Reversed and Remanded Opinion filed March 16, 2000.

In The

Fourteenth Court of Appeals

———————

NO. 14-95-01073-CR

———————

ALFREDO B. GUARDIOLA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 208th District Court
Harris County, Texas
Trial Court Cause No. 675,595

O P I N I O N

Appellant, Alfredo B. Guardiola, was charged with three counts of arson. TEX. PEN. CODE ANN. § 28.02 (Vernon 1994). After the trial court denied his motion to suppress, appellant pleaded *nolo contendere* to each count and the trial judge found him guilty. Pursuant to a plea agreement, appellant was sentenced to forty years confinement. In five points of error, appellant contends that the trial court erred in denying his motion to suppress. We agree and we reverse and remand.

BACKGROUND FACTS

On May 11, 1989, Houston Police Homicide Detective Jose Selvera and Houston Fire Department Arson Investigator Hilario Garcia Torres began the arson investigation at the home of the Gonzalez family. The fire killed Elizabeth and Mario Gonzalez and their two children.

Appellant gave a statement to police the following day and was released. He was not considered to be a suspect in the arson case at that time. However, appellant was subsequently convicted for theft of stolen property belonging to the Gonzalez family. After serving six months in the penitentiary, appellant was released. He was then questioned about the arson on several occasions over the next few months by arson investigators Jose Selvera and Hilario Torre. The investigators claimed that appellant was still not considered to be a suspect, but thought he had material information about the arson. Finally, appellant stopped talking to investigators and refused to answer any questions about the fire.

These same investigators, and D.P.S. Officer Paul Brown, went to Harris County Assistant District Attorney Alice Brown for help. They told her appellant was a material witness to arson and murder, and that he had refused to answer questions. The officers admitted they did not have probable cause to arrest appellant. They asked Ms. Brown to issue a grand jury subpoena to enable them to continue questioning appellant. It is clear the investigating officers had no legal way to force appellant to answer their questions, and it is equally clear they felt the grand subpoena might cloak them with the authority to accomplish their goal.

Assistant District Attorney Brown told the investigators that the arson investigation was not her case, but she agreed to help them by issuing the grand jury subpoena. Texas law allows any assistant district attorney in Harris County to issue a grand jury subpoena. TEX. CODE CRIM. PROC. ANN. Art. 20.10, 20.11, 24.15 (Vernon 1994).

Armed with the cloak of authority of the grand jury subpoena, all three investigators went to the home of the appellant and served him with the subpoena. Two days later, when appellant was due to testify before the grand jury, the three investigators went to Alice Brown's office and waited for appellant. Appellant called Alice Brown and told her he was in the 337th District Courtroom and asked directions to the grand jury. Although that courtroom was in the same building as the grand jury room, Brown directed appellant to come to her office, which was located in a different building.

When appellant arrived, he was met by Alice Brown, Selvera, Torres, and Paul Brown. Alice Brown testified she did not know whether to give appellant his Miranda rights or the rights given to a grand jury witness. However, Alice Brown advised appellant of his rights in accordance with TEX. CODE CRIM. PROC. ANN. Art. 38.22 (Vernon 1979). She then left the room without making any attempt to question appellant or send him to the grand jury. Appellant was then questioned by the three investigators while in Ms. Brown's office. Later he was taken to the police station and questioned, and subsequently he was taken to the fire department where he was questioned, given a polygraph, and questioned some more. He was kept in a locked room, "guarded" when he went to the bathroom, and denied the right to get out of the chair and stand when his back started hurting him from the hours of sitting. Thirteen hours after responding to the illegal grand jury subpoena, appellant confessed to the arson.

There is no evidence or claim by any officer of the state that there was ever any attempt or intent to have appellant appear and testify before a grand jury. Further, there is no evidence or claim the grand jury was in session, and if so, was investigating this arson.

PROCEDURAL HISTORY

On September 17, 1992, appellant was charged with the offense of capital murder. He filed a motion to suppress his confession. The motion was denied on October 6, 1992. On March 7, 1993, a jury found appellant guilty and later sentenced him to life in prison. Appellant filed a motion for new trial, which the trial court granted on May 12, 1993. The grounds for the motion for new trial included both voir dire issues and the unusual interrogation technique employed by Detective Selvera. The trial court did not indicate upon which ground it granted the motion.

