

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER 1996 SESSION

**FILED**

**March 17, 1997**

**Cecil Crowson, Jr.**  
Appellate Court Clerk

STATE OF TENNESSEE,

\*

C.C.A. # 03C01-9601-CR-00006

Appellee,

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HAMILTON COUNTY

VS.

\*

Hon. Stephen M. Bevil, Judge

MARK CHRISTOPHER DAVIS,

\*

(Second Degree Murder)

Appellant.

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For Appellant:

For Appellee:

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OPINION FILED: \_\_\_\_\_

AFFIRMED

GARY R. WADE, JUDGE

## OPINION

\_\_\_\_\_The defendant, Mark Christopher Davis, was convicted of second degree murder. The trial court classified the defendant as a Range I offender and imposed a twenty-year sentence. In this appeal of right, the defendant challenges the sufficiency of the evidence and claims the trial court erred by admitting his incriminating, pretrial statements.

We affirm the judgment of the trial court.

In the late evening of September 7, 1994, the defendant and a friend, Darren Hubbard, were walking near a housing project in Chattanooga when a white van approached. The driver, Michael Underhill, stopped his vehicle and asked the defendant if he had any drugs to sell. The defendant, who was armed with a concealed handgun, answered in the affirmative, entered the van, and shortly thereafter shot the victim. The defendant jumped out of the van, which then traveled down the street and off the roadway into a wooded area. The defendant walked over to Hubbard, showed him two five dollar bills and a ten, and then left to buy some marijuana.

Constance Smyer saw the van roll into the woods. She and her mother contacted the police.

Anthony Bernard, a Chattanooga police officer, was the first officer to arrive at the scene. He climbed down an embankment and through thick brush to reach the van. When asked if he was all right, the victim replied: "Yes, I'm just drunk, I'm okay." Officer Bernard then noticed a small amount of blood on the victim and called for an ambulance. When the victim removed his wallet to show his

driver's license, several crumpled dollar bills of unknown denomination fell to the ground and the officer directed him to put them back into his pocket. When the ambulance arrived, the victim tried to stand, fell to the ground, and eventually died. At trial, Officer Bernard could not recall having seen a knife in the van.

Detective Swafford was assigned to investigate the shooting. After receiving a tip, the detective interviewed Hubbard and, based upon the information acquired, sought to question the defendant. After being read his rights and signing a waiver form, the defendant claimed he was stoned on the night of the shooting and denied seeing the victim's white van. Upon further questioning, however, he admitted that he had seen the van and acknowledged that he had sold drugs to the driver; he denied any involvement in the shooting. When the defendant began to change his story, the detective asked Hubbard to talk to the defendant and to encourage him to "tell the truth." Upon further interrogation, the defendant admitted shooting the victim. A full statement from the defendant was then tape-recorded.

Darren Hubbard, who was a witness for the state, testified that he had joined the defendant in a visit to a cousin's residence on the day of the murder; they played cards, drank beer and smoked marijuana. Hubbard claimed that he and the defendant left the residence that evening and were walking the same direction down the street when the driver of a white van stopped and asked if they had any drugs to sell. The defendant answered yes and got into the van. After the van was driven a short distance, Hubbard heard gun shots and saw the van stop. When the defendant got out of the vehicle, he admitted that he had shot the victim "because he didn't give [me] the money." When Hubbard asked what he "got off this job," the defendant did not speak but did show Hubbard twenty dollars. Hubbard testified that he told the defendant that if the police became involved, he expected the

defendant to exonerate him. Hubbard claimed that he then went to his girlfriend's apartment and the defendant left to buy some marijuana.

Hubbard refuted many of the claims the defendant made to police. For example, he denied that the defendant told him that the victim was armed with a knife or that the shooting was in self-defense. He denied that the defendant had crack cocaine on the night of the murder. Although Hubbard claimed at trial that he had previously seen the van parked at a "crack house" and described the driver as a "crack head," he admitted that he originally told police he had no prior knowledge of the van.

Charles Harlan, M.D., the chief medical examiner for the state, testified that the victim, who was shot twice, had a blood alcohol level of .07%; he described that as the equivalent of the victim drinking five beers. Because he found a trace amount of cocaine in the bloodstream, Dr. Harlan determined that the victim had ingested cocaine between twelve hours to fifteen minutes before his death. Although there were no needle marks on the victim to indicate recent injections, certain crystalline structures in the victim's arteries indicated that the victim had previously taken illegal drugs intravenously. Dr. Harlan also provided his findings on the trajectory of the bullets that tended to refute the defendant's rendition of the shooting.

