

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.

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

I respectfully dissent. I would hold that the trial court erred in denying defendant's motion to suppress his inculpatory statements because (1) they were the product of an illegal arrest and (2) they were the product of an unreasonable five-day delay between the arrest and the arraignment.

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 "[s]omething 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 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

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).

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.

On appeal, defendant argues that he was illegally detained without a warrant for more than forty-eight hours while police officers gathered witnesses' statements and interrogated defendant several times, finally obtaining a confession (in two statements) on October 7, 1999. Initially, I would find that defendant was illegally arrested as argued by defense counsel at the *Walker* hearing.³ The evidence adduced at the *Walker* hearing shows that defendant presented himself at the police station with his parents at about 8:30 p.m. on October 4, 1999. Defendant believed that he would give a statement and then be released. Defendant did give a statement, denying that he was involved in the shooting, but he was not released. Instead, the police kept him confined at the station, and Investigator Fisher stated that defendant was not free to leave after giving the statement because the police were still investigating the homicide and that defendant was under arrest. Investigator Fisher also admitted that there was not enough information to request an arrest warrant for defendant at that time, meaning that the police did not have probable cause to arrest defendant.

It is without question that defendant's arrest was unconstitutional because it was made without a warrant and was not based on probable cause.⁴ The United States Supreme Court, in a

³ Defense counsel's specific argument was that defendant was arrested for an investigation, which is illegal on the basis of current case law. This argument was properly presented to the trial court and, thus, preserved. The majority opinion criticizes the argument as being not reasoned, but this Court has affirmed criminal convictions on many occasions without the benefit of a prosecutor's brief. We do not need a dissertation of the law to understand the issue.

⁴ The majority opinion criticizes my decision to address the legality of the arrest, contending that this is a factual determination that was not conclusively established below. Investigator Fisher's
(continued...)

trilogy of cases, has held that confessions obtained from suspects arrested without probable cause and later interrogated while in custody had to be suppressed, even if "voluntary," unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is "sufficiently an act of free will to purge the primary taint." *Taylor v Alabama*, 457 US 687, 689-690; 102 S Ct 2664; 73 L Ed 2d 314 (1982); *Dunaway v New York*, 442 US 200, 217; 99 S Ct 2248; 60 L Ed 2d 824 (1979); *Brown v Illinois*, 422 US 590, 602; 95 S Ct 2254; 45 L Ed 2d 416 (1975). The Supreme Court identified three factors that should be considered in determining whether a confession has been purged of the taint of the illegal arrest: (1) the temporal proximity of the arrest and the confession, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct. *Taylor*, supra at 690. The prosecution deals with this "fruit-of-the-poisonous-tree" doctrine at some length in its appellate brief. I would find, however, that this case requires more than just a consideration regarding whether the confession is merely voluntary and that the Fourth Amendment issue is not being adequately addressed by the majority.

Here, defendant was arrested without a warrant and without probable cause during the late evening hours of October 4, 1999. He was interrogated on October 4, 1999, interrogated again about twenty-four hours later on October 5, 1999, underwent a polygraph examination in the morning of October 7, 1999, and was again interrogated in the late afternoon of October 7, 1999, at which time the police then filed their warrant request. After the first interrogation on October 4, the police took defendant to his neighborhood for him to point out where B. B. could be found. Moreover, Investigator Fisher fully acknowledged that defendant was being held in the police station so that the police could further investigate the case. Under these circumstances, it cannot be said that the confessions given on October 7 are sufficiently an act of free will to purge the primary taint of the illegal arrest. There are simply no intervening events that can be said to break the causal connection between the illegal arrest and the confessions. Given the delay of three days between the arrest and the confessions, I would think that the pressure on defendant would be even greater where the defendant is being kept in a police station jail cell. Further, I find the police conduct to be particularly egregious in this case. The lead officer, Investigator Fisher, acknowledged that the police did not have probable cause to obtain an arrest warrant when defendant was arrested. It should hardly be a revelation to the police that it is illegal to arrest a suspect for investigation of a crime. *Brown*, supra at 602, 605; *People v Davenport*, 99 Mich App 687, 692; 299 NW2d 368 (1980); *People v Martin*, 94 Mich App 649, 653; 290 NW2d 48 (1980).

