Affirmed and Opinion filed August 9, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00038-CR

FRANCISCO ZAPATA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 795,868

O P I N I O N

Appellant presented himself at a hospital with a severely cut finger, claiming he had been assaulted by a robber wielding a knife. A week later, suspicious that appellant might have been involved in a nearby stabbing death, the police asked him to come to the station for questioning. Appellant gave two inculpatory statements. He was subsequently charged with capital murder, convicted, and sentenced to life imprisonment. At the pre-trial suppression hearing, appellant claimed he was in custody at the time of the statements, but that the police failed to procure an arrest warrant in violation of Chapter 14 of the Texas Code of Criminal Procedure. We determine whether appellant was illegally in custody and,

if so, whether the statements were admissible under the *Brown* attenuation-of-the-taint analysis. We hold both were admissible and affirm.

Background[1]

While walking alone along Lawndale Avenue in the dark morning hours of October 11, 1998, complainant, Moises Ayala, was jumped by several men and stabbed to death. Later that morning, appellant went to a hospital to be treated for a severe cut to his index finger. Appellant told the treating doctor that he received the cut from a knife attack. The doctor called the police. Appellant told Houston Police Department ("HPD") Officer Romero he had been assaulted by a would-be robber at a payphone outside a nightclub at about 2:00 a.m., just after the club closed. Romero investigated and found that appellant's story was inconsistent with the facts he discovered. First, there was no blood in the area around the payphone, despite the fact that appellant had been bleeding severely when he arrived at the hospital. Second, appellant had told Romero the area where he was attacked was dark but Romero found the area was well-lit. Officers Chavez and Mosqueda, who were assigned to investigate complainant's murder, were alerted to appellant's assault report. One item that drew their attention was that, consistent with appellant's heavy bleeding, there were blood trails leading away from the murder scene. The officers also determined that the club closed around midnight rather than some two hours later, as asserted by appellant.

A week after the murder, on October 18, at approximately 11:00 a.m., Chavez and Mosqueda went to appellant's home and asked him to accompany them to the station to discuss the assault he had alleged. Chavez did not tell appellant about his interest in the murder investigation, but admitted at the suppression hearing that he "fully intended" to talk to appellant about it. After 20 to 30 minutes of discussing the assault, the officers confronted appellant about the inconsistencies in his story. Appellant admitted he had fabricated the assault story because he was present when the murder occurred. Chavez

[1] The facts below are from the hearing on appellant's motion to suppress his statements.

then placed appellant in an "interview room" and asked appellant to give details about his involvement. Chavez read appellant his *Miranda* warnings. Appellant indicated he understood the warnings but the officers did not request appellant to waive his rights.

In his videotaped statement, appellant told the officers that the night of the murder, a teenager named Carlos Segura offered to sell him a stereo he had stolen. Appellant called his brother-in-law, Mark Zavalla, and sister, Adie, who stated that they might want to buy it. Appellant, Carlos, and another friend, Joel, set out on foot to the Zavallas' apartment where they would make the sale. On the way there, the three men came upon complainant, who was walking toward them from the opposite direction. Appellant claimed that Carlos, drunk and tired of walking, said, referring to complainant, "there's the money right there, why go all the way over [to the apartment?]" Carlos then tackled complainant, who broke free and ran. Carlos caught complainant and started stabbing him. Appellant said he and Joel had nothing to do with the attack and, in fact, tried to stop Carlos. Appellant said he had tried to grab Carlos's knife-wielding hand from behind, at which point appellant was cut on the index finger. After complainant fell, they all left the scene without taking anything. Carlos threw away the knife. Appellant went to his sister's house and later went to the hospital to have his wound treated. Appellant said he gave a false report about being assaulted because, "I'm involved in this, you know. I got scared, you know." However, despite numerous questions from police about his involvement, appellant steadfastly denied having anything to do with planning or committing the murder.

