09/27/85 STATE TENNESSEE v. ALFRED EUGENE GRIZZELL

1985 | Cited 0 times | Court of Criminal Appeals of Tennessee | September 27, 1985

John D. Templeton, Special Judge

Alfred Eugene Grizzell was convicted of armed robbery and kidnapping and sentenced to terms of life imprisonment and four to ten years. On appeal he presents six issues for review. We affirm the judgments.

According to the state's proof, in 1975 appellant Grizzell and Jerry Sills were inmates of the Florida Correctional System and participants in a rehabilitation program sponsored by Florida Jaycee Clubs. They were allowed to attend a Jaycee convention in Tampa in February 1975. Instead of returning to prison when the convention was over, they left Florida February 17, 1975. Clad in "free world" clothes and Jaycee regalia, they were able to pose as Jaycees looking for a ride to the airport in Tampa and induced Thomas Ryan to give them transportation. On the way, Sills put a pistol to Ryan's head and appellant took over operation of Ryan's car. They traveled to Nashville and lodged at Key Stop Motel. It was February 18. James M. Thrower, a 70 year old retired man, was a guest at the motel. Sills and appellant gained Thrower's confidence. About 10:00 p.m. the three men were in Thrower's room and without warning appellant assaulted Thrower with a blackjack. Thrower was struck numerous times on the head and bled profusely. Appellant and Sills took Thrower's wallet, all of his credit cards and identification documents, and his watch. They put Thrower in his cadillac and looked for a place to dispose of him. They drove around several hours without finding a suitable place and returned to the motel to clean up Thrower's room. While appellant was in the room, Thrower escaped from Sills and spread the alarm. The three men left in Ryan's car which they later abandoned. The next morning appellant rented a car with Thrower's credit card and the three went to Chicago and thence to California. Appellant and Sills intend to rob a grocery store in Los Angeles and posted Ryan as a lookout. Ryan's actions were suspicious and he was arrested before the robbery could take place. It was March 1, 1975. Under questioning, Ryan at first undertook to deceive the police but soon gave a statement relating the activity above described, including the robbery and kidnapping of Thrower. The proof showed that appellant continually used Thrower's papers and pretended to be Thrower from the time of the robbery until he was arrested in July 1975. At the time of the arrest he at first identified himself as Thrower and numerous Thrower documents were found in the automobile he was using. Ryan testified for the state at the trial and related the events in the criminal episode that began in Florida and ended in California. Since Ryan was with appellant for the space of about 11 days, the testimony identifying appellant as a participant was very convincing. There really is no doubt that appellant committed the armed robbery and kidnapping.

The first issue for review is whether the Judge properly refused to suppress the victim's identification

of appellant. Thrower was shown photograph arrays the day after the crimes and selected two persons, one as appellant and one as Sills. The identifications were wrong. It appears no pictures of appellant and Sills were in these arrays. In July 1975, appellant and one, Corn, were arrested in Akron, Ohio. In November 1975, about eight months after the crimes, Thrower viewed arrays containing these subjects. Thrower had been informed before he saw the arrays that suspects in his case had been arrested in Akron. He correctly identified appellant but incorrectly identified Corn as Sills. The pictures of appellant and Corn were the only ones in the arrays that had the label "Akron, Ohio" on them. Thrower identified appellant at trial. It is insisted that the pretrial procedure was unduly suggestive and led to a very substantial likelihood of irreparable misidentification and that the in court identification thereby was tainted. The suggestiveness flows from the fact Thrower knew suspects had been arrested in Akron, Ohio and from the presence of the Akron, Ohio label on the pictures of appellant and Corn in the photograph arrays. It is insisted, also, that Thrower, who had not seen appellant for nine years at time of trial, was influenced by seeing appellant handcuffed and a prisoner at the suppression hearing. Further appellant's 1975 description of his assailant was vague and unreliable and, as already noticed, he misidentified appellant and other alleged participations in the crime in other photograph arrays.

It is agreed that an unnecessarily suggestive pretrial identification procedure conducted by police officers may result in a later in court identification being inadmissible for denial of due process. Sloan v. State, 584 S.W.2d 461 (Tenn. Cr. App. 1978). The Judge, of course, must first determine whether the procedure is suggestive and of state origin. But even if it is, the in court identification still may be admissible because of its reliability. As said in State. v. Beal, 614 S.W.2d 77, 82, (Tenn. Cr. App. 1981):

However, under Tennessee law, as under federal law, the existence of an unnecessarily suggestive identification procedure will not trigger the application of a per se rule of exclusion. Instead, the State may elicit in-court identification testimony if the prosecution can show that it is not tainted by the pretrial identification procedure. The test is whether the in-court identification is reliable under the "totality of the circumstances," including the opportunity of the witness to view the offender at the time of the crime, the witness's degree of attention, the accuracy of the prior description of the offender, the level of certainty of the witness at the confrontation, and the length of time between the crime and confrontation. Neil v. Biggers, 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972); Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140 (1977); Rippy v. State, 550, S.W.2d 636, 639-40 (Tenn. 1977).

