Affirmed and Opinion filed February 7, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-00904-CR

FRANCIS F. PELKEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Cause No. 809,881

O P I N I O N

The appellant, Francis Fredrick Pelkey, was indicted on April 8, 1999 for the August 13, 1980 murder of Dorrace Nell Johnson. A jury convicted him of murder, and he was sentenced to forty years in prison. On appeal he raises several complaints, most of which relate to the nineteen-year delay between the murder and his indictment. We affirm.

At 6:15 a.m. on August 13, 1980, Ms. Johnson left her home west of Houston on her way to a business meeting several hours north of Houston. Later that morning, witnesses saw a car like hers parked with a van on the Interstate 45 frontage road north of Houston near FM 1960. Another witness saw Ms. Johnson and appellant at the latter's apartment

complex between eight and eight-thirty that morning. Later that afternoon, Ms. Johnson's body was found in a wooded area with multiple gunshot wounds and without shoes, hose, or underwear.

The next day, appellant called the police and told them he had knowledge of the murder. After meeting with a Harris County deputy, he drove his van to the sheriff's office where he gave a written statement. In the statement, he reported that he had stopped along the highway the previous morning to help a woman change a tire. After doing so, his van would no longer start, and the woman gave him a ride to his apartment to get some tools. Upon returning and starting his van, two unknown men approached. One man put a gun to appellant, reached behind his seat, grabbed appellant's pistol in his left hand, and shot Ms. Johnson who was inside the van. According to appellant, the strangers forced him into their truck, and then one of them took his shirt, hat, gun, and van, and drove away with Ms. Johnson. Sometime later, this man returned without Ms. Johnson, returned appellant's clothing and van to him, and threatened (after looking at his driver's license) to kill him if he ever told the police what had happened.

Appellant was questioned by police for twelve to fourteen hours that day, and allowed the police to search his van, examine his pistol, take photographs, fingerprints, and hair samples, and submitted to a polygraph examination. In the evening, he was taken before a magistrate who gave him the statutory warnings. Appellant returned home that evening, and over the next several days voluntarily returned to the sheriff's office for further questioning. No charges were filed in 1980, or for many years thereafter.

Right to Speedy Trial

In his first point, appellant contends his Sixth Amendment right to a speedy trial was violated by the delay between the commission of the offense and his indictment. But the speedy trial clause only applies if the defendant is under formal indictment, information, or arrest. *United States v. Marion*, 404 U.S. 307, 320, 92 S. Ct. 455, 463 (1971). Here,

appellant was never charged, arrested, handcuffed, or otherwise placed in custody. While delay before accusation may raise due process concerns, it is distinct from the delay the speedy trial provision aims to prevent. *See Marion*, 404 U.S. at 313. When the appellant has not been charged or the charge has been dismissed, the speedy trial requirements have no application. *See United States v. MacDonald*, 456 U.S. 1, 9, 102 S. Ct. 1497, 1502 (1982).

Appellant points out that the magistrate's pre-printed form of admonishments which were read to him in 1980 included a statement that "You have been accused of ~~(and charged with)~~ the offense of CAPITAL MURDER . . . On Complaint filed by STATE OF TEXAS FOR DECEASED." (deletion in original)(blanks for offense and complainant filled in). But the form also indicated that the person named had been arrested and was in custody. The record is clear that none of this was correct. We decline to exalt this form over substance.

Since appellant was not indicted or arrested in 1980, and does not complain about any delay that occurred after his indictment in 1999, we find no violation of his right to a speedy trial. We overrule his first point of error.

Pre-Indictment Delay

In his second point of error, appellant claims the long delay between the offense and his indictment violated due process. The Due Process Clause does not invalidate criminal prosecutions simply because a reviewing court believes a prosecutor should have sought an indictment earlier. *United States v. Lovasco*, 431 U.S. 783, 790, 97 S. Ct. 2044, 2049 (1977). Statutes of limitation are the primary protection against such delays and the prejudice that results from the passage of time. *Marion*, 404 U.S. at 322.[1] Moreover, prosecutors are under no duty to file charges before they are satisfied they can prove a suspect's guilt beyond a reasonable doubt. *Lovasco*, 431 U.S. at 791.

[1] Texas has no statute of limitations for murder, *see* Tex. Code Crim. Proc. Ann. 12.01 (1) (Vernon Supp. 2002), indicating that the seriousness of the offense and the potential consequences for the accused justify more than normal pre-indictment investigation.