At 2:30 p.m., after appellant finished the statement, the officers took appellant in an unmarked van in an unsuccessful attempt to locate Carlos and Joel. At 3:00, the officers took appellant for confinement in the city jail. The next day, at approximately 1:40 p.m., the officers took appellant to a magistrate who, among other things, gave him his statutory warnings and made a determination that probable cause existed for his arrest.

The officers then returned to appellant's cell to resume questioning. At one point,

appellant put his head down, sighed, and admitted he had not been truthful with the officers. He told them that Joel had not participated in the murder and had only implicated him to cover for his brother-in-law, Mark, who had been involved. The officers then escorted appellant back to the interview room where they took another videotaped statement. Again, they gave appellant his *Miranda* rights, to which appellant indicated his understanding, but the officers did not request or obtain an express waiver. In the statement, appellant admitted that he participated in stabbing complainant. Appellant was charged with capital murder. The court denied appellant's motion to suppress his two statements. Both of the statements were admitted at trial.

In a single issue, appellant argues both his confessions were products of an illegal arrest in violation of Chapter 14 of the Texas Code of Criminal Procedure, thus the trial court erred in admitting them.

Standard of Review

In reviewing the trial court's ruling on a motion to suppress, we apply a bifurcated standard of review. *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000). We give almost total deference to the trial court's determination of historical facts, while we conduct a *de novo* review of the trial court's application of the law to those facts. *Carmouche*, 10 S.W.3d at 327. The trial court is the exclusive finder of fact in a motion to suppress hearing, and, as such, it may choose to believe or disbelieve any or all of any witness's testimony. *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990). Since the trial court did not make explicit findings of historical fact, we review the evidence in a light most favorable to the trial court's ruling. *Carmouche*, 10 S.W.3d at 327–28.

Discussion

Was Appellant in Custody When he Gave his First Statement?

Appellant argues his statement was inadmissible because it was obtained by means of his illegal arrest, when he was placed in custody and interrogated without a warrant, in

violation of Chapter 14 of the Texas Code of Criminal Procedure.[2] The State does not assert that the warrant requirement was excused by any exceptions under Chapter 14. Rather, it contends appellant was not in custody at the time of the statement. Alternatively, it argues that even if appellant was in custody, the statement is nonetheless admissible under the attenuation-of-the-taint analysis. We find that appellant was not in custody at the time of the statement.

As a general rule, police officers must always obtain an arrest warrant prior to taking someone into custody. *Dejarnette v. State*, 732 S.W.2d 346, 349 (Tex. Crim. App. 1987). In recognizing the importance of this rule, the court of criminal appeals has held that: "The Legislature has determined through its enactment of Arts. 14.01 through 14.04 and 38.23 [of the code of criminal procedure], that the right to be free from warrantless arrest is at least equal in magnitude to the state and federal constitutional right to be free from unreasonable searches and seizures." *Bell v. State*, 724 S.W.2d 780, 787 (Tex. Crim. App. 1986).[3]

A person is in custody if, "under the circumstances, a reasonable person would believe that his freedom of movement was restrained to the degree associated with a formal arrest." *Dowthitt v. State*, 931 S.W.2d 244, 254 (Tex. Crim. App. 1996). The reasonable person standard presupposes an innocent person, and the law enforcement official's subjective intent to arrest is irrelevant unless that intent is somehow communicated or otherwise manifested to the suspect. *Id.* Determining whether a person is in custody in a given situation is a question to be determined on an *ad hoc* basis, after considering all the objective circumstances. *Id.* at 255. Stationhouse questioning does not, in and of itself,

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[2] Appellant does not contend his confessions were involuntary or that they were taken in violation of any constitutional rights.

