IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs September 26, 2006

STATE OF TENNESSEE v. MARIO ANTWAN FULGHAM

Direct Appeal from the Criminal Court for Hamilton County
No. 244717 Jon Kerry Blackwood, Judge

No. E2005-02346-CCA-R3-CD - Filed December 18, 2006

The defendant, Mario Antwan Fulgham, was convicted of facilitation of first degree murder, attempted especially aggravated robbery, and attempted aggravated robbery–Class A, B, and C felonies respectively–and sentenced as a Range I, standard offender to concurrent terms of twenty-four, ten, and five years in the Department of Correction. On appeal, he argues that the trial court erred by denying his motion to suppress statements he made to law enforcement and that the State improperly quoted a Biblical scripture in its closing argument. Following our review, we affirm the judgments of the trial court but remand for entry of corrected judgments to reflect that the defendant was convicted by a jury rather than by pleading guilty, as the judgments now reflect.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed and Remanded for Entry of Corrected Judgments

ALAN E. GLENN, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and J.C. MCLIN, JJ., joined.

Mike A. Little, Chattanooga, Tennessee, for the appellant, Mario Antwan Fulgham.

Paul G. Summers, Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; William H. Cox, III, District Attorney General; and Neal Pinkston and David Denny, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

FACTS

At approximately 12:00 a.m. on July 31, 2002, Morris Talley was robbed at gunpoint near Chattanooga's East Lake community. In the parking lot of a nearby Citgo gas station later that morning, Brian Scott Hall was shot and killed while using a pay phone. On June 18, 2003, a grand jury indicted the defendant and two codefendants, James Leroy Westbrook and Quincy Londale

Scott, for first degree murder, especially aggravated robbery, and aggravated robbery based upon these two incidents.

Suppression Hearing

The defendant filed a motion to suppress, and a pretrial hearing was held on this motion. At the hearing, Detective Jason Irvin of the Chattanooga Police Department acknowledged that at approximately 1:00 p.m. on August 13, 2002, he and two other officers[1] "picked up" the defendant at a house on Wheeler Avenue, where he lived with a woman named Dana. Irvin said, "We all came to a decision it was time to pick [the defendant] up, after" taking a statement from Westbrook. Irvin stated that when they arrived, the two other officers went to the front door while he went around back until "they could get someone to the door." He confirmed that they entered the defendant's bedroom, where he was in bed, and told him they "needed to question him on an incident he was involved in and told him he needed to come and speak to us at the service center" and that the defendant agreed to go. He testified that the defendant did not resist, but "[a]t that point, we were going to detain him . . . [and] we would have told him he was coming if he refused to go."

Detective Irvin stated that the defendant was not handcuffed when they drove him to the police station in an unmarked car and that he "sat in the front seat with the driver." Upon their arrival at the station, the defendant sat in Detective Thompson's office for a while where Irvin, Thompson, and Investigator Freeman "were advising him, you know, we needed to talk to him about several incidents that he was involved in and he needed to think about whether he was going to talk to us at that time." On cross-examination, Irvin acknowledged that the defendant was in Thompson's office for approximately one hour. Asked if during that hour they encouraged the defendant to talk, Irvin said, "I wouldn't say encourage[d] him to talk, we just told him what he was there for." Irvin said he believed they told the defendant that Westbrook had already given a statement. Irvin also confirmed that no one read the defendant his Miranda rights before he was placed in Thompson's office and that, in his opinion, the defendant was not free to leave while he was at the police station.

Dana Humphrey testified that on August 13, 2002, the defendant was "[i]n the bed asleep" when the police arrived at her apartment on Wheeler Avenue. Humphrey said an officer told the defendant to get up, handed him his clothes, and "told him he had to go with them for questioning." She also testified that she read the defendant's mail to him because he had trouble reading and that he was taking several medications.

