IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
October 28, 2003 Session

STATE OF TENNESSEE v. TERRY STEVEN BROOKSHIRE

Appeal from the Circuit Court for Blount County
No. C-12670 D. Kelly Thomas, Jr., Judge

No. E2002-02820-CCA-R3-CD
March 8, 2004

The defendant, Terry Steven Brookshire, was convicted of aggravated robbery, a Class B felony. See Tenn. Code Ann. § 39-13-402. The trial court ordered a sentence of eight years. In this appeal of right, he contends that the trial court erred by admitting his videotaped statement, in which he remained silent in response to the detective's last questions, in its entirety. The judgment of the trial court is affirmed.

Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed

GARY R. WADE, P.J., delivered the opinion of the court, in which JOSEPH M. TIPTON and ALAN E. GLENN, JJ., joined.

Julie A. Rice, Knoxville, Tennessee (on appeal); and Joseph Costner and Andy Long, Maryville, Tennessee (at trial), for the appellant, Terry Steven Brookshire.

Paul G. Summers, Attorney General & Reporter; Braden H. Boucek, Assistant Attorney General; and William Reed, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On March 27, 2000, the victim, Barbara Campbell, was working the night shift at a Ken-Jo convenience market in Maryville. At approximately 2:00 a.m., a man entered the market, displayed a pistol, and demanded money. Ms. Campbell gave the robber all the money that she could find and he left the store. A video surveillance camera recorded the events.

Detective Carlos Hess, Jr., of the Maryville Police Department, interviewed the defendant just over an hour later. In a videotaped statement, the defendant confessed that he had purchased the pistol (a BB gun) used in the robbery earlier that day. He stated that he and his cousin spent some time shooting the gun before he dared his cousin, Michael Alexander, to rob the Ken-Jo. The defendant admitted that he drove his cousin to the convenience market and then waited in the car

while his cousin committed the offense. He acknowledged that he kept $46 of the $91 in proceeds and that the remainder went to his cousin.

The defendant was charged with aggravated robbery and convicted by a jury of that offense. The trial court imposed a sentence of eight years in the Department of Correction. In this appeal of right, the defendant asserts that the trial court committed constitutional error by failing to redact the last portion of his videotaped statement, wherein he failed to respond to certain of the questions asked by the investigating detective. The state contends that the defendant's videotaped statement was knowing and voluntary and that it was properly admitted in its entirety.

The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V; see also Malloy v. Hogan, 378 U.S. 1, 6 (1964) (holding that the Fifth Amendment's protection against compulsory self-incrimination is applicable to the states through the Fourteenth Amendment). Article I, Section 9 of the Tennessee Constitution provides that "in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself." Tenn. Const. art. I, § 9. "The significant difference between these two provisions is that the test of voluntariness for confessions under Article I, § 9 is broader and more protective of individual rights than the test of voluntariness under the Fifth Amendment." State v. Crump, 834 S.W.2d 265, 268 (Tenn. 1992).

Generally, one must affirmatively invoke these constitutional protections. An exception arises, however, when a government agent makes a custodial interrogation. Statements made during the course of a custodial police interrogation are inadmissible at trial unless the state establishes that the defendant was advised of his right to remain silent and his right to counsel and that the defendant then waived those rights. Miranda v. Arizona, 384 U.S. 436, 471-75 (1966); see also Dickerson v. United States, 530 U.S. 428, 444 (2000); Stansbury v. California, 511 U.S. 318, 322 (1994). A defendant's rights to counsel and against self-incrimination may be waived as long as the waiver is made voluntarily, knowingly, and intelligently. Miranda, 384 U.S. at 478; State v. Middlebrooks, 840 S.W.2d 317, 326 (Tenn. 1992). In order to effect a waiver, the accused must be adequately apprised of his right to remain silent and the consequence of deciding to abandon the right. State v. Stephenson, 878 S.W.2d 530, 544-45 (Tenn. 1994). In determining whether a waiver was voluntary and knowing, the totality of the circumstances must be examined. State v. Bush, 942 S.W.2d 489, 500 (Tenn. 1997). If the "greater weight" of the evidence supports the court's ruling, it will be upheld. Id. This court must conduct a de novo review of the trial court's application of law to fact. State v. Bridges, 963 S.W.2d 487 (Tenn. 1997); State v. Yeargan, 958 S.W.2d 626 (Tenn. 1997).

The trial court's determination with regard to the voluntariness and, consequently, the admissibility of the defendant's statements is binding on appeal unless the evidence preponderates against it. State v. Goforth, 678 S.W.2d 477, 479 (Tenn. Crim. App. 1984).

In this case, the defendant filed a pretrial motion to suppress evidence stemming from a stop of his vehicle made prior to the robbery, i.e., the identity of his cousin, and also sought to suppress the items obtained by the police in a warrantless entry onto his residential property after the robbery.

After a hearing, the trial court denied the motion. The only issue in this appeal, however, is whether the trial court should have redacted portions of the statement the defendant made to the police shortly after the robbery.

