Affirmed and Opinion filed May 24, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-00909-CR

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MARK THOMAS DIXON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Cause No. 97CR0950

O P I N I O N

Appellant, Mark Thomas Dixon, appeals the trial court's denial of his pre-trial motions to suppress (1) the arrest and search of appellant; and (2) appellant's second videotaped confession. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On May 30, 1997, Officer William Allen Schultz, Jr., of the League City Police Department, responded to a "911" call of "a body on the floor" of a residence in League City. The residence was the home of Barbara and Curtis Holder.

After arriving at the scene, Officer Schultz found no sign of forced entry into the house. Mrs. Holder, who was at a neighbor's house across the street, told the officer to enter through the back door because it was unlocked. Once inside, Officer Schultz found Curtis Holder dead on the kitchen floor, covered with plastic bags and lying in a large pool of blood. The home had been ransacked, with drawers and their contents strewn across the floor.

Detective Morton Grant, who was assigned to investigate the murder, interviewed Mrs. Holder that evening. She told him that she had come home that afternoon and discovered her husband murdered in an apparent burglary. During this interview, Mrs. Holder also told Det. Grant that she had just been released from a hospital where she was treated for depression and suicidal thoughts.

A few days later, on June 1, 1997, at approximately 11:30 p.m., the League City Police Department dispatch asked Det. Grant to call Cindy Keelan, who had information about Mrs. Holder. When Det. Grant called Mrs. Keelan, she told him that earlier in the day Mrs. Holder had asked her to babysit Mrs. Holder's daughter while Mrs. Holder went to the League City Police Department to discuss the murder. That call appeared on Mrs. Keelan's caller identification monitor as being from "Baybright Car Wash" in League City. Mrs. Keelan agreed to babysit, and shortly thereafter, Mrs. Holder left the child at Mrs. Keelan's house. Later that evening, Mrs. Keelan received a second call from Mrs. Holder, who stated that she was still at the police department being interviewed and asked Mrs. Keelan to watch her daughter a little longer. From her caller identification monitor, Mrs. Keelan discerned that the call originated not from the police department, but from a Quality Inn motel on Nasa Road in Harris County. Upon learning of these events from Mrs. Keelan, Det. Grant advised his supervisor, Sergeant Gary Ratliff, of the information Mrs. Keelan had provided and of his concerns for Mrs. Holder's welfare. Det. Grant, believing that Mrs. Holder might have been contemplating suicide, went with Sgt. Ratliff to the Quality Inn. There, they located Mrs. Holder's van in a parking lot at the back of the motel. After unsuccessfully attempting to determine the location of Mrs. Holder's room, they sought assistance from a local officer,

Jason Cooper of the Webster Police Department.

All three officers went to the back section of the motel and began knocking on doors, identifying themselves as police officers. The occupants of those rooms promptly answered the officers' knocks. When the officers were unable to locate Mrs. Holder, Officer Cooper obtained a list of all occupied rooms in the back section of the motel. The officers then decided to knock on the remaining occupied rooms. Room 155 was the first door they tried on this second attempt to locate Mrs. Holder. After knocking on the door, Officer Cooper identified himself as a police officer. A male voice asked whether it was "a wake up call." Det. Grant heard male and female voices inside the room. Officer Cooper again identified himself as a police officer and again requested that the occupants open the door. Still, there was no response. Approximately five minutes elapsed before Det. Grant knocked on the door and again requested that the occupants open the door. Immediately after Det. Grant knocked, he heard a loud noise and a hitting sound at the door. Not knowing the source of the noise, he became concerned and feared for his safety. He retreated away from the door, took cover behind a concrete pillar, drew his weapon, and immediately asked Officer Cooper to get a backup unit at the scene. Officer Cooper also retreated and, out of concern for his safety, drew his firearm.

After the door to Room 155 finally opened, Mrs. Holder appeared in the doorway. The door nearly closed behind her. Det. Grant observed that Mrs. Holder appeared lethargic and unsteady on her feet. He holstered his weapon, approached Mrs. Holder, and helped her walk eight to ten feet away from the door out of the "line of fire." He asked her if she had been drinking. She answered "No, but I've taken a couple of pills." Det. Grant asked her who the man in the room was, to which Mrs. Holder replied, "I don't know, I just met him at a bar tonight." Det. Grant sat her down on the curb, handcuffed her for safety reasons, and returned to the door, which was still partially open. The room was dark and no one was visible. Det. Grant again asked that the room be vacated. Opening the door, a male stepped into the doorway. Det. Grant was unsure whether this was the same male whose voice he had heard.