At trial, the defendant claimed self-defense. He contended that a female cousin had given him money to buy drugs for resale to pay her rent. He testified that he had about twenty crack-cocaine rocks when he was approached by the victim. The defendant insisted that the victim snatched five of the "rocks" even though the twenty dollars was only enough to pay for one. The defendant claimed

that when he demanded either the crack or money, the victim attacked him with a knife. The defendant acknowledged shooting the victim; when the victim continued to attack, a second shot was fired. The defendant contended that he jumped from the van, taking only the twenty dollars and leaving the drugs behind.

On appeal, of course, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as triers of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983); Tenn. R. App. P. 13(e).

It is the state's duty to prove every element of the crime. Second degree murder is defined as the "knowing killing of another." Tenn. Code Ann. § 39-13-210(a)(1). "Knowing" is further defined as, "act[ing] knowingly with respect to the conduct ... when the person is aware of the nature of the conduct." Id. § 39-11-106(20). Knowing is applied to the result of someone's conduct if "the person is aware that the conduct is reasonably certain to cause the result." Id.

In our assessment, the jury had a rational basis for its determination. The defendant admitted that he had concealed his gun between his legs before entering the van. He acknowledged at trial that he intended to fire the first shot into the victim. While he denied intentionally shooting the victim a second time, he

conceded that the gun was in his hand and his finger on the trigger when the shot was fired. Hubbard overheard the defendant confess to the shooting. As was their prerogative, the jury rejected the self-defense theory and accredited the testimony of the state's witnesses. See Arterburn v. State, 391 S.W.2d 648 (Tenn. 1965); State v. Gilbert, 612 S.W.2d 188, 190 (Tenn. Crim. App. 1980). There was clearly sufficient evidence to support a verdict of a "knowing" second degree murder.

The defendant contends that the trial court erred by overruling his motion in limine, presented on the day of trial, to disallow the introduction of certain statements made by the defendant prior to his being informed of his Miranda rights.<sup>1</sup> See David Louis Raybin, Tennessee Criminal Practice and Procedure, § 24.70 for a general discussion of motions in limine. Where the defendant claims that the state has taken a statement under circumstances that violate a constitutional right, the appropriate remedy is to file a motion to suppress. Tenn. R. Crim. P. 12(b)(3), (f); State v. Zyla, 628 S.W.2d 39, 41 (Tenn. Crim. App. 1981). Because the trial court considered the issue on the merits, we have chosen to treat the pretrial hearing as if the defendant had utilized the proper procedure. See State v. Johnson, 673 S.W.2d 877, 883 (Tenn. Crim. App. 1984).

The standard of review by an appellate court on a motion to suppress has recently been clarified by our supreme court in State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). The party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence. Id. "So long as the greater weight of the evidence supports the trial court's findings,

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<sup>1</sup>Generally, a defendant waives his right to contest the admissibility of evidence by failing to file a motion to suppress prior to the day of trial. State v. Kinner, 701 S.W.2d 224, 227 (Tenn. Crim. App. 1985).

those findings should be upheld on appeal." Id.

At the pretrial hearing, the defendant claimed that he was taken into custody and questioned by police before being advised of his rights. He acknowledged, however, that he was read his rights and signed a waiver form before giving his taped statement. On cross-examination, the defendant claimed that he could not remember being advised of his constitutional rights during his prior arrests.

Officer Swafford, having had seventeen years of experience in law enforcement, kept notes of his interrogation. He specifically recalled having advised the defendant of his rights and accepting his written waiver before any questions were asked. Miranda warnings must precede the custodial interrogation of a suspect. Berkemer v. McCarty, 468 U.S. 420 (1984). To determine the validity of a waiver of Miranda, this state adheres to the totality of the circumstances test; that is, was the waiver voluntarily, knowingly, and intelligently made:

[T]he question of waiver must be determined on "the particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused."

North Carolina v. Butler, 441 U.S. 369, 374-75 (1979)(quoting Johnson v. Zerbst, 304 U.S. 458 (1938)); see State v. Stephenson, 878 S.W.2d 530, 544-45 (Tenn. 1994).

The trial court obviously accredited the testimony of Officer Swafford when it determined that the defendant had been timely advised of his constitutional rights and had executed a valid waiver. The record fully supports that finding, and thus, we find no error.

Accordingly, the judgment of the trial court is affirmed.

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Gary R. Wade, Judge

CONCUR:

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David H. Welles, Judge

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Jerry L. Smith, Judge