . was the product of a free and deliberate choice rather than intimidation, coercion, or deception"' and (2) whether the waiver was '"made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."'" *Lampkin*, 470 S.W.3d at 893 (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). Based on all circumstances of the interrogation, we must

determine if the choice to speak was uncoerced and sufficiently comprehended. *Moran*, 475 U.S. at 421; *Joseph*, 309 S.W.3d at 25.

Before the interrogation, West stated, "You have the right to remain silent and not make any statement at all and any statement you make may be used against you at trial. Do you understand that?" In response, Anderson said, "Mm hum. I do." Anderson then indicated his understanding to West's recitation of each of his rights by nodding. After all of the Article 38.22 statutory rights were read, West asked Anderson if he understood his rights. Anderson shook his head up and down, indicating that he understood the Article 38.22 statutory warnings.[4] Immediately after receiving the warnings, Anderson willingly participated in an interview that lasted for more than an hour. At no time did Anderson request an attorney or ask that the interview be stopped. In an effort to exculpate his mother, who also owned the home where drugs were located, and a woman who was found in the home when the search warrant was executed, Anderson readily admitted that the drugs belonged to him. The interview was conducted in a calm manner and demonstrates the absence of intimidation, coercion, or promise made in exchange for a confession.

Based on the totality of the circumstances, we find that the trial court did not abuse its discretion in determining that Anderson voluntarily, intelligently, and knowingly waived his rights or in overruling Anderson's objections to the admission of his confession. We overrule this point of error.

[4]*See Lampkin*, 470 S.W.3d at 892–93 (overruling defendant's Article 38.22 objection where, in response to question of whether he understood his Article 38.22 warnings, defendant's interrogation demonstrated that he said "yes" and, although this action was not captured on video, testimony established that defendant "shook his head up and down in the affirmative").

(2) Denying Anderson a Continuance Was Not an Abuse of Discretion

Anderson's indictment was issued in 2012. On May 12, 2014, the State designated West as a trial witness and stated that his address was the same address as that of the Marshall Police Department. Subsequently, West came under the investigation of federal authorities and resigned from his job. In November 2014, the State amended its witness list and omitted West as a witness. On April 24, 2015, Anderson attempted to subpoena West, without success. On April 25, Anderson filed a sworn motion to continue the trial on the ground that he was unable to locate West because he was no longer working with the Marshall Police Department. On April 27, 2015, although it did not intend to call West as a witness, the State amended its witness list and added West's current address "as a courtesy" to Anderson after he had asked for this information. Anderson subpoenaed West on the eve of trial. Anderson stated that he was able to get in touch with West, but that West was in Ohio. He asked the trial court to continue the case so that he could have time to secure West's presence at trial. The motion for continuance, which was argued on the day of Anderson's April 28, 2015, trial, was denied by the trial court. Anderson argues that this ruling was made in error.

We review a trial court's ruling on a motion for continuance for an abuse of discretion. *Gallo v. State*, 239 S.W.3d 757, 764 (Tex. Crim. App. 2007). To reverse a case stemming from a trial court's denial of a motion to continue, an appellant must demonstrate that the denial was error and that it resulted in harm. *Gonzales v. State*, 304 S.W.3d 838, 843 (Tex. Crim. App. 2010). First, we must decide if the trial court erred in denying the motion to continue and, if so, we will

consider whether such error was harmful. *Id.* Diligence is a precondition for a continuance based on the need for additional trial preparation. *Id.*

Article 29.06 of the Texas Code of Criminal Procedure requires that a motion for continuance "state 'the diligence which has been used to procure [a witness's] attendance' when it is based on the absence of a witness." *Dewberry v. State*, 4 S.W.3d 735, 756 (Tex. Crim. App. 1999) (quoting TEX. CODE CRIM. PROC. ANN. art. 29.06 (West 2006)). "Diligence, in the motion for continuance context, is the exercise of timely and persistent efforts to secure the attendance of witnesses, using the means and agencies provided by law." *Tucker v. State*, 109 S.W.3d 517, 520 (Tex. App.—Tyler 1999, pet. ref'd) (citing *Edwards v. State*, 185 S.W.2d 111, 112 (Tex. 1945)). If the defense tries to obtain a witness for trial only a few days before trial, the trial court may find that the defense has not used due diligence. *Norton v. State*, 564 S.W.2d 714, 716–17 (Tex. Crim. App. 1978). Diligence under Article 29.06 requires diligence in seeking to obtain the witness and asking for a continuance if that proves impossible. *Dewberry*, 4 S.W.3d at 756.