Accordingly, I would rule that the confessions obtained on October 7, 1999, must be suppressed because they were obtained as a result of an illegal arrest. There are no attenuating circumstances in this case breaking the causal connection between the illegal arrest and the confessions.

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testimony in this regard was clear and unequivocal that the police did not have probable cause at the time of the arrest to seek an arrest warrant. Moreover, the majority engages in its own factual finding regarding the voluntariness of the confessions when noting certain factors supporting voluntariness that were not found by the trial court.

Moreover, even if the question of the illegal arrest is not addressed, I would still rule that defendant's confessions must be suppressed because of the delay between the arrest and the arraignment. In *People v Cipriano*, 431 Mich 315, 333; 429 NW2d 781 (1988), our Supreme Court held that unnecessary delay between arrest and arraignment is only one factor to be taken into account in evaluating the voluntariness of a confession obtained during the period of delay. Instead, 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." *Id.* at 334. Thus, unnecessary delay is one factor to consider, and the focus should be not only on the length of the delay, but on what occurred during the delay and its effect on the accused. *Id.* at 334-335.

After *Cipriano* was decided, the United States Supreme Court decided *Riverside Co v McLaughlin*, 500 US 44; 111 S Ct 1661; 114 L Ed 2d 49 (1991), where the Supreme Court defined the Fourth Amendment's requirement of a "prompt" judicial determination of probable cause as a prerequisite to an extended pretrial detention following an arrest without a warrant as having to be made within forty-eight hours of arrest. Specifically, the Supreme Court stated:

[W]e believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein* [*v Pugh*, 420 US 103; 95 S Ct 854; 43 L Ed 2d 54 (1975)]. For this reason, such jurisdictions will be immune from systemic challenges.

This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably. Examples of unreasonable delay are *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. In evaluating whether the delay in a particular case is unreasonable, however, courts must allow a substantial degree of flexibility. Courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest, and other practical realities.

Where an arrested individual does not receive a probable cause determination within 48 hours, the calculus changes. In such a case, the arrested individual does not bear the burden of proving an unreasonable delay. Rather, the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance. The fact that in a particular case it may take longer than 48 hours to consolidate pretrial proceedings does not qualify as an extraordinary circumstance. Nor, for that matter, do intervening weekends. A jurisdiction that chooses to offer combined proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest. [*Riverside, supra* at 56-57 (emphasis added).]

The effect of the holding in *Riverside* on *Cipriano* was addressed by this Court in *People v Manning*, 243 Mich App 615; 624 NW2d 746 (2000). This Court in *Manning*, *id.* at 638, held that *Riverside* does not supplant *Cipriano*, although a "sufficiently long delay in itself will be enough to make a confession involuntary under *Cipriano*." This Court further cautioned that "[u]nder the balancing analysis of *Cipriano*, officers obtaining confessions do run a greater risk of having them suppressed as involuntary when the arraignment is unnecessarily delayed." *Id.* at 641. As noted in the majority's opinion, this Court in *Manning* ultimately held that the proper analysis is voluntariness as set forth in *Cipriano*, with unreasonable delay being but one factor in that analysis. *Id.* at 643.

I am not convinced that this Court in *Manning* gave *Riverside* its due effect on *Cipriano*. In *Gerstein*, *supra* at 125, the United States Supreme Court held that the Fourth Amendment requires a state to "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." *Riverside* defined "promptly after arrest" as meaning that judicial determinations of probable cause must occur within forty-eight hours of arrest. Consequently, the holding in *Riverside* is grounded in the Fourth Amendment, and indeed, the Supreme Court clearly stated that the Fourth Amendment *requires* a judicial determination of probable cause as a prerequisite to a detention following arrest.⁵ While a Fourth Amendment violation need not require automatic suppression, the analysis focuses on whether the evidence was obtained by exploitation of the defendant's Fourth Amendment rights, in other words, whether the evidence is the product of the illegal governmental activity. See *New York v Harris*, 495 US 14, 19; 110 S Ct 1640; 109 L Ed 2d 13 (1990).