The defendant testified that he "felt [he] had to go" with the officers when they came to Humphrey's apartment. He said that, at the police station, he "went to a detective's office where several other detectives were at, sat on a couch and they asked me a whole bunch of questions" about what happened the night of the murder. He testified that "[t]hey told me I might as well tell them because Westbrook already told them what happened. They was saying I really ain't involved, that

[1] Investigator Thompson and Officer Curtis Green accompanied Irvin.

they know I stayed in the car and I ain't [sic] had no weapon and all this type of stuff." Prior to this, he said that no one had read him his rights.

The defendant acknowledged that at one point he was moved to another room, where Detectives Irvin and Phillips took his statement, but said that beforehand, no one read him his rights or had him sign a waiver. He said that afterwards, another detective came in and told him, "Sign this paper and you're free to go home." The defendant acknowledged his signature on a waiver of rights form dated August 13, 2002, at 2:18 p.m. but denied that he had written the time on the form.

Detective Bill Phillips testified that he read the defendant his rights and that the defendant signed a waiver. Phillips confirmed that they began tape-recording the defendant's statement at 2:20 p.m., two minutes after he signed the waiver, and that the defendant was not arrested at that time.

At the close of the hearing, the trial court denied the defendant's motion to suppress his statement, ruling that at the time he gave the statement he had not been arrested, but rather "it was an investigative detention, although [the defendant] felt like his freedom was restricted." In reaching this determination, the trial court relied on the fact that the defendant had not been handcuffed when he was transported to the police station and that he rode in the front seat of the car. The trial court also concluded that the defendant's statement was the product of a custodial interrogation.

Trial

At the defendant's trial, Latara Smith testified that she was Westbrook's former girlfriend. She said that around 10:00 p.m on July 30, 2002, she went to the house of her sister, Dana Humphrey, who was the defendant's girlfriend. The defendant lived at Humphrey's house and was there that night. She stated that Westbrook and Scott arrived later and that Scott "went around the corner and got another car," which she described as "a little red four-door car" with a front license plate bearing the name "Tara." The three men then left and, when they returned, the defendant retrieved "a long gun [with] a clip that looked like a C" from underneath her sister's couch before they left around midnight for the second time. Smith confirmed that the gun looked like State's exhibit 18, a Romarm WASR-10 7.62x39 millimeter assault rifle, which is similar to an "AK-47."

Smith said that the defendant returned home at "the time the news would come on, about four, maybe five [a.m.]" and described his demeanor at that time:

> Once he came in the house, he was all shaky and he would go backwards and forth to the window and to the door saying he did it but he didn't do it, he didn't mean to do it. And he took medication at the time and he took three of his asthma pumps. And I have always remembered that. He took a little blue pill last.

Smith said that Westbrook and Scott also returned to the house with other people about 5:30 a.m. She stated that Westbrook and Scott acted nervous, but when the news came on showing "yellow tape around a telephone booth" that was blocked off, the defendant and Scott "busted out laughing."

She said they left later that day and stayed in hotel rooms for two weeks, and, when they returned home, the three tried to dispose of a rifle and a handgun in the sewer.

Katara "Tara" Holloway testified that around 10:00 p.m. on July 30, 2002, Scott came to her apartment in the Woodlawn Apartment Complex, and she loaned him her red, 1992 Nissan Stanza. The defendant, rather than Scott, returned her car keys the next morning.

Morris Talley testified that around midnight on July 31, 2002, he was standing on the corner near his home in the East Lake community when "a red car with two people in the backseat, one person driving, pulled up and had a mask on and jumped out. Two people in the backseat jumped out with two guns, told me give them the money." He said he hesitated, and one of the men fired a shot at his left leg before he threw his money on the ground. The men then took the money, ran to the red car, and "went back up East 26th Street."

Bernice Hudson, a friend of the second victim, Brian Hall, testified that around midnight on July 31, 2002, she saw Hall at Club Paradise on East 23rd Street. She told Hall to call her later, which he did at 2:00 a.m. just as she arrived home. She stated that Hall told her to "[h]old on," and then she heard someone say, "What's up, Cuzz?" and, after a minute of silence, "Turn your bitch ass over." Hudson said she stayed on the line for two or three minutes but could only hear the phone "swaying back and forth." She called 9-1-1 but could not tell the operator Hall's location.

