

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 KA 1590

STATE OF LOUISIANA

VERSUS

BERNARD JAMES

**Judgment rendered April 24, 2015.**

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Appealed from the  
23<sup>rd</sup> Judicial District Court  
in and for the Parish of Ascension, Louisiana  
Trial Court No. 29441  
Honorable Alvin Turner, Jr., Judge

\* \* \* \* \*

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BERNARD JAMES

\* \* \* \* \*

**BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.**

*J. R. B.*  
*JEW*  
*J*

## **PETTIGREW, J.**

Defendant, Bernard James, was initially charged by amended grand jury indictment with three counts of first degree murder, violations of La. R.S. 14:30.<sup>1</sup> He pled not guilty on all counts and filed a motion to suppress statements. The trial court subsequently denied defendant's motion to suppress. Thereafter, defendant withdrew his former pleas of not guilty, and he pled guilty to first degree murder on counts one and two, and to an amended charge of second degree murder, a violation of La. R.S. 14:30.1, on count three. Defendant entered his guilty pleas pursuant to a written agreement whereby he reserved his right to appeal the trial court's ruling on his motion to suppress under **State v. Crosby**, 338 So.2d 584 (La. 1976). Under the terms of this agreement, the trial court sentenced defendant to three concurrent sentences of life imprisonment at hard labor, without the benefit of parole, probation, or suspension of sentence.

Defendant now appeals, alleging as errors: 1) the trial court's denial of his motion to continue his suppression hearing; 2) the denial of his right to appellate review because of the trial court's reliance on purported off-the-record rulings in denying the motion to continue his suppression hearing; and 3) the trial court's denial of his motion to suppress. For the following reasons, we affirm defendant's convictions and sentences.

### **FACTS**

Because defendant pled guilty to the instant offenses, the facts were set forth only in defendant's plea agreement and via recitation at the time of his plea. Those facts indicate that on or about February 17, 2012, defendant and his four codefendants drove to the Gonzales home of Robert and Shirley Marchand. The plan was to steal a safe from the Marchands' home office. While the men were at the residence, the Marchands and Douglas Dooley (Robert's son) were murdered, and the safe was taken from the home. After fleeing the scene, the perpetrators broke into the safe and

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<sup>1</sup> Defendant was charged along with several codefendants, none of whom are party to the instant appeal.

divided the contents among themselves. After a warrant was secured for his arrest, defendant eventually turned himself in to the police.

### **MOTION TO CONTINUE SUPPRESSION HEARING/INCOMPLETE RECORD**

In his first two assignments of error, defendant makes related arguments concerning the trial court's denial of his motion to continue his suppression hearing. In his first assignment of error, defendant contends that it was error for the trial court to deny his motion to continue, which was based upon defendant's request to be examined by an expert prior to the suppression hearing. In his second assignment of error, defendant asserts that his right to appellate review of the first assignment of error was prejudiced when the trial court relied upon purported off-the-record statements or orders in denying the motion to continue.

On January 16, 2014, defendant filed a notice of filing of ex parte motion in connection with an ex parte motion seeking funding for certain experts that he alleged were necessary for his defense. On February 7, 2014, the trial court granted a defense continuance because expert funding had not yet been secured. During this hearing, the trial court referred to "certain things the court has discussed with counsel that it will do" in regards to the funding issue and expressed its own willingness to address the Louisiana Public Defender Board ("LPDB") as to why the funding in the case was delayed. These references by the trial court were presumably discussed in more detail with defense counsel in chambers or otherwise off the record.

On April 17, 2014, defendant filed a motion to continue his suppression hearing, which had been rescheduled for April 22, 2014. In this motion, defendant stated that the LPDB "did not approve the funds and authorize the defense expert to begin work until April 1, 2014," and as a result, the expert had not been able to conduct his examination. At the April 22 hearing, the State declared itself ready to proceed on the motion to suppress. In discussion that followed, all parties discussed their recollections of the February 7 hearing with respect to the funding issue. The State recalled that the trial court said that it would ensure that funds would be available. The trial court stated that it had told defense counsel that the court would provide funding if the LPDB did

not. Defense counsel said that it was their understanding that the court would provide funding upfront and be reimbursed by the LPDB. However, they later discovered that the LPDB would not agree to reimbursement, so they decided to wait for funding. The trial court retired to read the February 7 transcript and returned to deny defendant's motion to continue without offering additional reasons. However, the trial court added it would allow the suppression matter to be reopened if defense counsel subsequently presented evidence, discovered upon subsequent information or testing, that defendant's statements should be suppressed. The suppression hearing proceeded as scheduled, and the trial court took the matter under advisement. On August 19, 2014, the trial court issued written reasons denying the motion to suppress.