The Judge did not reach these considerations as he was of the opinion the identification procedure was not suggestive. He overruled the motion to suppress.

We are inclined to regard the procedure as suggestive because of Thrower's knowledge before he saw photographs in November 1975 that suspects had been arrested in Akron, Ohio and because only two photographs had the Akron, Ohio label on them. We think the test of reliability should have been

applied.

It seems unlikely that Thrower's in court identification made in 1984 was based on the picture of 1975. His 1984 identification of appellant, based on seeing appellant in person, appears to have been prompt and positive and, as Thrower testified, "by the looks of his face". He did not notice that appellant was handcuffed. Thrower was in the motel room with appellant some 25 minutes in 1975 and the man he knew as "Red" was his assailant. Appellant's nickname was "Red". He had ample opportunity to view appellant in 1975 and a reason to remember him. Since the findings of the Judge in a suppression hearing have the weight of a jury verdict, State v. Tate, 615 S.W.2d 161 (Tenn. Cr. Appp. 1981), if the Judge had determined from the totality of the circumstances that Thrower's identification was reliable we would be hard put to disagree.

Although we think the procedure was suggestive and we are unable to say from the totality of the circumstances that the in court identification by Thrower was not tainted, we are satisfied that the admission of Thrower's identification was harmless beyond a reasonable doubt. The jury had before it Thrower's erroneous identification as well as other circumstances tending to challenge his identification of appellant. It is unlikely that the jury depended on Thrower's identification. The jury relied instead on the testimony of the witness Ryan who traveled with appellant some 11 days. Ryan's testimony coupled with appellant's use of Thrower's identification made absurd appellant's claim that he was not present at the scene of the crime.

The second issue is whether the Judge properly refused to compel the attendance of a witness, Kenneth Riser. The third issue is whether the Judge properly excluded a letter to appellant from Riser implicating Riser in the robbery. It was a part of appellant's defense that he was not in Nashville when the crimes occurred, did not participate in them, and was entirely unacquainted with state's witness Ryan. He accounted for his possession of Thrower's property by claiming he acquired part of it from Riser in Atlanta and part from an automobile belonging to Marvin Johnson in Texas. At the time of trial Riser was in prison in Georgia and Johnson was in prison in Florida. Appellant had present at trial as a witness Wendell Freels, an inmate of a Tennessee penitentiary. Freels testified that in February or March 1975 he traveled in his car to Florida with Riser who directed him to a motel in Atlanta where Riser gave appellant a wallet containing some credit cards. As already indicated, appellant testified that Riser gave him the wallet which contained Thrower's documents and later he found other Thrower papers in an automobile belonging to Johnson. Appellant sought to subpoena Riser and Johnson as witnesses pursuant to T.C.A. 40-17-201 et seq. Counsel for appellant had addressed an inquiry to Riser and Riser responded that he robbed Thrower, that appellant did not, and that he would not say who was with him at the robbery. He stated that he gave appellant the credit cards. Counsel for appellant and the district attorney went to the Georgia prison to take Riser's deposition. Riser refused to give a deposition unless granted immunity, or a covenant for any sentence for the Thrower crimes to run concurrently with the sentence he was serving, all which the district attorney declined to grant. Appellant's counsel said that Riser did admit he robbed Thrower. However, the district attorney said that in his presence Riser made no statements incriminating

himself. Riser immediately wrote a letter to appellant about the proposal to take his deposition, saying he refused and "I told 'em I'd talk when I got there". In the letter Riser went on to implicate himself, and "Johnny & Jerry", which could be taken to mean the accomplices were Marvin Johnson and Jerry Sills. According to the letter "Tommy Bryant" (Ryan) was not present and neither was appellant. The Judge declined to order compulsory process for Riser and declined to admit the letter into evidence.

Riser clearly exercised his right not to incriminate himself when he refused to give his deposition. There is no showing that he would have done otherwise at trial if summoned as a witness. The claim in his letter that "I told 'em I'd talk when I got there" is no such showing. He never receded from his refusal to testify except upon grant of immunity or of any sentence to add nothing to his term, a demand the district attorney denied. We think the Judge properly concluded that compulsory process for Riser would have produced a witness who would have refused to testify on Fifth Amendment grounds. Appellant, therefore was not denied the benefit of compulsory process. State v. Dicks, 615 S.W.2d 126 (Tenn. 1981).