[3] Article 38.23(a) states: "No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case." TEX. CODE CRIM. PROC. ANN. art. 38.23(a).

constitute custody. *Id*. That an interrogation starts out as noncustodial does not mean that custody cannot arise later as a result of police conduct during the encounter. *Id.*

The court has recognized four general situations which may constitute custody: (1) when a suspect is physically deprived of his freedom of action in any significant way; (2) when a law enforcement officer tells a suspect he cannot leave; (3) when law enforcement officers create a situation that would lead a reasonable person to believe his freedom of movement has been significantly restricted; and (4) when probable cause to arrest exists and law enforcement officers do not tell the suspect he is free to leave. *Id.* at 255. The court further stated:

> Concerning the first through third situations . . . the restriction upon freedom of movement must amount to the degree associated with an arrest as opposed to an investigative detention. Concerning the fourth situation . . . the officers' knowledge of probable cause [must] be manifested to the suspect. Such manifestation could occur if information substantiating probable cause is related by the officers to the suspect or by the suspect to the officers. Moreover, given our emphasis on probable cause as a "factor" in other cases, situation four does not automatically establish custody; rather, custody is established if the manifestation of probable cause, combined with other circumstances, would lead a reasonable person to believe that he is under restraint to the degree associated with an arrest.

Id.

As to the first three prongs, there is nothing indicating that prior to his first statement, appellant's freedom was physically deprived in any manner, nor did the officers tell appellant he was not free to leave, or create a situation that would lead a reasonable person to believe his freedom of movement has been significantly restricted. The facts in this case fall within the fourth inquiry: "when probable cause to arrest exists and law enforcement officers do not tell the suspect he is free to leave."[4] Just prior to making his

[4] The test for determining the existence of probable cause is whether the facts and circumstances within the officer's knowledge and of which he had sufficient trustworthy information were sufficient to warrant a prudent man in believing the arrested person had committed or was committing an offense. *See Guzman v. State*, 955 S.W.2d 85, 90 (Tex. Crim. App. 1997).

statement, appellant admitted he lied about the assault report and told the officers he was present at the scene of the murder. At that point, along with the other facts implicating appellant in the murder, the officers clearly had sufficient trustworthy information to warrant a reasonable belief appellant was criminally responsible for the murder. Additionally, the officers did not tell appellant he was free to leave. Therefore, the factors under number four are established.

We next decide whether the officers' knowledge of probable cause was manifested to the suspect. *Dowthitt*, 931 S.W.2d at 255. Manifestation of probable cause may occur if it is either communicated by the officers to the suspect or by the suspect to the officers. *Id.* We find that probable cause was manifested to appellant by the time the following events occurred: (1) the officers confronted appellant with the inconsistencies in his story; (2) when, after being asked why he lied about the assault, he stated, "I'm involved in this, you know. I got scared, you know;" and (3) appellant admitted his presence at the murder.

Still, as noted above, situation four does not automatically establish custody; rather, custody is only established if the manifestation of probable cause, combined with other circumstances, would lead a reasonable person to believe that he is under restraint to the degree associated with an arrest. *Id.* at 254.

Appellant primarily relies on *Dowthitt* in support of his assertion that he was in custody. In that case, the court recognized that Dowthitt's admission that he was at the murder scene was the crucial point at which custody began. *Id.* at 257. But that admission did not alone support a finding he was in custody. *Id.; see also Chambers v. State*, 866 S.W.2d 9, 19-20 (Tex. Crim. App. 1993) (holding that the appellant was not in custody even after admitting to the killing). It was only sufficient to do so after the suspect had been questioned for some 15 hours, the police had ignored two requests to see his wife, and was accompanied during restroom breaks. These acts by police were significant factors leading the defendant to believe he was under arrest and were largely absent in this case. *Dowthitt*, 931 S.W.2d at 256-57. Thus, we examine the other relevant circumstances

prior to appellant's statement. *Id.* (determination of custody must be made on a case-by-case basis after considering all of the objective circumstances).