Nevertheless, the United States Supreme Court has held that due process places some limits on pre-indictment delays, though it has not applied a specific test. *Marion*, 404 U.S. at 324-25. The Texas Court of Criminal Appeals has held that an accused will be entitled to relief if he can show a delay that (1) caused substantial prejudice to his right to a fair trial, and (2) was an intentional device used to gain a tactical advantage over the accused. *Ibarra v. State*, 11 S.W.3d 189, 193 (Tex. Crim. App. 1999).

In this case, appellant failed to meet either requirement. The only prejudice appellant asserts is the death of Joseph Simpson, the witness who saw him at his apartment complex on the morning of the murder. But appellant does not indicate how his presence with Ms. Johnson that morning exculpates him. Further, Simpson's written statement was admitted in evidence at trial. We cannot find that appellant has been substantially prejudiced.

Nor is there evidence that prosecution was delayed to gain a tactical advantage over appellant. During a pre-trial hearing, testimony indicated the police in 1980 believed the District Attorney's Office would not accept the case, and that it was prosecuted only after officers working on unsolved "cold cases" decided to present it to a different group of prosecutors. Finding no evidence of intentional delay or prejudice, we overrule appellant's second point of error.

Ex Post Facto

In his third issue on appeal, appellant argues that his conviction cannot be sustained under the Ex Post Facto Clause because the enactment of Rule of Evidence 607 in 1986 eliminated rights he had under the previous "voucher rule." The Court of Criminal Appeals has rejected a similar constitutional claim to retroactive application of this court-made change in the law. *See Janecka v. State*, 937 S.W.2d 456, 461 (Tex. Crim. App. 1996). In any event, it does not appear appellant had any rights under the previous rule.

The voucher rule was based on the notion that the State could not impeach its own witness, and thus had to disprove beyond a reasonable doubt all exculpatory assertions in

a defendant's confession if the State offered the confession into evidence. *Hernandez v. State*, 819 S.W.2d 806, 813 (Tex. Crim. App. 1991). Texas Rule of Evidence 607 allows impeachment of a witness by any party, and thus rejected the voucher rule. *Russeau v. State*, 785 S.W.2d 387, 390 (Tex. Crim. App. 1990). But the voucher rule did not apply to all statements–if the accused made no admission of guilt, his statement was entirely exculpatory and the rule was never invoked. *Palafox v. State*, 608 S.W.2d 177, 181 n.4 (Tex. Crim. App. 1979). Because appellant never admitted shooting or killing Ms. Johnson, the voucher rule never applied to his written statement, and the new rule did not reduce the quantum of evidence required to convict him. We overrule appellant's third point of error.

Legal Sufficiency

In appellant's final point of error, he argues the evidence is legally insufficient because it provides equal support for guilt and innocence. But this is no longer the standard for legal sufficiency challenges. *See Geesa v. State*, 820 S.W.2d 154, 159 (Tex. Crim. App. 1991), *overruled in part on other grounds by Paulson v. State*, 28 S.W.3d 570 (Tex. Crim. App. 2000) (holding that when evidence is conflicting, requiring State to eliminate alternative reasonable hypotheses repudiates role of jury in weighing evidence). Instead, we view the evidence in a light most favorable to the verdict, and decide whether any rational jury could have found each element of the offense beyond a reasonable doubt. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000).

In addition to the facts stated above, there was evidence that the gun used to shoot Ms. Johnson belonged to appellant, that he cleaned it before the police could examine it, and that it had a right-handed grip that would have been difficult for the "stranger" to use with his left hand (as appellant alleged). Further, a stranger would not have known that appellant's pistol was loaded or operable when he picked it up to shoot. Police found a woman's underwear and pantyhose in the drawer where appellant placed his gun-cleaning equipment. His cap had also been recently washed. Witnesses reported seeing only Ms. Johnson's car and appellant's van along the frontage road; none saw the alleged strangers'

truck. A composite sketch of one of the "strangers" drawn by a police artist with appellant's help closely resembled one of appellant's co-workers; his description of the strangers' truck matched that co-worker's truck. The State's dental pathologist testified that a bruise on the appellant's arm was consistent with a human bite mark and that the complainant's dental cast fit the bruise pattern of the bite mark.

As the exclusive judge of the credibility of the witnesses and of the weight to be given their testimony, the jury was entitled to disbelieve appellant's version of the facts. *See Wesbrook*, 29 S.W.3d at 111. We find that the evidence is sufficient for a rational jury to have found each element of the offense beyond a reasonable doubt. We overrule appellant's final point of error and affirm the trial court's judgment.

/s/ Scott Brister
Chief Justice

Judgment rendered and Opinion filed February 7, 2002.
Panel consists of Chief Justice Brister and Justices Fowler and Seymore.
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