Officer John Foley of the Maryville Police Department, who arrested the defendant, found a BB gun in the defendant's vehicle and the proceeds of the robbery under couches where the defendant and his cousin slept. He stated that he informed the defendant of his Miranda rights before transporting him to the police station.

After confirming with the defendant that he had received Miranda warnings from Officer Foley, Detective Carlos Hess advised the defendant of his Miranda rights a second time. The defendant executed a signed waiver of his rights and provided police with a statement. The signed waiver form appears in the record. The defendant's videotaped statement includes footage of Detective Hess providing Miranda warnings to the defendant and of the defendant executing the waiver.

The defendant, a high school graduate, acknowledged that he had been advised of his Miranda rights twice on the morning of his arrest. He agreed that he was generally familiar with the requirements of Miranda and acknowledged that he had been offered an attorney and understood that he did not have to answer questions by the police. While claiming that he was intimidated by the officers "because [he had] never been in trouble with the law," the defendant nevertheless described the officers as courteous and non-threatening and agreed that his videotaped statement was made "freely, knowingly, and voluntarily."

In ruling on the motion to suppress, the trial court determined that the defendant "[had given] his consent to the statement," implicitly finding that the defendant had knowingly and voluntarily waived his right to remain silent. Here, however, the defendant claims that in response to the detective's last questions, he had invoked his right to remain silent and that the jury therefore should not have been permitted to view that portion of the videotape.

Both the videotape and the transcript of the interrogation establish that the defendant provided police with background information and then confessed to the robbery. Specifically, the defendant admitted purchasing the BB gun at Wal-Mart earlier in the day, being pulled over by an officer in a cruiser, and then waiting in the car while his cousin robbed the Ken-Jo market. At the conclusion of the interview, Detective Hess asked as follows:

> Anything else you would like to add to this interview? It was pretty short and sweet but I guess it happened in a span of what, less than 60 seconds, he wasn't in there that long was he, maybe a minute and a half. Made $91.00 and you split it, so you reaped some benefits of it and you knew what was going on. You understand in the state of Tennessee that's the same as you walking in there and putting that gun to her? Do you think about that, well it's the same as looking at the same charge, aggravated robbery, class B felony there's only one other one you can go to and that's

> a class A, murder and rape a serious defense no less the DA may want to charge you contributing to the delinquency of a minor. Have anything you want to say?

Prior to trial, the defendant sought redaction of certain portions of the tape. The trial court ordered redaction of the videotaped footage of the defendant being led into the interview room in handcuffs. Although the state was agreeable to editing portions of the detective's last questions, the trial court ruled that they were admissible in their entirety and so was the defendant's failure to respond:

> I don't think that's objectionable. I think those are clearly statements made by an officer who's trying to – who is interrogating this man. The purpose of the interrogation is obvious to the [j]ury. And I think it would be misleading if any of that was taken out, because then the [j]ury wouldn't know if he should have responded or shouldn't and what he was responding to and what he wasn't. And I think the only way to give the [j]ury the fair view of that is to let them hear the whole thing. And then you all can argue to them about what you think that means and they can decide.

The record reflects that after the videotape was played, the trial court gave the jury a curative instruction to the effect that it was to ignore the officer's statements regarding the law and take its instruction on the law only from the trial court.

In State v. Cauthern, 778 S.W.2d 39 (Tenn. 1989), a death penalty case, the defendant initially waived his right to remain silent, signing a written waiver, and gave police an audiotaped statement. On what was page 22 of the written transcript of the statement, when police asked whether he would tell them "just exactly what happened," the defendant replied, "no," and attempted to turn off the recorder. A hidden recorder used by the police preserved the rest of the interview. The trial court failed to suppress that portion of the statement and on appeal, our high court held that it was error:

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been invoked."

778 S.W.2d at 46 (quoting Miranda, 384 U.S. at 473-74). Our supreme court held that the error was harmless as to the convictions, but reversed and remanded for a new sentencing hearing.

In this case, the defendant, who is holding his head in his hands at the end of the interview, did not provide a verbal response to the officer's last questions, but he did shake his head at least twice in what appears to have been a negative response. Under those circumstances, the trial court's reasoning that it was within the jury's province to interpret the nature of the defendant's response was sound. More importantly, however, there is no indication that the defendant's lack of a verbal response was an invocation of his constitutional right to remain silent. Here, the defendant effectively waived his Miranda rights at the initiation of the statement. The videotape suggests that by the end of the interrogation, the defendant was tired and perhaps ashamed. Significantly, the defendant does not assert that he affirmatively demonstrated to the police an intent to exercise his right to remain silent. Although the interviewing officer's statements regarding the law were not proper for jury consideration, they were in context and followed by a curative instruction from the trial court. Our law provides that the jury is presumed to have followed those instructions. See State v. Smith, 893 S.W.2d 908, 914 (Tenn. 1994). Under these circumstances, it is our conclusion that the jury was properly allowed to view the defendant's videotaped statement in its entirety.

Accordingly, the judgment of the trial court is affirmed.

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GARY R. WADE, PRESIDING JUDGE