Opinion issued August 11, 2011

In The

Court of Appeals

For The

First District of Texas

NOS. 01-10-01095-CR, 01-10-01096-CR

JOHNNIEL FERGUSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Case Nos. 1147702, 1167538

MEMORANDUM OPINION

Appellant, Johnniel Ferguson, pleaded guilty to the offense of injury to an elderly individual,[1] and the trial court deferred adjudication of his guilt and placed

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[1] *See* TEX. PENAL CODE ANN. § 22.04 (Vernon 2011). Trial court cause no. 1147702, Appellate court cause no. 01-10-01095-CR.

him on community supervision for two years. The State subsequently filed a motion to adjudicate appellant's guilt, alleging that appellant had violated the conditions of his community supervision by failing to pay fees and enroll in an anger management class. After appellant pleaded true to the State's allegations that he had violated the conditions of his community supervision, the trial court, in accord with his plea bargain agreement with the State, assessed his punishment at confinement for ten years. While appellant was on community supervision, a Harris County grand jury issued a true bill of indictment, accusing appellant of the offense of capital murder.[2] After the trial court denied his motions to suppress evidence, appellant, with an agreed punishment recommendation from the State, pleaded guilty to the lesser included offense of aggravated robbery,[3] and the trial court, in accord with the plea bargain agreement, assessed his punishment at confinement for forty years, with the sentence to run concurrently with that in the injury to the elderly individual case. In two issues, appellant contends that the trial court erred in denying his motions to suppress evidence and his pleas of true to the State's allegations in its motion to adjudicate his guilt were involuntary.

We affirm.

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[2] *See id.* § 19.03 (Vernon 2011). Trial court cause no. 1167538, Appellate cause no. 01-10-01096-CR.

[3] *See id.* § 22.02 (Vernon 2011).

Background

While appellant was on community supervision for the offense of injury to an elderly individual, he became a suspect in a capital murder case. When Houston Police Department ("HPD") officers went to appellant's house to request that he accompany them to a police station, he requested that the officers allow him to put on some socks, which the officers apparently denied.[4] At the start of his interview at the police station, appellant asked HPD Officers A. Ibarra and D. R. Daniel for a pair of socks. After Ibarra informed appellant of his legal rights, appellant agreed to speak with Ibarra, who told appellant that he had already spoken with other "co-defendants," they had confessed their involvement in the shooting and robbery of the complainant, and they had explained appellant's involvement. After Ibarra asked appellant to explain his involvement, appellant responded, "Just throw me some white tube socks if I can get some white tube socks you feel me I'll probably be able to do something." Ibarra then sent his partner to purchase some socks for appellant. Once appellant received the socks, he explained his involvement in the robbery and shooting of the complainant.

[4] The record is not clear as to the circumstances under which appellant was taken to the police station. The transcript of appellant's statement provides no information as to whether appellant was taken voluntarily or if he was placed under arrest.

Prior to trial, appellant filed two pre-trial motions to suppress his statement, asserting that he did not make it freely and voluntarily.[5] At the trial court's hearing on appellant's motions to suppress, the State introduced into evidence a transcript of appellant's statement, which the trial court had previously reviewed. Neither appellant nor the State called a witness to testify at the suppression hearing. Appellant's trial counsel argued to the trial court that the transcript revealed that appellant's statement was not made voluntarily because appellant did not make any incriminating statements until after he was given socks as "an inducement and a promise of benefit." Counsel noted that while the officers interviewed appellant at the police station, appellant had bare feet and was cold. He asserted that when appellant asked for a pair of socks, the officers "were coercing him, [and] pressuring him to change his statement." Counsel argued that appellant's statement was coerced because he did not tell the officers about his involvement until after he had received the socks.

The trial court denied appellant's motions, stating that it appeared "the officers were actually just trying to make [appellant] comfortable" and he was not induced or coerced into providing a statement. In its findings of fact and conclusions of law, the trial court concluded that appellant was not in custody when he made the statement and he made it freely and voluntarily without

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[5] *See* U.S. CONST. amends. V, XIV; TEX. CONST. art. I, § 19; TEX. CODE OF CRIM. PROC. arts. 38.22, 38.23 (Vernon 2010).

compulsion of persuasion. It found that appellant's request for socks "was tantamount to a statement that he was thirsty," the socks provided to appellant were not an inducement given to coerce a statement from him, the officers were trying to make appellant physically comfortable, the socks were not of such a character as would be likely to influence appellant to speak untruthfully, and Officer Ibarra "specifically addressed the provision of socks to [appellant] during the statement and was simply because [his] feet were cold and were not provided in exchange for a statement."

Voluntariness of Statement

In his first issue, appellant argues that the trial court erred in denying his motions to suppress his statement because "[g]iven the nature of [his] repeated requests for socks, and Investigator Ibarra's repeated contention that he already knew what appellant had done, the transcript of appellant's interview supports the conclusion that appellant, believing he had nothing else to hope for, negotiated for socks in exchange for his false confession."

The appropriate standard for reviewing a trial court's ruling on a motion to suppress evidence is bifurcated, giving almost total deference to a trial court's determination of historical facts and reviewing de novo the court's application of the law. *Maxwell v. State*, 73 S.W.3d 278, 281 (Tex. Crim. App. 2002). We "should afford the same amount of deference to [a] trial courts' rulings on

'application of law to fact questions,' also known as 'mixed questions of law and fact,' if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor." *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We conduct a de novo review where the resolution of mixed questions of law and fact do not turn on an evaluation of credibility and demeanor. *See id.* Thus, when, as here, we have a transcript of a statement and an uncontroverted version of events, we review the trial court's ruling on an application of law to facts de novo. *See Herrera v. State*, 194 S.W.3d 656, 658 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd).