Appellant was subsequently indicted on three counts of arson. On December 15, 1993, appellant filed his second motion to suppress his confession, based on the record from the first suppression hearing, supplemented by a portion of the trial record. The trial judge denied the motion. Pursuant to a plea agreement, appellant then pleaded *nolo contendere* on the arson charges. With the court's permission, he appeals the denial of his motion to suppress.[1]

---

[1] This permission includes permission to supplement the record of his motion to suppress hearing (continued...)

STANDARD OF REVIEW

In reviewing a ruling on a motion to suppress evidence, an appellate court must determine the applicable standard of review. We should afford almost total deference to a trial court's determination of the historical facts that the record supports, especially when the trial court's fact findings are based on an evaluation of credibility and demeanor. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App.1997). We should afford the same amount of deference to trial court's 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. *Id*. However, we may review *de novo* "mixed questions of law and fact" not falling within this category. *Id*.

In reviewing the voluntariness of a confession, we will give almost total deference to the trial court's determination of the historical facts, but apply a *de novo* review of the law's application to those facts. *See Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); *Henderson v. State*, 962 S.W.2d 544, 564 (Tex. Crim. App. 1997) (court applied federal standard of review for voluntariness of confession without deciding whether standard was proper.) We may not disturb the trial court's findings absent an abuse of discretion. *Penry v. State*, 903 S.W.2d 715, 744 (Tex. Crim. App. 1995).

POINTS OF ERROR

Appellant contends that his oral and written confessions were the product of his will being overborne by police misconduct, and were given involuntarily in violation of due process and due course of law. Specifically, he argues that his confessions were involuntary because the State: (1) failed to comply with TEX. CODE CRIM. PROC. ANN. Art. 38.22, Sec. 3 (Vernon Supp. Pamph. 1998) and (2) violated his due process and due course of law rights because both his oral and written confessions were not freely given. We agree and find that appellant's confession was not given voluntarily and was the product of an illegal arrest. We will first address the illegal arrest which occurred when the grand jury subpoena was issued.

---

[1] (...continued)
with selected trial testimony.

GRAND JURY SUBPOENA

As a general rule, a subpoenaed witness' appearance before a grand jury does not involve a seizure of the witness for Fourth Amendment purposes. *See United States v. Dionisio,* 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973). However, probable cause standards should be met if the subpoena power is unjustifiably manipulated so as to permit detention in a manner functionally indistinguishable from an arrest pursuant to a warrant. *See Boyle v. State*, 820 S.W.2d 122 (Tex. Crim. App. 1989)(orig. submission); 41 George E. Dix and Robert O. Dawson, Texas Practice: Criminal Practice and Procedure § 18.38 (2d ed. 1995).

In *Boyle,* Amarillo police found the body of a murdered hitchhiker and received information that the trucker, who was seen picking up the deceased, would be in Diboll the next day. Lacking sufficient probable cause to issue an arrest warrant, a Sargent with the Amarillo police department acquired a grand jury subpoena and attachment for Boyle, the truck driver. This information was dispatched to Diboll police and Boyle was arrested and held for the Amarillo police department. Boyle was mirandized prior to custodial interrogation. After the initial interrogation, Boyle was arraigned and again mirandized. He later signed a consent to search form and incriminating evidence was discovered pursuant to this search.

In a hearing on his motion to suppress, Boyle contended his arrest pursuant to the grand jury subpoena was illegal and violated his Fourth and Fourteenth Amendments to the U.S. Constitution, as well as his rights under Art. I, Sec.9 of the Texas Constitution. He argued that his arrest was merely a "pretext arrest" and was used to obtain incriminating evidence which the state could not obtain in any legal manner. The state vigorously asserted it was not a pretext arrest because it "obtained a subpoena" pursuant to Article 20.10, and Article 24.15 of the Texas Code of Criminal Procedure.

