STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v ANTOINE MARIO MCKINNEY, Defendant-Appellant.	FOR PUBLICATION May 3, 2002 9:10 a.m. No. 228530 Wayne Circuit Court LC No. 99-010892 Updated Copy August 16, 2002

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

METER, J.

Defendant appeals as of right from his convictions following a bench trial 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. The trial court sentenced him to two years' imprisonment for the felony-firearm conviction and to seventeen to forty years' imprisonment for each of the remaining convictions. We affirm.

This case involves the fatal shooting of Zawadie Walker and the nonfatal shooting of Tamika Beard in Detroit during the early morning hours of October 4, 1999. On October 7, 1999, defendant, while in police custody, gave two inculpatory statements in which he admitted shooting the victims. Defendant's sole argument on appeal is that evidence of these inculpatory statements[1] should have been suppressed at trial because he made the statements after being detained by police, without a warrant, for more than forty-eight hours.[2]

"We review de novo a trial court's ultimate decision on a motion to suppress." *People v Beuschlein*, 245 Mich App 744, 748; 630 NW2d 921 (2001). We review the trial court's underlying findings of fact, however, for clear error. *Id*. "A finding of fact is clearly erroneous

[1] At certain points in his appellate brief, defendant refers to his inculpatory "statement" made on October 7, 1999. However, because defendant in fact made two inculpatory statements on October 7, we presume he is contending that both statements should have been suppressed.

[2] Defendant entered police custody on the evening of October 4, 1999, gave his inculpatory statements midday on October 7, and was arraigned on October 9.

if it leaves us with a definite and firm conviction that the trial court made a mistake." *People v Manning*, 243 Mich App 615, 620; 624 NW2d 746 (2000).

Contrary to the dissent's conclusion, this case is easily resolved by relying on *Manning, supra,* in which the defendant made an argument similar to that raised in the instant case. The *Manning* Court held that although a delay of more than forty-eight hours between arrest and arraignment is presumptively unreasonable, such a delay does not automatically require the suppression of statements obtained during the detention period. *Id*. at 631, 643. The Court stated the following with regard to the issue of suppression:

> [A]utomatic exclusion is not required . . . . The proper analysis is voluntariness under the *Cipriano* [*People v Cipriano,* 431 Mich 315; 429 NW2d 781 (1988)] factors. The delay of more than eighty hours presumptively violated the Fourth Amendment, but an unnecessary delay does not require automatic suppression of the confession. It is *not* automatic that evidence obtained during a Fourth Amendment violation must be excluded. When a confession was obtained during an unreasonable delay before arraignment, in Michigan the *Cipriano* factors still must be applied. The unreasonable delay is but one factor in that analysis. The longer the delay, the greater the probability that the confession will be held involuntary. At some point, a delay will become so long that it alone is enough to make a confession involuntary.
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> In engaging in the balancing process that *Cipriano* outlines, a trial court is free to give greater or lesser weight to any of the *Cipriano* factors, including delay in arraignment. A trial court cannot, however, give preemptive weight to that one factor . . . . To do so is to adopt a rule of automatic suppression of a confession obtained during the period of delay . . . . [*Manning, supra* at 643 (emphasis in original)].

Accordingly, the issue facing us in the instant case is simply whether the trial court clearly erred in analyzing and applying the *Cipriano* factors. See *id.* at 620. The *Cipriano* Court set forth the following nonexclusive list of factors for use in determining whether a statement is voluntary:

> 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. [*Cipriano, supra* at 334; see also *Manning, supra* at 635.]

Here, in holding that defendant's statements were voluntary, the trial court stated:

> This Court notes that looking at the totality of the circumstances, this case did take a couple of days for the police to sort out. Due to the fact that the defendant made different statements, and due to the fact that the police tried to follow through on the statements that he made through their investigative tactics; and their investigations.
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> I do believe that the police bent over backwards trying to accomodate [sic] this particular defendant.
>
> The defendant was not lacking in food, water or sleep, nor medications. All the statements that he did make, looks as though the police did mirandize him.
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> This Court believes that the statements were given in a voluntary fashion.

We are not left with a definite and firm conviction that the court erred in reaching this conclusion. *Manning, supra* at 620. Indeed, the following evidence supported the trial court's ruling that the statement was voluntary: (1) Detective Andrew Sims' testimony that before he obtained the first incriminating statement from defendant on October 7, defendant read and initialed a document setting forth his constitutional rights, (2) Sims' testimony that defendant did not ask for an attorney, (3) Sims' testimony that he made no threats or promises to defendant, (4) Detective Barbara Simon's testimony that before she obtained the second incriminating statement from defendant, he read out loud his constitutional rights and initialed a document indicating that he had "not been threatened or promised anything" and that he "agree[d] to answer any questions put [to] me or to make a statement," (5) Simon's testimony that she did not make any threats or promises to defendant, (6) Simon's testimony that defendant did not appear to be under the influence of drugs or alcohol, (7) Simon's testimony that defendant did not mention any medical needs that required treatment, and (8) defendant's testimony that he was nineteen years old and had completed eleven years of school at the time he made the statements. Additionally, there was no allegation that defendant had been deprived of food, water, or sleep before making the statements. Under these circumstances, we find that the trial court did not clearly err in concluding that the statements were voluntary and in thus failing to suppress them, despite the fact that *some Cipriano* factors weighed in favor of defendant.[3] See generally *Manning, supra* at 644-645.