Here, it is significant that appellant went to the station voluntarily and gave his statement only shortly afterward. That appellant's appearance was at the request of officers or that they had an ulterior motive in bringing him to the station is of minimal effect on the custody determination:

> There is a solid body of law . . . holding that where the circumstances show that the person voluntarily accompanied the police in the investigation of a crime, and he knew or should have known that the police might suspect that he is implicated in the offense, whether he is acting upon the invitation, urging, or request of police officers, and not being forced, coerced or threatened, the act is voluntary and the person is not then in custody.

Chambers, 866 S.W.2d at 18 (citations omitted).

This case is similar to *Oregon v. Mathiason*, 429 U.S. 492 (1977). There, the defendant voluntarily went to the police station at their request. Once there, he was escorted into an office and told that, although he was not under arrest, the police believed that he had been involved in a burglary. The officer falsely stated that the defendant's fingerprints were found at the scene and that his truthfulness would possibly be considered by the district attorney or judge. Despite the officers' stated belief that the defendant was guilty and the coercive environment they created, the Supreme Court held that since the defendant voluntarily came to the police station and was informed that he was not under arrest, he was not in custody or otherwise deprived of his freedom of action in any significant way:

> Such a noncustodial situation is not converted to one in which Miranda applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a "coercive environment." Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime.

Mathiason does compare favorably for the appellant here in that the officers

explicitly told that defendant he was not under arrest. Nonetheless, the officers there postured themselves more forcefully when they lied to him about his fingerprints at the crime scene and they told him that they thought he committed the crime. It seems that the officers' assurance that the suspect was not under arrest would ring hollow if the officers, almost in the same breath, had just accused him of these things. The record here does not show, prior to his first statement, that the officers intimidated appellant, handcuffed him, or otherwise asserted themselves in a manner which could be deemed as restricting appellant's freedom of movement. Though appellant's admission that he lied and that he was present at the murders certainly would cause a reasonable person to feel they were in deep trouble, we find that all the circumstances taken together would not have led a reasonable person to believe that he was under restraint to the degree associated with an arrest. Thus, we hold that appellant was not in custody at the time he gave his first statement and the trial court did not err in admitting the statement.

Was Appellant's Second Statement Admissible?

If appellant was not in custody at the time he admitted his presence at the murder, he surely was shortly after that, when the officers put him in jail. Because the officers failed to obtain a warrant by that time, we hold his arrest was illegal.[5]

We therefore determine whether the second statement was admissible under the four-factor attenuation-of-the-taint test stated in *Brown v. Illinois*, 422 U.S. 590 (1975), as adapted by the court of criminal appeals. *Bell v. State*, 724 S.W.2d 780, 788 (Tex. Crim. App. 1986). Rather than articulate a bright line rule for exclusion of confessions, the Supreme Court noted four relevant factors to be considered in determining whether the causal chain between the illegal arrest and the statements is broken so that the statements are the product of a free will. In *Bell*, the factors were utilized in a determination whether the taint was attenuated in a warrantless arrest in violation of chapter 14. *Id.* These four factors are: (1) the giving of Miranda warnings; (2) the temporal proximity of the arrest

[5] The State appears not to contest the illegality of the arrest.

and the confession; (3) the presence of intervening circumstances; and (4) the purpose and flagrancy of the official misconduct. *Id.* To an extent, we will discuss these factors together because they are closely interrelated.

As to the first factor, by the time appellant gave his second statement, he had been given his *Miranda* warnings at least three times, twice by police and once by the magistrate. This factor therefore weighs in the State's favor. The court of criminal appeals has observed that, by itself, the second factor — time between arrest and confession — is something of an ambiguous element and not a strong one when viewed out of context:

> [T]he *Brown* court's assumption that the mere passage of time increases the likelihood of the confession being untainted is not sound. 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.