Defendant now argues on appeal that the trial court erred in denying his motion to continue and in relying upon off-the-record statements in doing so. However, defendant failed to preserve either of these issues for review.

While a guilty plea generally waives all non-jurisdictional defects in the pre-plea proceedings, a defendant may condition his plea, subject to acceptance by the trial court, upon the reservation for appellate review of specified pre-plea errors. See Crosby, 338 So.2d at 588. In the instant case, when defendant entered his **Crosby** plea, the following conversation occurred:

[Trial court:] Do you intend to appeal any rulings or orders entered by the court prior to your guilty plea?

[Defendant:] Yes, sir.

[Trial court:] And that's in regards to the **Crosby** plea; is that correct?

[Defense counsel:] On the motion to suppress, yes, your honor.

[Trial court:] Only on the motion to suppress. ... Is that correct, Mr. James?

[Defendant:] Yes, sir.

[State:] Your honor, I'd like the record to be clear that as to the statement only.

[Trial court:] That's what they said, as to the statement.

In addition to the above colloquy, defendant also signed a written plea agreement, which set forth his **Crosby** reservation as follows (emphasis in original):

Defendant wishes to appeal the Court's Ruling on the Motion to Suppress his Statement ONLY held on April 22, 2014 and ruled on by this Honorable Court via written reasons on August 19, 2014 pursuant to **State v. Crosby**, 338 So.2d 584 (La. 1976).

The trial court's written reasons denying the motion to suppress address only the issues concerning defendant's actual statements, but nothing related to expert funding, the motion to continue, or any other issues.

Based on the above, we find that defendant failed to properly preserve these issues for review. His **Crosby** plea reserved his right to appeal the trial court's ruling on the motion to suppress only. In some instances, we have elected to review a defendant's assignments of error where his **Crosby** reservations were vague. See State v. Gordon, 2004-0633, p. 10 (La. App. 1 Cir. 10/29/04), 896 So.2d 1053, 1061-1062, writ denied, 2004-3144 (La. 4/1/05), 897 So.2d 600 (permitting review of various pretrial motions when the **Crosby** reservation was stated as "issues that you have that the Court has been wrong in regard to your motions to suppress and so on" and "certain issues on some of these pretrial motions and so on and so forth"). Because the State was so adamant, as evidenced in the written plea agreement and at the time of defendant's plea, that the **Crosby** reservation apply only to the ruling on the motion to suppress, we find that it would be improper to review any issues raised outside the very specific reservation.

These assignments of error are unreviewable on appeal.

### **MOTION TO SUPPRESS**

In his third and final assignment of error, defendant argues that the trial court erred in denying his motion to suppress. Specifically, defendant contends that the trial court erred in its analysis regarding defendant's understanding of his **Miranda**<sup>2</sup> rights and in evaluating whether defendant's statements were freely and voluntarily given.

The State bears the burden of proving the admissibility of a purported confession. La. Code Crim. P. art. 703(D). Louisiana Revised Statutes 15:451 provides

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<sup>2</sup> **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

that before a purported confession can be introduced in evidence, it must be affirmatively shown to be free and voluntary and not made under the influence of fear, duress, intimidation, menaces, threats, inducements, or promises. It must also be established that an accused who makes a confession during custodial interrogation was first advised of his/her **Miranda** rights. **State v. Plain**, 99-1112, p. 5 (La. App. 1 Cir. 2/18/00), 752 So.2d 337, 342. The State must specifically rebut a defendant's specific allegations of police misconduct in eliciting a confession. **State v. Thomas**, 461 So.2d 1253, 1256 (La. App. 1 Cir. 1984), writ denied, 464 So.2d 1375 (La. 1985).

Whether a showing of voluntariness has been made is analyzed on a case-by-case basis with regard to the facts and circumstances of each case. **State v. Benoit**, 440 So.2d 129, 131 (La. 1983). The trial court must consider the totality of the circumstances in deciding whether a confession is admissible. **State v. Hernandez**, 432 So.2d 350, 352 (La. App. 1 Cir. 1983). Testimony of the interviewing police officer alone may be sufficient to prove a defendant's statements were freely and voluntarily given. **State v. Maten**, 2004-1718, p. 12 (La. App. 1 Cir. 3/24/05), 899 So.2d 711, 721, writ denied, 2005-1570 (La. 1/27/06), 922 So.2d 544.

A trial court's ruling on a motion to suppress the evidence is entitled to great weight, because the court had the opportunity to observe the witnesses and weigh the credibility of their testimony. **State v. Jones**, 2001-0908, p. 4 (La. App. 1 Cir. 11/8/02), 835 So.2d 703, 706, writ denied, 2002-2989 (La. 4/21/03), 841 So.2d 791. Correspondingly, when a trial court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion, i.e., unless such ruling is not supported by the evidence. See **State v. Green**, 94-0887, p. 11 (La. 5/22/95), 655 So.2d 272, 280-281. However, a trial court's legal findings are subject to a de novo standard of review. See **State v. Hunt**, 2009-1589, p. 6 (La. 12/1/09), 25 So.3d 746, 751.