The Court of Criminal Appeals held "that the procedure utilized in placing the appellant under arrest pursuant to a grand jury material witness attachment was a pretext, subterfuge, and deceptive artifice intentionally employed to circumvent the principles and tenets of the Fourth and Fourteenth Amendments to the United States Constitution and Art. 1, Sec. 9 of the Texas Constitution." *Id*. at 130. The court further concluded that to hold otherwise would "in essence constitute a suspension of the Fourth and Fourteenth Amendment and Art.1, Sec.(9) of the Texas Constitution. As such it would be authority for

the State to circumvent the protections accorded by both the United States Constitution and the Texas Constitution and substitute therefore the unrestricted right to arrest and detain anyone solely upon the claim that he is a material witness." *Id*. Although the Court of Criminal Appeals ultimately affirmed the conviction in *Boyle*, it did so because, prior to the search, the owner of the tractor trailer had given police permission to search the tractor. Therefore, permission of the driver, Boyle, was not necessary. Notwithstanding the ultimate outcome of the *Boyle* appeal, the court did not change its' language or condemnation of abuse of grand jury subpoena by the state.

Like the judge that issued the grand jury material witness attachment in *Boyle*, the assistant district attorney in this case abused the power and authority given her by the legislature. Further, she was in violation of American Bar Association's Standards making it "...unprofessional conduct for a prosecutor to secure the attendance of persons for interviews by use of any communication which has the appearance or color of a subpoena...." ABA, Standards for Criminal Justice, The Prosecution Function, 3-3.1(d)(2d ed. 1980). The prosecutor's power to subpoena must not be used as a tool for police officers to force a suspect to talk when he previously refused to do so. By abusing the grand jury process, the assistant district attorney avoided all the protections built into the process by the state legislature.

The Texas Legislature has not chosen to vest police officers with subpoena power and it would circumvent that legislative judgment for the police to be allowed to make use of the grand jury process in order to do indirectly that which the police cannot do directly. Although the grand jury started life as a protection against prosecution without adequate cause, judges in many jurisdictions recognize that it has in fact become a tool of the state.[2] Our sister court, in dealing with abuse of grand jury subpoenas, has recognized that" the opportunity for abuse is great" *Thurman v. State*, 861 S.W.2d, 96,100 (Tex. App.-Houston (1st District), 1993, no writ). However, the court ultimately found no abuse of the grand jury subpoena power because, "... the subpoena was not a fishing expedition, but was based on individualized suspicion." *Id*. Justice Cohen concurred with his own opinion to emphasize the evils resulting from the states' abuse of the grand jury subpoena. Justice Cohen urges legislation that would limit those who can

[2] People v. Boulet, 88 Misc.2d 353, 354, 388 N.Y.S.2d 250; People v. Arocho, 85 Misc.2d 116, 379 N.Y.S.2d 250; Duckett v. State, 268 Ark. 687, 600 S.W.2d 18 (Ark.App.1980).

issue grand jury subpoenas, and limit their use to only those matters under investigation by the grand jury. *Thurman* dealt with a grand jury subpoena for medical records, even though the officers did not suspect the defendant had committed the offense of DWI. In this case, the subpoena allowed the state to go on a "fishing expedition" when they could not do so by any other means. We cannot allow the state to violate a citizens constitutional rights of due process and privacy just to satisfy its desire to "investigate" a crime. There is no dispute that a grand jury subpoena constitutes a powerful tool for the state, and in the event the state abuses or misuses this power it may result in an illegal seizure and a breakdown of our constitutional guarantees. *See Boyle v. State*, 820 S.W.2d 122 (Tex. Crim. App. 1989).

It is clear that the prosecutor and the investigators stepped outside the scope of their authority in abusing the grand jury subpoena to obtain a confession from appellant. We find that the detention was unlawful and resulted in an illegal arrest. Furthermore, we hold that detention was ongoing and increased with severity during the arrest.