Appellant sought to introduce the letter from Riser as a declaration against penal interest. The Judge excluded the letter for lack of reliability and corroboration. The rule is, "that for hearsay declarations against penal interest made by an unavailable declarant, to be admissible, must be proven trustworthy by independent corroboration evidence that bespeaks reliability". Smith v. State, 587 S.W.2d 659, 661 (Tenn. 1979).

The testimony of Freels and appellant corroborated the claim that Riser gave appellant Thrower's wallet and credit cards. Riser's statements indicate some knowledge of the crime. However, Freels, Riser and appellant were friends who had been in a Florida penitentiary together. Riser had declined to put his confession in a deposition. He chose instead to address his confessions to appellant's attorney and appellant himself. The statements, if they ever could be used against Riser at all, would be weak and ineffective for their evasive and ambiguous nature. There is no corroboration at all that Ryan was not present when the crimes were committed. We think the Judge correctly determined the statements were not proven trustworthy by reliable independent evidence.

The fourth issue is whether the indictments should have been dismissed for lack of a speedy trial. It is agreed that to determine whether the accused has been denied his Sixth Amendment right to a speedy trial, a balancing test is employed in which are considered the length of the delay, reason for the delay, whether the accused asserted his right, and whether he was prejudiced by the delay. State v. Bishop, 493 S.W.2d 81 (Tenn. 1973).

To catalogue the events between the crimes on February 18, 1975 and the trial commencing March 20, 1984, we look to the record, including the opinion here in State v. Grizzell, 584 S.W.2d 678 (Tenn. Cr. App. 1979). Appellant was arrested in Ohio in July 1975 and returned to the Florida prison system which had lost custody when he did not return from the Jaycee convention in February 1975. He was

identified by Thrower in the picture array in November 1975 the a warrant issued immediately for his arrest. Appellant received notice of the arrest warrant from prison authorities in Florida where he was incarcerated on January 23, 1976. According to appellant, he mailed a pro se demand for trial within 180 days to the clerk and district attorney on March 1, 1976. However, neither the clerk nor the district attorney received any such demand and it must be concluded that the demand was not made at that time. Appellant was indicted April 2, 1976. The district attorney initiated extradition but on July 12, 1976 was notified by Florida to proceed under the Interstate Compact on Detainers (ICD). On September 2, 1976 the district attorney requested custody under ICD and on December 6, 1976 was notified by Florida that appellant was available. On April 3, 1977 he was returned to Tennessee for trial. On May 12, 1977 he filed a motion to dismiss for not being tried in 180 days after demand for trial pursuant to ICD and the Judge sustained the motion and dismissed the indictments. The state sought extraordinary appellate relief which was denied and the state was left to pursue its appeal in the regular way. Appellant was returned to Florida in 1978. The state's appeal was successful and the indictments were revitalized as appears in State v. Grizzell, supra, certiorari denied June 4, 1979. The state again requested custody from Florida August 8, 1979. But appellant filed an action in Florida resisting the request. A Florida trial court sustained his action but the state appealed and the Florida appellate courts reversed on June 23, 1981. However, on March 28, 1981 Florida discharged appellant from the penal system. Because the Tennessee claim was still being litigated, a Florida court released him with instructions to keep in contact with the Florida parole authorities. He was released on his own recognizance. The district attorney sent a letter to Florida penal authorities January 19, 1982 inquiring about appellant's status and learned appellant had been discharged and he was out of contact with Florida. The state enlisted the assistance of federal authorities and in 1983 appellant was arrested in Louisiana and in November 1983 returned to Tennessee for trial. Trial was sent for February 27, 1984 but continued to March 20, 1984 at which time trial began.

Appellant relies heavily on the length of delay from commission of the offense to trial, about nine years, and from initiation of prosecution to trial, about eight years. The length of delay itself is not determinative. But we agree it is sufficient to require an examination of the other three factors.

Appellant submits that the delay was to a great extent the fault of the state, particularly from the initiation of prosecution to the return of appellant to Tennessee the first time which was a space of about 16 months. As already noticed, the state had lodged a notice of the warrant with Florida authorities by January 1976. Indictment occurred April 2, 1976. The state initiated extradition proceedings immediately thereafter but in July 1976 was notified to by Florida proceed under ICD. Appellant became available in December 1976 under ICD and was returned to Tennessee in April 1977. Although the process was deliberate, we think it involved no unnecessary delay for the period involved. Also, we do not find unreasonable the delay of about six months between the date the Florida appellate court rejected appellant's resistance to Tennessee's claim on appellant in June 1981 and Tennessee's inquiry to Florida in January 1982. All the rest of the delay was the result of litigation and the failure of appellant to make himself available to Tennessee pursuant to judgment

of the Florida courts.