"A statement of an accused may be used in evidence against him if it appears that the same was freely and voluntarily made without compulsion or persuasion." TEX. CODE. CRIM. PROC. ANN. art. 38.21 (Vernon 2005). When considering whether a statement was voluntarily made, we consider the totality of the circumstances in which the statement was obtained. *Creager v. State*, 952 S.W.2d 852, 855 (Tex. Crim. App. 1997).

A confession is involuntary if circumstances show that the defendant's will was overborne by police coercion. *Id.* at 856. The defendant's will may be overborne if the record shows that there was "official, coercive conduct of such a nature" that a statement from the defendant was "unlikely to have been the product

of an essentially free and unconstrained choice by its maker." *See Alvarado v. State*, 912 S.W.2d 199, 211 (Tex. Crim. App. 1995).

A defendant's statement is also involuntary if it is induced by a promise that was positive, made or sanctioned by someone in authority, and of such an influential nature that it would cause a defendant to speak untruthfully. *Martinez v. State*, 127 S.W.3d 792, 794 (Tex. Crim. App. 2004). The truth or falsity of a statement is irrelevant to a voluntariness determination not only under federal constitutional law but also under state law. *Id.* at 794–95. Under Texas law, the determination is whether the officially sanctioned positive promise would be likely to influence the defendant to speak untruthfully and not whether the defendant in fact spoke untruthfully. *Id.* at 795. Under federal law, we must focus on official coercion as it impacts the free will of the accused. *Smith v. State*, 779 S.W.2d 417, 427 (Tex. Crim. App. 1989). To determine if the alleged promise were likely to influence the defendant to speak untruthfully, we must consider whether the circumstances surrounding the promise made the defendant inclined to confess to a crime he did not commit. *E.g.*, *Garcia v. State*, 919 S.W.2d 370, 388 (Tex. Crim. App. 1994) (en banc) (op. on reh'g).

In support of his argument that his statement was obtained involuntarily, appellant asserts that he refused to answer any questions about the complainant's death unless the officers provided him with a pair of socks. He further asserts that

once the socks were provided, he was then "obliged to uphold his part of the exchange" and confess that he participated in a plan to rob the complainant.

However, this accommodation was not an inducement given to coerce a statement from appellant. Although appellant requested socks before and during the interview, Officer Ibarra's promise to provide appellant with a pair of socks was not the type of promise that would typically be considered as influencing a person to speak untruthfully. *See Muniz v. State*, 851 S.W.2d 238, 254 (Tex. Crim. App. 1993) (en banc) (determining that promise to contact charitable agencies to assist the defendant's wife and mother was not the sort of promise that would likely cause someone to confess to aggravated rape and murder); *Flores v. State*, No. 14-08-00835, 2010 WL 5238580, at *5 (Tex. App.—Houston [14th Dist.] Apr. 6, 2011, pet. ref'd) (mem. op.) (holding that promise of cigarette did not rise to level of coercion nor render appellant's statement involuntary).

Here, Officer Ibarra read appellant his legal rights, and appellant indicated that he understood those rights, agreed to speak with Ibarra, and at no time indicated that he wished to speak with a lawyer. During the interview, appellant did request a pair of socks several times and told the officers that he would "tell the truth" after receiving a pair of socks. Once appellant received a pair of socks, he then told Ibarra about his involvement in the shooting of the complainant. However, appellant's assertion that the promise of a provision of socks induced

him to confess is without evidentiary support. In fact, the transcript shows that Ibarra specifically informed appellant that he was providing him with socks because he was cold, and the socks were not in exchange for a confession or statement, to which appellant agreed. Notably, appellant explained the reason for his request for socks—he did not want to go to jail without socks. At the conclusion of the interview, appellant stated that the officers did not promise him anything to "talk," he "did it on [his] own," he knew he had the right to terminate the interview at anytime, and he was treated "good" and "fairly."

Appellant was suspected of committing a serious offense, and it is not likely that he would confess to such an offense in exchange for a pair of socks. *See Flores*, 2010 WL 5238580, at *2. Based on the record presented, Ibarra's provision of socks cannot be characterized as a promise sufficient to induce appellant to confess. The evidence supports the trial court's conclusions that appellant knowingly waived his legal rights before making his voluntary statement and he did not confess in exchange for a promise of socks. Accordingly, we hold that the trial court did not err in denying appellant's motions to suppress his statement to the police officers on the ground that it was made involuntary.

We overrule appellant's first issue.

Adjudication of Guilt

In his second issue, appellant argues that the trial court erred in adjudicating his guilt for the offense of injury to an elderly individual because his "plea of 'true' to [the] alleged violations of his community supervision was involuntary and based on the erroneous belief that his involuntary statement to police would be admissible in his capital murder trial."

Appellant asserts that he would "never have accepted the maximum sentence [for his community supervision violations] but for the fact that it was a package deal that included his plea of guilty to a reduced charge of aggravated robbery." He further asserts that he would not have accepted the "package" sentencing "deal" if the trial court had not erroneously denied his motions to suppress his involuntary statement. However, as we have held, appellant's statement was not involuntary and the trial court did not err in denying his motions to suppress. Accordingly, we hold that the trial court did not err in adjudicating appellant's guilt for the offense of injury to an elderly individual.

We overrule appellant's second issue.

Conclusion

We affirm the judgments of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Bland, and Massengale.

Do not publish. TEX. R. APP. P. 47.2(b).