Anderson's written motion for continuance failed to comply with Article 29.06 because it did not state the diligence he had used in procuring West's attendance. Such a motion for continuance is inadequate if it fails to set out all the requirements of Article 29.06. *Latham v. State*, 20 S.W.3d 63, 67 (Tex. App.—Texarkana 2000, pet. ref'd). Further, Anderson's counsel had been engaged in the case since 2013, knew that West was the other investigator involved in Anderson's case, and should have been made aware of his value as a witness. Trial had been continued several times. Yet, Anderson first attempted to secure West's presence on the Friday

before his Tuesday trial and first urged his motion to continue the case on the day of trial.[5] On these facts, we cannot say that the trial court abused its discretion in denying Anderson's motion for continuance. *See Clay v. State*, 195 S.W. 600, 601 (Tex. Crim. App. 1917). Thus, we overrule this point of error.

(3) No Brady *Violation Has Been Shown*

According to Ames, West resigned while under investigation by the FBI because "something was done incorrectly" while he was working with a confidential informant. Further details of the allegations against West were not specifically known by the State or its witnesses, although Bounds testified it had "something to do with money."

During the argument related to Anderson's motion for continuance, the trial court asked Anderson why the State was required to provide an updated address on West if they were not going to call him as a witness. Anderson responded,

> Because he's exculpatory. Under *Brady*/United States, I have a right to call him. I believe he's got some history that would be relevant to this case for many reasons; one, to the case-in-chief; secondly, as to the -- whether or not there is a possible reason why the informant -- confidential informant would be disclosed.

Anderson argued that the State should have provided him with the reason why West was under investigation because it could have involved "drug cases[,] . . . . the defendant[,] or anything related to the case."[6] In response, the State argued that West's prosecution was "being handled

[5]According to the State, the news that West was under investigation was reported in local newspapers, and it was "long known that Brody West" had resigned from his job.

[6]Although the confidential informant in this case was sponsored by Ames, Ames testified that West had contact with the informant on more than one occasion.

specifically by the federal system," that it was not involved with the prosecution, that it did not know what West was charged with "other than what's been reported in the paper," and that it was not certain whether West would actually be prosecuted or whether there was, in fact, any wrongdoing committed by West. After the State argued that it could not disclose information that it did not have, the trial court overruled Anderson's motion for continuance based on the *Brady* argument.

On appeal, Anderson argues that the State failed to disclose the nature of the federal investigation against West and the relationship that he "may have had with the confidential informant in this case." "The Due Process Clause of the Fourteenth Amendment to the United States Constitution is violated when a prosecutor fails to disclose evidence favorable to the accused that creates a probability sufficient to undermine confidence in the outcome of the proceeding." *Owens v. State*, 381 S.W.3d 696, 700 (Tex. App.—Texarkana 2012, no pet.) (citing *Thomas v. State*, 841 S.W.2d 399 (Tex. Crim. App. 1992)). Therefore, potentially exculpatory information must be disclosed. *Id.* (citing *Brady*, 373 U.S. at 83; *Thomas*, 841 S.W.2d at 404).

However, information, the content or the exculpatory effect of which is merely speculative, need not be produced. *Id.* at 701 (citing *Page v. State*, 7 S.W.3d 202, 206 (Tex. App.—Fort Worth 1999, pet. ref'd)). "'The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.'" *Id.* (quoting *United States v. Agurs*, 427 U.S. 97, 109 (1976)); *see Hampton v. State*, 86 S.W.3d 603, 612 (Tex. Crim. App. 2002).

To succeed on his *Brady* argument, Anderson was "required to 'establish a basis for [his] claim that it contain[ed] material evidence.'" *Smith v. State*, 314 S.W.3d 576, 584 (Tex. App.—Texarkana 2010, no pet.) (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 58, n.15 (1987)); *see United States v. Valenzuela–Bernal*, 458 U.S. 858, 867 (1982) (Defendant "must at least make some plausible showing of how [the witness'] testimony would have been both material and favorable to [the] defense."). Other than speculation, there was no showing that the facts involving West's investigation, the majority of which were not known to the State, would have been either exculpatory or material to Anderson's case.[7] We find that Anderson has failed to meet his burden under *Brady*. *See Hampton* 86 S.W.3d at 612. Consequently, we overrule this point of error.

We affirm the trial court's judgment.

Josh R. Morriss, III
Chief Justice

Date Submitted: January 12, 2016
Date Decided: February 18, 2016

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[7]"*Brady* does not require the State to disclose information to defendants that the State does not have in its possession and that is not known to exist." *Id.* (citing *Pena v. State*, 353 S.W.3d 797, 812 (Tex. Crim. App. 2011)).