The only evidence that appellant demanded a speedy trial is his contention that he mailed a demand to the clerk and district attorney general March 1, 1976 to be tried within 180 days in compliance with ICD. At the time an arrest warrant had issued and indictment was to come April 2, 1976. As already noticed, the demand was never received and his claim that he made a demand is not supported by the evidence. His ICD claim eventually was rejected. The ICD claim itself was an attempt to escape prosecution without a trial on the merits. Thereafter he made no demand for a speedy trial and in fact actively sought to avoid a trial. As observed in State v. Baker, 614 S.W.2d 352, 355 (Tenn. 1981), failure to assert the right to a speedy trial ordinarily is not a waiver but it is a crucial factor; and if it appears the accused does not want a speedy trial the court will be reluctant to find denial of the constitutional right except in extraordinary circumstances.

Although no single factor is determinative, the most crucial inquiry is whether the accused has been prejudiced. Tillery v. State, 565 S.W.2d 509 (Tenn. Cr. App. 1978). The burden is on the accused to show that the delay was prejudicial. Halquist v. State, 489 S.W.2d 88 (Tenn. Cr. App. 1972). Appellant submits that he was prejudiced by the delay for the inability to locate witnesses after nine years. The claim is supported primarily by general statements of counsel that a witness named in the indictment could not be found, that employees of Key Stop Motel of 1975 could not be located, and that a possible alibi witness could not be reached. The statements are not further enlarged upon or explained to show the existence of potential material witnesses. Galen Boyd, who rented a car to a man in 1975 on Thrower's credit card is expressly mentioned as being unable to identify the man but her testimony given in the case indicates she would have been of no help to appellant in any event. All of those shown to be material witnesses were still available at the time of trial. In our opinion, appellant was not prejudiced.

We conclude that upon weighing all of the factors involved, appellant's right to a speedy trial was not infringed.

The fifth issue is whether appellant was denied the effective assistance of counsel. Appellant submits numerous complaints including that his counsel failed to interview and subpoena witnesses, acquire relevant documents, employ expert handwriting witnesses, object to inadmissible evidence, make sure appellant could hear the testimony, object to improper comments by the district attorney, convey a plea bargain offer to him, and other matters. Only one alleged failure is referred to with particularity which is counsel allowed the jury to learn he had been an inmate of the Florida penal system. The fact that he had been such an inmate came into evidence not only as an incident of the state's proof but also as an incident of his own defense and the evidence was admissible. Counsel representing appellant preliminary to and at trial testified on the subject of effective assistance of counsel. It is apparent from the record that counsel conducted exhaustive discovery, made diligent search for witnesses, actually went to Georgia and Florida to depose witnesses, and did everything possible to prepare for trial. Counsel's representation at trial actually was outstanding, particularly in

the crucial part which was the cross examination of Ryan and Thrower. It appears that as a trial tactic counsel declined to make certain objections and to follow a line of questioning advocated by appellant. Considering the overwhelming proof of appellant's guilt, counsel's performance was remarkably good. We have examined the record on all of the complaints raised, including the general ones, and agree with the Judge. Appellant had the effective assistance of counsel as guaranteed by the state and federal constitutions.

The sixth issue is whether appellant was prejudiced by the admission into evidence of business records. Appellant had possession of Thrower's Texaco credit cards and there was evidence he made purchases on credit cards. Texaco credit card invoices are made out by attendants at Texaco stations and signed by the customers and then forwarded to the Texaco central business office for processing. Robert Jones, the custodian of the Texaco records at its credit card center or central billing office in Houston, Texas, testified as to how a purchase is made on a credit card at a Texaco gas station and how the records are sent by the retailer to the central office. He identified certain records of purchases at various retailers on Thrower's credit card in 1975. Appellant complains the tickets are not admissible as business records because the making of them is not proven by the retailers or otherwise. The Judge was of the opinion the tickets were admissible as business records, T.C.A. 24-7-111, and we think he was right. The admission or exclusion of such records by the Judge will not be reversed except for a manifest abuse of discretion. VanZant v. State, 218 Tenn. 187, 402 S.W.2d 130 (1966).

Appellant filed a document pro se designated as "Supplemental Brief of Appellant". The document does not contain any citation to authorities relief on and otherwise fails to conform to our rules. But we have considered the matters presented in the document and find them without merit.

All of the issues are decided against appellant and the judgments are affirmed.

Concur: Charles H. O'Brien, Judge, Joe D. Duncan, Judge