ATTENUATION

Having concluded that the arrest of appellant was improper, it is generally necessary that any evidence obtained as a direct result of the illegal arrest be suppressed under the exclusionary rule of the Fourth Amendment and Article 1, Section 9 of the Texas Constitution. *Wong Sun v. United States*, 371 U.S. 471, 485, 83 S.Ct. 407, 416, 9 L.Ed.2d 441 (1963); *Boyle v. State*, 820 S.W.2d 122, 130 (Tex. Crim. App.1989), *cert. denied*, 503 U.S. 921, 112 S.Ct. 1297, 117 L.Ed.2d 520. However, if the State can demonstrate that the connection between appellant's illegal arrest and his subsequent confession is sufficiently attenuated from the primary taint to permit the use of his statement at trial to acquire a conviction, then the illegal arrest will not prevent the court from denying appellant's motion to suppress. *Jones v. State*, 833 S.W.2d 118, 124 (Tex. Crim. App.1992), *cert. denied*, 507 U.S. 921, 113 S.Ct. 1285, 122 L.Ed.2d 678 (1993); *Fierro v. State*, 706 S.W.2d 310, 314 (Tex. Crim. App.1986).

In determining whether the taint on evidence obtained subsequent to an illegal arrest is sufficiently attenuated to permit its use at trial, account must be taken of four factors: (1) the giving of Miranda warnings; (2) the temporal proximity of the arrest and the confession; (3) the presence of intervening circumstances; and (4) the purpose and flagrancy of the official misconduct. *Brown v. Illinois*, 422 U.S.

590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975); *Johnson v. State*, 871 S.W.2d 744, 751 (Tex. Crim. App. 1994). All four factors must be considered, and no one factor is dispositive. *Id*.

The record reflects that appellant received his Miranda warnings on at least two occasions: (1) when Alice Brown spoke to him in her office, and (2) before appellant gave his written statement and confession. However, the giving of multiple Miranda warnings does not remove the taint from an illegal arrest. If we held that the mere giving of Miranda warnings, even if given on multiple occasions, could remove the taint of an unconstitutional arrest, regardless of how wanton and intentional the violation of a suspect or material witness's rights under the Fourth Amendment, we would substantially dilute the effect and purpose of the exclusionary rule. *See Davis v Mississippi*, 394 U.S.721, 726-727, 22 L.Ed.2d 676, 89S.Ct 1394, 1397-1398 (1969). If the warnings were, in effect, a cure all, the constitutional guarantees against unlawful searches and seizures could be reduced to a "matter of words," and all incentives to avoid violations of a persons Fourth Amendment rights would be eviscerated. *See Mapp v. Ohio*, 367 US 643,648, 6 L.Ed.2d 1081, 81 S.Ct 1684, 1687, 84 A.L.R.2d 933 (1961).

Temporal proximity is a more ambiguous factor and does not carry as much weight as the giving of Miranda warnings. *Maixner v. State*, 753 S.W.2d 151, 156 (Tex. Crim. App. 1988). From the time appellant entered the prosecutor's office, until the time he confessed to the arson, approximately thirteen hours elapsed. Texas courts have reached many different conclusions as to how much time between the illegal arrest and confession is necessary to attenuate the taint. [3] Making a comparison on the basis of the time alone demonstrates its paucity of meaning as a determinative factor. "It ignores the possibilities for exploitation inherent in the time lapse factor, and that the illegal custody could become more oppressive as it continues uninterrupted." *See* 3 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 11.4(b) (1978).

---

[3] Texas cases resolved in favor of the defendant range from spans of one and a half (*Ussery v. State*, 651 S.W.2d 767 (Tex. Crim. App. 1983)) and two hours (*Green v. State*, 615 S.W.2d 700 (Tex. Crim. App. 1981), *cert. denied*, 454 U.S. 952, 102 S.Ct. 490, 70 L.Ed.2d 147 (1982))) to two or three days (*Beasley v. State*, 674 S.W.2d 762 (Tex. Crim. App. 1982)), while cases resolved in favor of the State range from three hours (*Dowdy v. State*, 534 S.W.2d 336 (Tex. Crim. App. 1976)) and five hours (*Coleman v. State*, 643 S.W.2d 947 (Tex. Crim. App. 1982)) to twenty-four hours (*Townsley v. State*, 652 S.W.2d 791 (Tex. Crim. App. 1983)), and two days (*Alonzo v. State*, 591 S.W.2d 842 (Tex. Crim. App. 1979)).