Sgt. Ratliff requested that Officer Cooper do a "protective sweep" of the motel room for officer safety. Officer Cooper entered the room and checked the two living areas for other occupants and weapons. He opened no drawers or containers. The process took less than a minute. Afterwards, Officer Cooper told Sgt. Ratliff he saw knives on the bathroom floor and knife holes in a sheetrock wall. Sgt. Ratliff, with his weapon holstered, asked appellant if they could step back inside the room to have a discussion. Appellant agreed.

Sgt. Ratliff then patted down appellant and read his *Miranda* rights in the presence of Det. Grant. Appellant indicated he understood his rights and agreed to waive them. Sgt. Ratliff took a pill bottle from appellant's shirt pocket, noticing pills and metallic objects inside. Knowing Mrs. Holder had taken some pills, Det. Grant took the pill bottle. Sgt. Ratliff asked appellant how he knew Mrs. Holder. Appellant stated that he had known Mrs. Holder for about nine days, having met her in the hospital. Appellant told the officers Mrs. Holder had just come into the room and gone to sleep.

Det. Grant returned to Mrs. Holder, uncuffed her hands, and asked her what kind of pills she had taken. She would only say that she had taken some sleeping pills. Det. Grant then asked her about the appellant. She said that she did not know who he was and that she had just met him at a bar. She stated that none of the property in the motel room belonged to her and that she only had the clothes she was wearing.

Det. Grant then went back into the motel room and asked appellant how he knew Mrs. Holder, to which appellant responded "I just met her at a hospital in Texas City about two weeks ago, I'm seeing her and we're in love." Det. Grant told appellant that Mrs. Holder's husband had just been murdered. Appellant stated that he had nothing to do with it. He also stated that all the property in the motel room, contrary to what Mrs. Holder had just told the officer, belonged to Mrs. Holder.

At this point, Sgt. Ratliff was suspicious about the contradicting stories as to the property ownership and how Mrs. Holder and appellant knew each other. Sgt. Ratliff asked

Mrs. Holder and appellant to accompany him to the Webster police station. They agreed. They rode in two different vehicles to the station. Once there, they waited for several hours while the officers conducted further investigation.

Sgt. Ratliff obtained a search warrant to search the Quality Inn room and executed it the next morning. Appellant later gave two videotaped confessions of his part in the murder of Curtis Holder.

Appellant filed two pre-trial motions to suppress evidence. In his first motion to suppress, appellant argued that his arrest and the pat-down search at the motel, both warrantless, were made without adequate probable cause and in violation of Chapter 14 of the Texas Code of Criminal Procedure and Article I, sections 9, 13, and 19 of the Texas Constitution and the Fourth Amendment to the United States Constitution. The trial court denied appellant's motion to suppress the arrest and search and issued detailed findings of fact and conclusions of law in support of its ruling.

Appellant also filed a motion to suppress defendant's second confession, arguing the this videotaped confession was involuntary and coerced and, thus, violated the Fifth Amendment to the United States Constitution and article 38.22 of the Texas Code of Criminal Procedure. After a hearing, held during trial but outside the jury's presence, the court denied appellant's motion to suppress the confessions and issued detailed findings of fact and conclusions of law in support of this ruling.

The jury found appellant guilty of capital murder. Because the State did not seek the death penalty for appellant, punishment was automatically assessed by the trial court at confinement for life in the Institutional Division of the Texas Department of Criminal Justice.

II. ISSUES PRESENTED FOR REVIEW

In his first point of error, appellant contends that the trial court erred in denying his

motion to suppress evidence relating to the warrantless "arrest" and pat-down search of him at the motel. In his second point of error, appellant argues the trial court erred in not suppressing the second videotaped confession because it was made in violation of article 38.22 of the Texas Code of Criminal Procedure.

III. STANDARD OF REVIEW

The appropriate standard of review for a suppression ruling is bifurcated, giving almost total deference to the trial court's findings of fact, but conducting a *de novo* review of the court's application of law to those facts. *State v. Ross*, 32 S.W.3d 853, 856 (Tex. Crim. App. 2000) (citing *Carmouche v. State*, 10 S .W.3d 323, 327 (Tex. Crim. App. 2000)); *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1999).

IV. ANALYSIS

A. Reasonableness of Seizure and Searches

Appellant contends that when the officers transported him to the Webster Police station to clear up discrepancies, he was under arrest without probable cause and not merely being detained. Specifically, appellant argues that (1) any suspicious circumstances that existed at the motel that night were attributable to Mrs. Holder and not to appellant; (2) appellant was handcuffed; (3) while at the motel, the police had their weapons drawn; (4) appellant was placed into the caged back of a police car for transport; (5) appellant was detained for many hours in a locked police interview room; (6) no further investigation or questioning took place; (7) the "protective sweep" was unjustified because the officers had no reason to believe anyone else who could pose a threat was in the room; and because (8) the officers did not have any reason to believe appellant was armed and needed a pat-down search. Appellant argues that the information used to obtain appellant's first videotaped confession was a product of, and therefore tainted by, the illegal arrest.