In this regard, it bears noting that our Supreme Court in *Cipriano* went to some lengths to explain that two of the defendants involved had been arrested on the basis of probable cause. See *Cipriano*, *supra* at 338, 342-343. Thus, the initial arrests were legal, although not made with warrants. Perhaps it is for this reason that our Supreme Court in *Cipriano* did not have to address any Fourth Amendment violation, or at least the interplay between a Fourth Amendment violation and a Fifth Amendment violation.

In the present case, defendant was arrested and held in police detention for over one hundred hours before he was arraigned. Under *Riverside*, *supra* at 57, this delay is presumptively unreasonable and the government bears the burden of demonstrating the existence of a bona fide emergency or other extraordinary circumstance. The government can do and has done neither here. There is absolutely nothing in the record suggesting that defendant was held for more than one hundred hours because of any emergency or extraordinary circumstance. Rather, defendant was held so that the police could continue to investigate the crime. Moreover, by focusing exclusively on whether the statements to the police were voluntary, the majority opinion does not address the *Riverside* violation. Even the *Manning* Court acknowledged that the "longer the delay, the greater the probability that the confession will be held involuntary" and a long enough delay alone can make a confession involuntary. *Manning*, *supra* at 643. Indeed,

⁵ Our Supreme Court's assertion in *Cipriano*, *supra* at 332, that "the prompt-arraignment requirement was never elevated by the United States Supreme Court to the level of a constitutional right" does not appear to be correct in light of *Gerstein* and *Riverside*.

to not hold otherwise would allow the police to hold an accused indefinitely before an arraignment, but allow an otherwise "voluntary" confession to be admissible at trial.

Therefore, there being a Fourth Amendment violation, I would proceed under the *Brown-Dunaway-Taylor* cases and determine whether there were intervening events breaking the causal connection between the unreasonable prearraignment delay and the confessions so that it can be said that the confessions are an act of free will to purge the primary taint.⁶ For the reasons set forth under the illegal arrest analysis, I would hold that there were no intervening events breaking the causal connection between the unreasonable prearraignment delay and the confessions. Moreover, with respect to the unreasonable prearraignment delay issue, I would note that the delay in securing the determination of probable cause allowed the police to gather additional evidence against defendant precisely so that an arrest warrant could be obtained. In other words, the delay certainly has the appearance of being used as a tool to extract defendant's confessions, which were then used to secure his arrest warrant. Once again, because there are no attenuating circumstances breaking the causal chain between the unreasonable prearraignment delay and the confessions, the confessions must be suppressed.

The error in admitting the confessions is not harmless beyond a reasonable doubt. *Arizona v Fulminante*, 499 US 279, 307-308; 111 S Ct 1246; 113 L Ed 2d 302 (1991); *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994). The confessions were really the only evidence actually linking defendant to the shooting. Indeed, the surviving victim testified that B. B. shot the gun and that she did not see defendant. Respress' testimony provided a motive for defendant to have shot Walker, but Respress was apparently not an eyewitness to the shooting and did not identify defendant as being the shooter. Further, the forensic evidence showed that there were two different guns involved. The trial court as well used defendant's confessions when rendering its findings and verdict. Consequently, the prosecutor cannot prove beyond a reasonable doubt that the error in admitting defendant's confessions did not contribute to the verdict. *Id.* at 406, quoting *Chapman v California*, 386 US 18, 23; 87 S Ct 824; 17 L Ed 2d 705 (1967).

Accordingly, I would reverse the trial court's ruling that denied defendant's motion to suppress his confessions. The confessions were the product of an illegal arrest and an unreasonable prearraignment delay, and there are no attenuating circumstances breaking the chain between these Fourth Amendment violations and the confessions. I would order that defendant's confessions be suppressed and remand for a new trial.

/s/ Kathleen Jansen

⁶ I would note that the United States Supreme Court in *Taylor, supra* at 690, emphasized that in "*Brown* and *Dunaway*, this Court firmly established that the fact that the confession may be 'voluntary' for purposes of the Fifth Amendment, in the sense that *Miranda* warnings were given and understood, is not by itself sufficient to purge the taint of the illegal arrest." Similarly, I would be cautious about placing too much emphasis on a finding that a statement is voluntary if it is the product of an unreasonable prearraignment delay.