Investigator James Tate of the Chattanooga Police Department testified that, during the early morning hours of July 31, 2002, he was dispatched to the Citgo gas station at the corner of Hickory and 23rd Streets where he found Hall's body facedown in the parking lot.

Sergeant Darrell Whitfield, the officer in charge of the crime scene unit, testified that the physical evidence recovered from the Citgo parking lot included a shell casing. Whitfield said that, soon after leaving that crime scene, he was called to another scene close by "where additional evidence that was related" to Hall's shooting had been discovered in a vacant lot. Another shell casing was recovered there. Soon after processing that scene, Whitfield was dispatched to the Woodlawn Apartments where "a possible suspect vehicle" had been located. There, he photographed a red Nissan Stanza.

The county medical examiner, Dr. Frank King, testified that a bullet passed through Hall's spine area, perforating his aorta and colon, which would have paralyzed him before causing his death in as quickly as thirty seconds.[2] King opined that the shooter would have been standing behind Hall.

Agent Robert Daniel Royse of the Tennessee Bureau of Investigation's Forensic Services Division was accepted as an expert in firearms identification and testified that the shell casings recovered in the Citgo parking lot and the vacant lot were "Russian 7.62x39 millimeter cartridge

[2] King also testified that Hall's blood-alcohol content was "0.256 gram percent alcohol," meaning he had consumed fourteen or fifteen drinks in the hour and a half before his death.

cases" and that both cartridges "had in fact been fired in the same rifle." Royse informed that "[t]ypically the AK type weapons, the SKS rifles, many .30 Ruger rifles, [and] possibly others" fire that caliber of ammunition.

Detective Bill Phillips testified that he was the lead detective in the investigation of Hall's death and that on August 13, 2002, he and Detective Irvin took a statement from the defendant. Phillips confirmed that, prior to the statement, he advised the defendant of his constitutional rights and that the defendant appeared to understand those rights.

An audiotape of the defendant's statement was played for the jury during Phillips' testimony. In his statement, the defendant acknowledged that he was present when Brian Hall was shot and said that Westbrook and Scott had picked him up at his house that night. He said that he had been driving a car that belonged to "Tara" and that Westbrook had a rifle and Scott had a shotgun. He stated that they rode around and that he remembered seeing a man standing on the corner of Fourth Avenue by East Lake Courts. He said he stopped "at the corner where the stop sign is," and Westbrook and Scott jumped out of the car. Asked their reason for getting out of the car, the defendant said, "Uh.. robbery." He stated that he heard the rifle fire and Westbrook and Scott say "little bitch ran." The defendant said that they continued riding around before pulling into the Citgo parking lot. The following exchange between the defendant and Detectives Phillips and Irvin then occurred:

PHILLIPS: Ok. Tell me what happened there.

[DEFENDANT]: Uh. . . I don't know which one of 'em [sic] said it but somebody said stop right here, there's somebody. I don't know his name. I just stopped. They jumped out.

IRVIN: Did they say why they's [sic] jumping out?

[DEFENDANT]: Oh no, I mean I guess it was the same thing as the first, you know what I'm saying, that's how I looked at it.

IRVIN: Did they say anything though?

[DEFENDANT]: They, I don't know which one of 'em knew 'em [sic]. One of 'em [sic] knew him I guess, you know what I'm saying?

IRVIN: Uh-hum (yes).

[DEFENDANT]: And they just said stop right here and I stopped and they jumped out.

PHILLIPS: With their guns or without them?

[DEFENDANT]: With the guns.

The defendant said that the victim slapped at the shotgun and then he heard the rifle fire. He said that Westbrook was holding the rifle. After the shot was fired, the victim fell, and the defendant knew "it wadn't [sic] no small handgun so I just figure at the time he was dead or he was fucked up pretty bad so I told them I's fixin' [sic] to pull off. They jumped in the car and we pulled off." He said they then drove back to the Woodlawn Apartments where he separated from Westbrook and Scott. He confirmed that he returned Holloway's keys to her later that morning.