Bell v. State, 724 S.W.2d 780, 788 n. 4 (Tex. Crim. App. 1986) (citations omitted). In *Dunaway v. New York*, 442 U.S. 200 (1979), Justice Stevens noted that "[i]f there are no relevant intervening circumstances, a prolonged detention may well be a more serious exploitation of an illegal arrest than a short one." *Id.* at 220 (Stevens, J., concurring). Not long after appellant gave his second statement, the officers put him in jail and left him there for nearly 24 hours.[6] This comes perilously close to the maximum period allowed under the federal injunction requiring HPD take suspects before a magistrate within 24 hours of arrest. *See Sanders v. City of Houston*, 543 F.Supp. 694, 705 (S.D. Tex.1982), *aff'd*, 741 F.2d 1379 (5th Cir. 1984) ("when a person has been arrested on a policeman's assessment of probable cause, the person arrested must be brought before a judicial officer as soon as possible, but in any event not later than twenty-four (24) hours after the arrest."); *see also* TEX.CODE CRIM. PROC. ANN. art. 14.06(a) ("the person making the arrest shall take the person arrested or have him taken without unnecessary delay before [a] magistrate. . . ."). Thus, if anything, factor two weighs against the State. However, as

[6] Taking into account the time from when the police went to appellant's house, appellant was in police presence for well over 24 hours.

discussed below, appellant's appearance before the magistrate was a significant intervening circumstance.

Prior to taking appellant's second statement, the officers presented him to a magistrate. The "Statutory Warning and Determination of Probable Cause" form shows that the magistrate advised appellant that he was accused of capital murder, and that "[a]fter examining the facts and circumstances giving rise to this arrest, [the magistrate] determined that probable cause for this confinement does exist. . . ." The magistrate also gave appellant his *Miranda* warnings, advised him of his right to an examining trial, set bail, and set a date for appellant to reappear for a re-determination of probable cause. Finally, the magistrate noted on the form that appellant understood his rights and had no questions about them. Because a neutral magistrate determined there was probable cause for appellant's arrest, appellant was afforded every material protection that obtaining an arrest warrant would have provided and more. Accordingly, this factor weighs in favor of the State.

We did not ascertain that the police's conduct was purposeful in arresting appellant without a warrant and waiting a seemingly long period before magistrating him. If anything, though, they were negligent. *See Brown*, 422 U.S. at 612 ("The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right."). Still, the officers' taking appellant to a magistrate just prior to questioning him, in all likelihood, would only have *lessened* the likelihood of his providing them a second statement. As Dix & Dawson observed:

> [P]resentation of a suspect may in several ways interfere with effective custodial interrogation of the suspect. The magistrate is to administer warnings concerning the rights to remain silent and to counsel, and those warnings may be more effective than the warnings administered by law enforcement officers. Moreover, the suspect may at the appearance make a documented invocation of the right to counsel, in which case officers may be barred from reapproaching the suspect concerning waiver of his interrogation rights. Finally, officers' opportunity for custodial interrogation may end if the magistrate releases the suspect, either on the basis of a

> finding that probable cause is absent or on bail or some other form of pretrial release.

40 GEORGE E. DIX & ROBERT O. DAWSON, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 13.191 (1995). These protections would not have been afforded appellant had the officers only sought an *ex parte* arrest warrant. We infer from all the circumstances, then, that the officers' conduct was not greatly purposeful or flagrant. Moreover, because the only complained-of legal wrong is the failure to obtain a warrant, we find appellant's appearance before the magistrate was a significant, if not dispositive, intervening circumstance. *See Bell*, 724 S.W.2d at 789, n. 5. (taking a suspect before a magistrate can be a significant intervening circumstance). Having carefully weighed the *Brown* factors in view of the facts, we find the taint of appellant's illegal arrest was sufficiently attenuated. We therefore hold the trial court did not err in admitting appellant's second statement. We overrule appellant's sole issue.

The judgment of the trial court is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed August 9, 2001.

Panel consists of Justices Yates, Wittig and Lee.[7]

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[7] Senior Justice Norman R. Lee sitting by assignment.