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[3] The dissent contends that we are failing to consider the effect of the presumptively unreasonable prearraignment delay in this case. We disagree with this contention. Indeed, the prearraignment delay is *one* factor in our consideration, but enough other factors weigh in favor of voluntariness so that the statements were admissible. As noted earlier, *Manning* states as follows:

> It is *not* automatic that evidence obtained during a Fourth Amendment violation must be excluded. When a confession was obtained during an unreasonable delay before arraignment, in Michigan the *Cipriano* factors still must be applied. The unreasonable delay is but one factor in that analysis. The longer the delay, the greater the probability that the confession will be held

(continued…)

The dissent questions the holding of *Manning*, implying that the *Manning* Court failed to interpret and apply properly the United States Supreme Court's decision in *Riverside Co v McLaughlin*, 500 US 44, 56-57; 111 S Ct 1661; 114 L Ed 2d 49 (1991), in which the Court emphasized that a delay of more than forty-eight hours between arrest and a judicial determination of probable cause is presumptively unreasonable. We disagree with this implication and conclude that *Manning* properly addressed the effect of *Riverside* on existing Michigan law. Moreover, we note that under the Michigan Court Rules, we are bound to follow the rule of law set forth in *Manning.* As stated in MCR 7.215(I)(1), "A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990 . . . ." Under *Manning*, the trial court did not err in admitting defendant's statements.

The dissent further contends that reversal is required here because the challenged statements were the fruit of an illegal arrest. It is true that in *Taylor v Alabama*, 457 US 687, 690; 102 S Ct 2664; 73 L Ed 2d 314 (1982), the United States Supreme Court noted that a confession, even if voluntary, should be excluded from trial if it resulted from a custodial interrogation after an illegal arrest and if intervening events did not serve to break the causal connection between the illegal arrest and the confession. However, defendant *does not make* this "fruit of the poisonous tree" argument on appeal. Indeed, while defendant makes references to the illegality of his longer-than-forty-eight-hour detention, he does not develop a reasoned argument or cite any case law regarding the alleged *initial* illegality of his arrest and the resulting consequences under the doctrine set forth in *Taylor*. Nor did defendant make a reasoned argument or cite relevant case law below with regard to this issue.[4] Instead, defendant focused below and focuses on appeal solely on the delay between his arrest and arraignment and contends that this delay mandated the exclusion of his inculpatory statements. We do not agree with the dissent's desire to resolve this case on the basis of an issue not raised by the appellant.

Moreover, we do not agree with the dissent's desire to make essentially a factual finding regarding the illegality of the initial arrest. Contrary to the dissent's representation, the illegality of the initial arrest was not conclusively established below. The primary investigating officer, James Fisher, testified that after defendant came to the police station on the evening of October 4, 1999, he gave a statement regarding the shootings. On the basis of this statement, Fisher interviewed additional people, whose statements conflicted with defendant's. Fisher testified that

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(…continued)

> involuntary. At some point, a delay will become so long that it alone is enough to make a confession involuntary. [*Manning, supra* at 643 (emphasis in original).]

Here, we conclude that the delay was not so long that "it alone [was] enough to make [the] confession[s] involuntary," see *id.*, and enough *Cipriano* factors weighed in favor of admissibility so that the statements were admissible.

[4] Because defendant did not make this argument below, the trial court did not rule on it. Instead, the court focused solely on the prearraignment delay and the issue of voluntariness.

at this point defendant was arrested. It is not clear from this testimony that probable cause was lacking for the initial arrest. The dissent correctly notes Fisher's statement that at a point after defendant was arrested, Fisher did not believe he had enough information to request formally a warrant. We do not believe, however, that this statement should be equated with a conclusive admission that probable cause was lacking. Indeed, Fisher may have concluded that while he did have probable cause to arrest defendant, he preferred to conduct an additional investigation before formally presenting his evidence to the magistrate. Accordingly, by stating that defendant was illegally arrested, the dissent is essentially making a factual finding, and it is not the role of appellate courts to make factual findings. At any rate, because defendant does not raise the issue of an initial illegal arrest on appeal, we need not resolve the issue and can rest our holding today on this Court's opinion in *Manning, supra* at 643.

Affirmed.

Zahra, J., concurred.

/s/ Patrick M. Meter
/s/ Brian K. Zahra