ANALYSIS

I. Motion to Suppress

On appeal, the defendant argues that the trial court erred by denying his motion to suppress the statements he gave to law enforcement officers because "said statements were a result of an unlawful arrest or detention" made in his home without a warrant or consent. Additionally, he asserts that his arrest was unlawful because Detective Phillips "did not identify a reasonable cause to arrest" him.

When this court reviews a trial court's ruling on a motion to suppress an inculpatory statement from evidence, "[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). The factual findings of a trial court in a suppression hearing are upheld on appeal unless the evidence preponderates against those findings. Id. However, the trial court's application of law to its factual findings is reviewed *de novo*. See State v. Yeargan, 958 S.W.2d 626, 629 (Tenn. 1997). Testimony presented at trial may be considered by an appellate court in deciding the propriety of the trial court's ruling on a motion to suppress. See State v. Henning, 975 S.W.2d 290, 299 (Tenn. 1998). The party prevailing at the suppression hearing is afforded the "strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence." State v. Keith, 978 S.W.2d 861, 864 (Tenn. 1998) (citing Odom, 928 S.W.2d at 23).

We first will consider whether the officers had probable cause to arrest the defendant and, even if so, whether they had a basis for entering his residence to do so.

Before going to the defendant's residence, Detectives Phillips, Irvin, and Thompson had arrested Westbrook and taken his statement, wherein he said that the defendant had been driving him and Scott in a red Nissan Stanza belonging to Katara Holloway on the night of the shooting and that he was armed with a SKS rifle and Scott had a twelve-gauge shotgun. Westbrook described robbing a man on the side of the road, as well as shooting a man at a pay phone in a Citgo parking lot:

> [The defendant] like bitch get off the phone. Dude ain't . . he didn't . . he ain't say nothing [sic]. He was still on the phone. Hey, nigger get off the phone. He still

> didn't turn around so [Scott] like hey Coon, Coon. Dude turned around. He dropped the phone so the phone still hanging there so [Scott] holding the shotgun to him. He smacked the shotgun down and then he reached like he going behind his back and when I lift up the gun I fired but it was just . . the weight of the gun. I pick up the gun and it just fired. Then dude just spend to the side but he didn't fall so me and [Scott], we jump back in the car. We peel out then . . . .

Probable cause to make an arrest exists when "the facts and circumstances and reliable information known to the police officer at the time of the arrest '[are] sufficient to warrant a prudent [person] in believing that the [individual] had committed or was committing an offense.'" State v. Johnson, 980 S.W.2d 414, 422-23 (Tenn. Crim. App. 1998) (quoting Beck v. Ohio, 379 U.S. 89, 91, 85 S. Ct. 223, 225 (1964)). Westbrook's detailed account of the defendant's involvement in the crimes being investigated was ample information to provide the detectives with probable cause to arrest him. See id.

Notwithstanding that the officers had probable cause to arrest the defendant, their entry into his home without an arrest warrant or consent was a violation of his right under the Fourth Amendment to be secure against unreasonable seizures. See State v. Clark, 844 S.W.2d 597, 599 (Tenn. 1992) (stating that "'[i]n terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.'") (quoting Payton v. New York, 445 U.S. 573, 590, 100 S. Ct. 1371, 1382 (1980)) (emphasis omitted).

However, the unconstitutional entry into the defendant's home does not trigger the exclusionary rule or otherwise require the suppression of his subsequent statement on Fourth Amendment grounds. In New York v. Harris, 495 U.S. 14, 21, 110 S. Ct. 1640, 1644-45 (1990), the United States Supreme Court held that "where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of Payton." See also State v. Huddleston, 924 S.W.2d 666, 672 n.3 (Tenn. 1996) (stating that "[a]lthough violation of the Fourth Amendment's warrant requirement for a search will result in suppression of evidence obtained despite an after-the-fact judicial determination of probable cause, violation of the Fourth Amendment's rule against warrantless arrests in a dwelling generally does not lead to suppression of a post-arrest confession").

