NO. 07-09-0252-CR

IN THE COURT OF APPEALS

FOR THE SEVENTH DISTRICT OF TEXAS

AT AMARILLO

PANEL D

APRIL 20, 2010

SERGIO ESTRADA,

Appellant

v.

THE STATE OF TEXAS,

Appellee

FROM THE 137TH DISTRICT COURT OF LUBBOCK COUNTY;

NO. 2008-421,687; HONORABLE CECIL G. PURYEAR, PRESIDING

Memorandum Opinion

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

Sergio Estrada was convicted of failing to register as a sex offender. He claims the trial court erred in failing to grant his motion to suppress his oral confession because he gave it while in custody and without having received any warnings in violation of *Miranda v. Arizona* and art. 38.22 of the Code of Criminal Procedure. We affirm the judgment.

Appellant was on deferred adjudication for sexually assaulting a child. Officer Jeff Davis testified he went to the apartment where appellant claimed to be living on

October 8, 2008. He spoke to appellant's neighbors and to the apartment manager and learned that appellant had moved out of the apartment several months earlier. Davis then went to appellant's place of employment and spoke to appellant in the parking lot. The two of them proceeded to Davis' car where his recording device was activated and Davis asked appellant questions about where he was living. During this recording, appellant confessed to not having registered his change of address as required by art. 62.055 of the Code of Criminal Procedure. Davis claimed that appellant was neither handcuffed nor under arrest at the time of his oral statement. After a hearing, the trial court denied appellant's motion to suppress.[1] He was subsequently convicted by a jury and sentenced by the trial court to two years confinement.

An oral statement of an accused taken while in custody may not be used against him unless he first received the warnngs set forth in art. 38.22 of the Code of Criminal Procedure and *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Four situations which may constitute custody include: 1) when the suspect is physically deprived of his freedom in any significant way, 2) when a law enforcement officer tells the suspect he cannot leave, 3) when law enforcement officers create a situation which would lead a reasonable person to believe his freedom of movement has been significantly restricted, and 4) when there is probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave. *Dowthitt v. State,* 931 S.W.2d 244, 255 (Tex. Crim. App. 1996). It is the fourth situation upon which appellant relies. To be applicable, the officer's knowledge of probable cause must have

[1]The trial court did not specify the basis for its ruling, despite appellant having filed a request for findings of fact and conclusions of law. Nonetheless, appellant does not complain of this failure on appeal.

been manifested to the suspect. *Id.* That can occur if information substantiating probable cause is related by the officer to the suspect or by the suspect to the officer. *Id.* However, the manifestation of probable cause must also be combined with other circumstances which would lead a reasonable person to believe that he is under restraint to the degree associated with an arrest. *Id.*

For purposes of this appeal, we assume *arguendo* that Davis improperly secured the confession of appellant and that the trial court erred in denying the motion to suppress.[2] This does not end the inquiry, however, for we must assess whether the error harmed appellant. Because appellant's contention implicates a constitutional right, authority obligates us to apply the harm analysis specified in Rule 44.2(a) of the Texas Rules of Appellate Procedure. Per the latter, we must reverse unless we determine beyond a reasonable doubt that the mistake did not contribute to the conviction or punishment. TEX. R. APP. P. 44.2(a); *Martinez v. State,* No. 07-08-296-CR, 2010 Tex. App. LEXIS 413 at *30 (Tex. App.–Amarillo January 21, 2010, no pet. h.). Moreover, such indicia as the source and nature of the wrong, the extent, if any, that it was emphasized by the State, and the potential weight which the jury could have assigned to the inadmissible evidence when compared to the admissible evidence warrant consideration. *Scott v. State,* 227 S.W.3d 670, 690 (Tex. Crim. App. 2007).

Aside from appellant's oral statement, the jurors heard the following evidence at trial. Appellant had originally registered his address as the Kentwood Apartments on Avenue Q in January 2008. No changes in that address were ever reported by him. Nonethless, he began living with a co-worker and his family in September of 2008

[2]The State concedes in part that some of appellant's confession was improperly secured.

because he had nowhere else to live. The individual who served as manager of the Kentwood Apartments at the time appellant had executed a lease testified that he 1) remembered appellant failed to pay rent for July 2008, 2) noticed appellant was no longer living in the apartment by the first of August 2008, 3) hired some people in August of 2008 to remove the property left in the apartment, 4) had the electricity turned off, and 5) changed the door locks. When arrested in October of 2008, appellant listed his address on the book-in sheet as being at a locale other than the Kentwood Apartments.[3] Those living across the hall from appellant at the Kentwood Apartments informed Officer Davis in October of 2008 that appellant had moved out several months earlier. And, on two occasions during the fall of 2008, officers had been unable to serve appellant with an arrest warrant at the Avenue Q address. This litany of evidence comprises a rather large foundation upon which the jury could have relied in adjudicating appellant guilty. Indeed, it even consists of appellant's own inculpatory words as captured in the book-in sheet.

That the confession sought to be suppressed was alluded to at least three times by the State in its closing argment cannot be ignored. Nor can we ignore that one's own confession of guilt can be assigned greater weight by jurors for it removes doubt. Yet, the words uttered by appellant to Davis did not constitute the only confession provided by appellant. As previously mentioned, he told those booking him after his arrest that he lived at an address other than the one on Avenue Q, and the State alluded to that as well in its closing argument. So, even if the confession to Davis was inadmissible, the

[3]Appellant was arrested not only for failing to register as a sex offender but for his outstanding traffic warrant.

jury remained free to legitimately use appellant's own words (as they appeared in the booking sheet) against him. So, it is difficult to say that any impropriety expressed in the State's closing argument had any more sway than the legitimate words of the prosecutor. This seems especially true when, as here, the jury was instructed to disregard any evidence it believed was obtained in violation of the law.

Simply stated, we cannot but conclude that the evidence about which appellant complains was redundant of other ample evidence establishing his guilt. Though the better strategy is to eschew its use, we, nonetheless, conclude beyond reasonable doubt from the record before us that it failed to contribute to the jury's decision. We do caution the State, however, against using the harmless error rule as a justification for doing that which is improper. Never should the law be breached to gain a conviction, especially by those sworn to uphold those laws.

Finding the purported error harmless, we affirm the judgment.

Brian Quinn
Chief Justice

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