Captain Mike Toney of the Ascension Parish Sheriff's Office was the sole witness to testify at the suppression hearing. Captain Toney explained that at some point while he was interviewing one of the other perpetrators, defendant turned himself in to the

police. Upon beginning his interview with defendant, Captain Toney presented him with a waiver-of-rights form, which defendant initialed and signed, indicating his willingness to make a statement. Captain Toney stated that he verbally advised defendant of his **Miranda** rights. Captain Toney explained that he made no promises to defendant, nor did he threaten him, intimidate him, physically harm him, or place him under duress. In his opinion, defendant elected to give his statement freely and voluntarily.

In assessing defendant's behavior, Captain Toney found him to be very cooperative and coherent. He observed that defendant was responsive to questions and that he asked his own questions throughout the interview. Captain Toney also noticed that defendant had an odor of alcohol on his breath, but he did not find any indication that defendant was in an intoxicated state where he could not comprehend the circumstances of the interview.

Captain Toney also discussed the process that he used to interview defendant. On cross-examination, he admitted that he was unsure how long defendant had been at the police station before he began the interview around 12:30 a.m. on March 7, 2012. He explained that he administered the waiver-of-rights form to defendant immediately upon commencing the interview, but he did not start recording the interview until approximately one hour later. According to Captain Toney, it was Ascension Parish Sheriff's Office procedure to conduct suspect interviews in this manner.

In conjunction with Captain Toney's testimony, the State introduced a copy of the recorded portion of defendant's interview. In the recording, defendant acknowledges that he is being recorded, and he continues to answer Captain Toney's questions. Captain Toney also readvised defendant of his **Miranda** rights at the time of this recorded statement. Throughout the interview, as Captain Toney explained, defendant seems relatively coherent and responsive, and does not appear to suffer from any obvious effects of intoxication. On several occasions, Captain Toney had to ask defendant to speak louder, but defendant was never threatened, forced, or coerced to give his statement. Defendant never requested an attorney or asked to stop the interview.

In its written ruling denying the motion to suppress, the trial court found that "the prerequisites of **Miranda** have been satisfied," that defendant was read and understood his rights, and that he understood the consequences of giving up those rights. Defendant now argues that the trial court erred in considering only whether the "prerequisites" of **Miranda** were satisfied and in finding that the State met its burden of proving the admissibility of defendant's statements.

Under the circumstances of this case, it is clear that defendant was subject to custodial interrogation. As a result of the warrant for his arrest, defendant was not free to leave. In evaluating the evidence presented at the hearing, it is clear that the State met its burden of proving that defendant was advised of his **Miranda** rights, as evidenced by Captain Toney's testimony and the properly executed waiver-of-rights form.

As to the free and voluntary nature of defendant's statements, we note that on the waiver-of-rights form, defendant indicated his willingness to answer questions. At no point during the recorded interview did defendant request an attorney or ask that the interview be stopped. Captain Toney testified that he made no promises to defendant, nor did he threaten him, intimidate him, physically harm him, or place him under duress. This testimony directly contradicts defendant's argument on appeal that Captain Toney "was ... demanding and cajoling [defendant] to answer questions." While only about one-third of defendant's total interview was recorded, he has not alleged that anything untoward happened during the unrecorded period. Further, while defendant waited for an unknown time before his interview began, it does not appear that he ever requested a break. Lastly, although Captain Toney smelled an odor of alcohol on defendant, he did not observe defendant to be intoxicated. Indeed, Captain Toney found defendant to be coherent and responsive. Thus, the State presented abundant, uncontroverted testimony that the defendant's statements were freely and voluntarily made, without the influence of fear, duress, intimidation, menaces, threats, inducements, or promises.



After carefully reviewing the testimony adduced at the suppression hearing and defendant's recorded statements, in light of the entire record, we find that the State met its burden of proving that defendant gave a free and voluntary confession. Defendant was made aware of his **Miranda** rights at the beginning of his custodial interrogation. He elected to answer Captain Toney's questions, and he did so in a coherent and responsive way. While defendant was held for some time before his interview, he did not express any apparent discomfort or fatigue. Taken together, the totality of the interview clearly conveys that defendant's statements were not made because of any promises, coercion, duress, or threats. The trial court did not err or abuse its discretion in denying defendant's motion to suppress.

This assignment of error is without merit.

**CONVICTIONS AND SENTENCES AFFIRMED.**