Investigative detentions and arrests are seizures. *Johnson v. State*, 912 S.W.2d 227,

235 (Tex. Crim. App. 1995). A seizure under the Fourth Amendment to the United States Constitution and under Article I, Section 9, of the Texas Constitution occurs when a reasonable person would believe he or she was not free to leave and when that person has yielded to the officer's show of authority or has been physically forced to yield. *Id*. at 235–36. To justify an investigative stop, the officer must have specific articulable facts that, in light of his experience and personal knowledge, together with inferences from those facts, would reasonably warrant an intrusion on the freedom of the citizen detained. *Terry*, 392 U.S. 1, 21 (1968); *Comer v. State*, 754 S.W.2d 656, 657 (Tex. Crim. App. 1986). The officer must reasonably suspect that some unusual activity is occurring or has occurred, that the detained person is connected with the activity, and that the unusual activity is related to the commission of a crime. *Hoag v. State*, 728 S.W.2d 375, 380 (Tex. Crim. App. 1987).

Although handcuffing the suspect is not ordinarily proper during an investigative detention, an officer may do so when reasonably necessary to effect the goal of the detention: investigation, maintenance of the *status quo*, or officer safety. *Rhodes v. State*, 945 S.W.2d 115, 117 (Tex. Crim. App. 1997). The degree of force employed by a police officer, though, is only one of several factors a court must consider in determining whether a particular seizure constitutes an arrest or merely an investigative detention. *State v. Moore*, 25 S.W.3d 383, 386 (Tex. App.—Austin 2000, no pet.). The nature of the crime under investigation, the degree of suspicion, the location of the stop, the time of day, and the reaction of the suspect all bear on this issue. *Id.*; *see also* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.2(d) (3d ed. 1996). The officer's opinion, while not determinative, is another factor to be considered. *Amores v. State*, 816 S.W.2d 407, 412 (Tex. Crim. App. 1991) (citing *Hoag*, 728 S.W.2d at 378–79). It is also important to consider whether the officer actually conducts an investigation after seizing the suspect. *Id.* Whether a seizure is an arrest or an investigative detention depends upon the reasonableness of the intrusion under all of the facts. *Rhodes v. State*, 913 S.W.2d 242, 247 (Tex. App.—Fort Worth 1995), *aff'd*, 945 S.W.2d 115 (Tex. Crim. App. 1997).

Applying these standards to the facts of this case, we find that the officers' conduct

leading up to the investigative detention was reasonable and provided the basis for holding appellant in detention. Det. Grant, Sgt. Ratliff, and Officer Cooper testified at the motion to suppress hearing. The officers had reason to fear for Mrs. Holder's welfare. She had recently been released from a hospital where she was treated for depression and suicidal thoughts. Only a few days before, her husband had been brutally murdered in their home. After the murder, she told the police that she would not "do anything" in front of her daughter. The officers understood this to mean that she would not commit suicide in her daughter's presence. The investigating officers made sure Mrs. Holder spent the night with a neighbor on the night of the murder. When Mrs. Keelan phoned the police to discuss Mrs. Holder's calls, the officers then knew Mrs. Holder was outside her daughter's presence when she had told officers she would be with her daughter. Mrs. Holder had not been truthful with the sitter about her whereabouts and activities. It was with this knowledge that the officers went to the motel to check on Mrs. Holder.

The occupants in room 155 had an unusual response to the officers' announcement and their request that the occupants come to the door -- a man asked whether it was a "wake up call." Unlike the other motel patrons, who responded promptly to the officers' knocks, appellant and Mrs. Holder did not open the door immediately. The officers had to make repeated requests before they finally opened the door. Then, there was a long silence before Mrs. Holder finally emerged from the room. Before that, the officers thought they heard multiple voices. While they were waiting, they heard a loud noise and a hitting sound or "commotion" at the door. The area was not well lit and they were in almost total darkness. The officers became concerned enough for their safety to draw their weapons and retreat.

Even after appellant emerged from the room, the officers had a legitimate concern as to whether there were others in the room that could pose a threat to their safety in light of the occupants' response to the officers' presence there, the darkness in that area, and the officers' uncertainty as to whether appellant's voice was the male voice the officers heard through the door.

An officer conducting an investigatory stop need only have a reasonable belief, not probable cause, to conduct a self-protective search. *Worthey v. State*, 805 S.W.2d 435, 437–38 (Tex. Crim. App. 1991) (citing *Terry v. Ohio*, 392 U.S. 1, 27 (1968)). Such a protective search for weapons may extend beyond the person, even in the absence of probable cause. *Id.* Under the circumstances of this case, the officers were fully justified in entering the motel room and in conducting a limited cursory search for anyone that might harm them, while they talked to Mrs. Holder and appellant. The self-protective search of room 155 lasted less than one minute.