We next will determine whether, as the trial court found, the defendant was in custody at the time of his statement to officers. Our supreme court has held that an individual is "in custody" if

> under the totality of the circumstances, a reasonable person in the suspect's position would consider himself or herself deprived of freedom of movement to a degree associated with a formal arrest. The test is objective from the viewpoint of the suspect, and the unarticulated, subjective view of law enforcement officials that the individual being questioned is or is not a suspect does not bear upon the question.

State v. Anderson, 937 S.W.2d 851, 855 (Tenn. 1996). A reasonable person in the defendant's circumstances when he gave the statement at issue would have considered himself or herself deprived of freedom of movement to a degree associated with a formal arrest. As such, the defendant was in custody when interrogated. Therefore, we agree with the trial court that the defendant's statement was the product of a custodial interrogation. Accordingly, the defendant was entitled to be given Miranda warnings, and the trial court found that he was advised of his rights, signed the waiver of his rights, understood he had a right not to give a statement, and that the statement he gave was not forced or coerced. The record supports this determination by the trial court. Thus, this issue is without merit.

II. State's Reference to "An Ancient Proverb" in Closing

The defendant argues that the State biased the jury against him by quoting Biblical scripture in its closing argument. This matter arose when defense counsel argued in closing that the State had not proven beyond a reasonable doubt that the defendant was responsible for the criminal conduct of Westbrook or Scott, asserting that he never intended to be involved in their crimes. In response, the State argued that the defendant knew what Westbrook and Scott intended to do when they got in the car with "two long guns" and that he involved himself with them willingly. Then, the State said:

> You know, there's *an ancient proverb* that's thousands of years old that goes right to the heart of this. And it's something we've all grown up with. It goes like this: My son, [if] sinners entice thee, consent thou not. If they say come with us, let us lay in wait for blood, let us lurk privily for the innocent without cause. Let us swallow them up alive as the grave and whole as those that go down to the pit. We shall find all precious substance, we shall fill our houses with spoil. Cast in thy lot among us, let us all have one purse. My son, walk not thou in the way with them, refrain thy foot from their path, for their feet run to evil and make haste to shed blood. Surely, in vein [sic], the net is spread in the sight of any bird and they lay wait for their own blood. They lurk privily for their own lives. So are the ways of everyone who is greedy of gain which taketh away life of the owners thereof. (emphasis added).

At trial, the defendant made no objection to the State's statement. On appeal, he explains that no objection was made "because the State introduced the quote as an ancient proverb instead of a scripture" but argues that this issue is not waived because it constitutes plain error and therefore can be raised at anytime. On appeal, the State acknowledges that this quotation is "substantially similar" to the King James Version of Proverbs 1:10-19 but denies that its use constituted plain error.

To recognize the existence of plain error, this court must find each of the following five factors applicable: (a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e)

consideration of the error is necessary to do substantial justice. State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (adopting the factors first articulated in State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)); see also Tenn. R. Crim. P. 52(b). "In addition, the 'plain error' must [have been] of such a great magnitude that it probably changed the outcome of the trial.'" Smith, 24 S.W.3d at 283 (quoting Adkisson, 899 S.W.2d at 642).

For several reasons, we agree with the State that the reference to "an ancient proverb" does not constitute plain error. First, as the State utilized the questioned statement, it was described as a proverb and not a quote from the Bible. Defense counsel did not object because, according to the defense brief, he did not recognize that it was similar to a Biblical passage. There is no basis for our concluding that the jurors, either, believed it to be other than an "ancient proverb." Thus, for several reasons, the defendant's plain error argument must fail. The defendant did not complain when the statement was made to the jury because only after the trial did he believe it to have been improper. He cannot show "substantial justice" requires that relief be granted as to this claim for he has not shown the jury believed the statement to be other than an ancient proverb, as it was introduced.

CONCLUSION

Based on the foregoing authorities and reasoning, we affirm the judgments of the trial court but remand for entry of corrected judgments to reflect that the defendant was found guilty by a jury.

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ALAN E. GLENN, JUDGE