Under the facts in our case, it appears that the custodial interrogation became more oppressive as the hours grew long. Officer Selvera subjected appellant to interrogation techniques which strikes us as inconsistent with proper police conduct toward a witness who was free to leave. The officer would sit in a chair in front of appellant and place his knees between appellant's legs and force them apart in order to intimidate him. Appellant was taken to a locked room for his polygraph examination. He was subjected to tag-team interrogation for more than twelve hours, first by the trio, then by the polygraph examiner, then by another polygraph examiner, then by Torres and finally by Selvera. When he asked to go to the rest room, Officer Wood accompanied him and stood watch outside the restroom door to escort appellant back to the locked interrogation room. We find that these factors conclusively show that the illegal arrest and detention was not only ongoing, but it increased with severity as the hours passed.

We next examine any intervening circumstances that occurred between the arrest and the confession. There is no indication in the record that an event such as taking appellant before a magistrate, procuring an arrest warrant, or releasing him from custody occurred. *See Johnson v. State*, 871 S.W.2d at 751.

Finally, we must consider the purpose and flagrancy of the official misconduct. This is one of the most important factors to consider. *See Bell v. State*, 724 S.W.2d 780, 789 (Tex. Crim. App. 1986). The clearest indications of attenuation should be required where police conduct is the most flagrantly abusive.

The sole purpose of the grand jury subpoena was to bring appellant before the investigating officers for questioning, not to bring him before the grand jury. The investigators succeeded in transforming a court process into a function of their own. In our view, this conduct was a flagrant violation of the constitutional rights of the Appellant, and it leaves this court with no other alternative but to reverse the conviction. Further, the coercive interrogation techniques applied by Selvera was flagrantly abusive and designed to intimidate and humiliate the appellant.

After considering all of the factors, we find that appellant's illegal arrest was not too attenuated from his oral and written confessions. Therefore, all oral and written statements must be suppressed.

VOLUNTARINESS

Finally, we find that the confession was not voluntarily given. To determine whether the circumstances render an accused's statement involuntary, we ultimately must determine whether his will was "overborne" by police coercion. *Armstrong v. State*, 718 S.W.2d 686, 693 (Tex.Crim.App.1985). We make this determination based on the totality of the circumstances surrounding the statement. *Id*. (citing *Davis v. North Carolina*, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895 (1966)). Relevant circumstances include the "length of detention, incommunicado or prolonged detention, denying a family access to a defendant, refusing a defendant's request to telephone a lawyer or family, and physical brutality." *Nenno v. State*, 970 S.W.2d 549, 557 (Tex. Crim. App. 1998).

Appellant testified he never felt free to leave and considered himself under arrest at all times. Appellant was accompanied by Officer Wood when he went to the bathroom, and the officer remained outside the door to escort appellant back to the interrogation room. The interrogation room Appellant was in for several hours immediately prior to giving his confession was a locked room and all officers entering and exiting had to do so with a key. *See Turner v. State,* 685 S.W.2d 38 (Tex.Crim.App. 1985). Appellant was brought to the office of an assistant district attorney under the color of authority of the state, and under the pretext that he was to testify before a grand jury. Instead, he was turned over to the same three officers by whom he was questioned over a period of several months. The same three officers to whom he had previously refused to talk. And the same three officers who personally appeared at his home and served him with the grand jury subpoena.

Appellant was interrogated in Ms. Browns' office, taken to police headquarters and interrogated, taken to the fire department and interrogated, given a polygraph, kept in a locked room, "guarded" while he went to the bathroom, interrogated in an intimidating and threatening manner, denied the right to stand when his back was hurting him from the long hours of sitting, and after thirteen hours appellant "confessed." Appellant was denied his due process rights under both the United States Constitution and the Constitution of the State of Texas. Therefore, we hold his confession was involuntary and inadmissible, and further hold the trial court abused its discretion in denying the motion to suppress. To hold otherwise would be to approve of the pretext, subterfuge, and deception practiced by the agents for the state, and blind ourselves to the rights of any accused under the Fourth and Fourteenth Amendments to the Constitution of the United States.

We reverse the judgment of the trial court and remand the case for further proceedings consistent with this opinion.

/s/ Ross A. Sears
Justice

Judgment rendered and Opinion filed March 16, 2000.

Panel consists of Justices Sears, Cannon, and Lee.*

Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Ross A. Sears, Bill Cannon, and Norman Lee sitting by assignment.