In conducting the cursory search, the officer saw several knives on the bathroom floor and knife holes in the wall. Det. Ratliff thought the knives looked like those he had seen in the Holder home just two days earlier during the murder investigation. Also weighing on the officer's mind was that he had seen knife holes in walls at the murder scene and had suspected that Mr. Holder knew his killer.

The officers obtained appellant's consent to go back into the motel room with him and talk with him there. Again, to reasonably guard their safety, the officers gave appellant a pat-down search for weapons. An officer may conduct a limited pat-down search of the outer clothing for weapons during a detention if the officer fears for his safety, or that of others. *Davis v. State*, 829 S.W.2d 218, 220 (Tex. Crim. App. 1992). At this stage, the officers already had legitimately seen, through the limited, self-protective room search, several knives resembling those found at the murder scene. This observation justified the pat-down search of appellant for weapons. The officer was also justified in seizing the pill bottle at that time. Still concerned about Mrs. Holder, the officer wanted to keep the pills so that if Mrs. Holder's condition worsened, he could assist medical personnel in determining what she had ingested.

The unusual circumstances in which the officers found appellant and Mrs. Holder at the motel two days after her husband's brutal murder, their inconsistent statements, the fact that Mrs. Holder had not yet been eliminated as a suspect, and the investigating officer's belief that

Curtis Holder had been murdered by someone he knew, provided sufficient justification for an investigative detention.

The record reveals that appellant accompanied the officers to the police station voluntarily. The officers did not threaten or coerce him. That the officers took appellant to receive *Miranda* warnings on the way to the station is more indicative of proper cautiousness than it is of an officer's intent to arrest him. *See Dancy v. State*, 728 S.W.2d 772, 777 (Tex. Crim. App. 1987). The officers did not handcuff appellant at the station. While they were at the station, the officers continued to investigate, and found that a ring from the pill bottle found on appellant matched an item listed in a police report from a recent burglary at the house next door to the Holder residence. This swift investigation led to the filing of felony burglary charges against appellant within hours of his arrival at the police station.

On this record, we find (1) the officers were justified in performing a limited search and pat-down of appellant, in the motel room, for weapons; (2) the officers had reasonable suspicion to and did reasonably detain appellant for investigatory purposes; and (3) appellant's interaction with police until some time after he was transported to the police station was, at most, an investigatory detention and not an arrest. Because we find that the circumstances justified the motel room and pat-down searches and investigatory detention, we need not determine whether the evidence obtained as a result was tainted.

Appellant's first point of error is overruled.

B. Express Waiver of Rights under Article 38.22

In his second and final point of error, appellant complains that the trial court should have suppressed his second videotaped confession because, although the officers provided *Miranda* warnings on the video and asked appellant whether he understood them, the officers "never asked Appellant whether he wished to waive those rights."

Section three, article 38.22 of the Texas Code of Criminal Procedure provides:

> (a) No oral or sign language statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding unless:
>
> > (1) an electronic recording, which may include motion picture, video tape, or other visual recording, is made of the statement;
> >
> > . . . .
> >
> > (2) prior to the statement but during the recording the accused is given the warning in Subsection (a) of Section 2 above and the accused knowingly, intelligently, and voluntarily waives any rights set out in the warning;

TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3(a)(1)–(2) (Vernon Supp. Pamph. 2001).

The Court of Criminal Appeals has stated "[w]e do not, however, interpret the oral confession statute to require an express verbal statement from an accused that he waives his rights prior to giving the statement. In reaching the voluntariness of a confession, this Court looks at the totality of the circumstances." *Barefield v. State*, 784 S.W.2d 38, 40–41 (Tex. Crim. App. 1989), *overruled on other grounds*, *Zimmerman v. State*, 860 S.W.2d 89, 94 (Tex. Crim. App. 1993), *vacated on other grounds*, 510 U.S. 938 (1993).

The record supports the trial court's conclusion that appellant freely, intelligently, and voluntarily waived his rights in accordance with article 38.22. Specifically, we note that (1) appellant indicated that he understood the rights read to him; (2) he waived those very same rights before making a confession on another videotape just days before; (3) he was given an opportunity to, and in fact, did ask questions immediately after the officer read the article 38.22 warnings; and (4) by the time of the second videotape, appellant had received his *Miranda* warnings several times already. From this combination of circumstances, we find that appellant gave a voluntary, knowing, and intelligent waiver of his rights during the second videotaped confession. Accordingly, we overrule appellant's second point of error.

The trial court's judgment is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed May 24, 2001.

Panel consists of Justices Edelman, Wittig, and Frost.

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