04/29/86 STATE TENNESSEE v. TYRONE E WADE

1986 | Cited 0 times | Court of Criminal Appeals of Tennessee | April 29, 1986

The defendant, Tyrone E. Wade, indicted for murder in the first degree, was found guilty of second-degree murder. He was sentenced to a term of 27 years imprisonment as a Range I, Standard offender. On this appeal, the defendant has presented six issues for review, on various grounds. We find no reversible error and affirm the judgment below.

Although the defendant does not question the sufficiency of the evidence, we will briefly summarize the evidence accredited to assist in placing the issues in proper perspective. The defendant had been drinking on the day of May 21, 1984 with Charles Donaldson and Jerome Bryant. The trio returned to a liquor store and the defendant observed Vonzelle Davis and his father, Lillard Davis, at a convenience store called the "Hot Stop" next door to the liquor store. Vonzelle Davis and Lillard Davis were slaying around." The intoxicated defendant asked Lillard Davis "Why don't you pick on somebody your size?", and struck Lillard Davis. When this occurred, Lillard Davis, Vonzelle Davis, Van McKinley, and others joined in the affray. The defendant was struck in the face and became angry. Vonzelle Davis took Van McKinley home.

The defendant, accompanied by Donaldson and Bryant procured a .32 caliber pistol and began making inquiry to learn the whereabouts of Van McKinley. While driving in the neighborhood where the fight occurred, they passed „some dudes standing on the corner." Defendant said, Stop'. I think I see some of them.' " The defendant got out of the car and shot three or four times toward the "dudes" on the corner. The "dudes" began to run before the defendant began shooting. The defendant got back into the car with Bryant and Donaldson and stated that he thought that he saw one of the people limping.

At 6:25 a.m. on the morning of May 22, 1984, the police department was notified of a possible homicide. They found Van McKinley at 1403 Fourteenth Avenue. He had bled to death from a gunshot wound caused by a bullet entering the lower rear right thigh and exiting on the front of the right thigh. A major artery was severed by the bullet. The victim's blood/alcohol level was 0.36 grams per cent.

The defendant was arrested at approximately 6:15 p.m. on May 22, 1984. on a capias charging him with passing forged papers and forgery. At approximately 1:45 a.m. on May 23, 1984, a written statement was obtained from the defendant, in which he stated that Charles Donaldson fired the shots at the fleeing men.

The defendant, testifying in his own behalf, stated that he was intoxicated at the time of the fight and

of the shooting. He stated that after the fight, he was angry. He admitted firing the shots, but said that he fired them toward the ground only to frighten McKinley and his companions. As we view the record, facts admitted by him constitute constructive malice. We readily see why the defendant does not contest the sufficiency of the evidence as it overwhelmingly establishes guilt.

In his first issue, the defendant says that the statement he gave to police at 1:45 a.m. on the morning of May 23, 1984, should have been suppressed because he was not taken before a magistrate without unnecessary delay as required by T.C.A. § 55-10-203 and Rule 5(a), T.R.Cr.P. We quote the code section:

"55-10-203. When person arrested must be taken before a magistrate--Admission to bail.--(a) Whenever any person is arrested for a violation of chapter 8 or parts 1-5 of this chapter the arrested person shall be taken without unnecessary delay before a magistrate or Judge within the county in which the offense charged is alleged to have been committed and who has jurisdiction of such offense and is nearest or most accessible with reference to the place where said arrest is made, in any of the following cases:

(1) When a person arrested demands an immediate appearance before a magistrate or Judge;

(2) When the person is arrested upon a charge of involuntary manslaughter, voluntary manslaughter or murder;

(3) When the person is arrested upon a charge of driving while under the influence of intoxicating liquor or narcotic drugs;

(4) When the person is arrested upon a charge of failure to stop in the event of an accident causing death, personal injury or damage to property; and

(5) In any other event when the person arrested refuses to give his written promise to appear in court as hereinafter provided.

(b) Any person arrested and charged with violating any provision of chapters 8 and 9 of this title or §§ 55-10-103 -- 55-10-310 inclusive, who is taken before a magistrate or Judge, as hereinbefore provided, shall be admitted to bail by posting a cash bond, but in no case shall such cash bond exceed the maximum fine and costs for the offense or offenses for which the defendant is charged."

Rule 5(a) provides:

"Rule 5. Initial Appearance Before Magistrate.--(a) In General.--Any person arrested except upon a capias pursuant to an indictment or presentment shall be taken without unnecessary delay before the nearest appropriate magistrate of the county from which the warrant for arrest issued, or the county

in which the alleged offense occurred if the arrest was made without a warrant unless a citation is issued pursuant to Rule 3.5. If a person arrested without a warrant is brought before a magistrate, an affidavit of complaint shall be filed forthwith. When an arrested person appears initially before a magistrate, the magistrate shall proceed in accordance w:th this rule."

The defendant asserts that he was arrested without a warrant at 6:15 p.m. on May 22, 1985 for murder. This assertion is contrary to the record; the record reveals that the defendant was arrested on a capias which charged the defendant with forgery and passing forged papers. He was still serving a sentence for the forgery at the time of trial.

At the time the defendant was arrested on the capias, he was a suspect on the murder charge but no more. The murder investigation had not progressed sufficiently to authorize an arrest for murder. Donaldson was also arrested on another offense on the same evening of the defendant's arrest. The officers interviewed both Donaldson and the defendant concerning the murder, but they gave inconsistent statements. Both consented to a polygraph test in continuance of the investigation. Accordingly, the officers awoke the polygraph operator and had him come to the jail and administer the test. It was not until after the test was administered that the officers learned who did the shooting The defendant was arrested for murder at approximately 4:00 a.m. and taken before the magistrate on this charge between 3:45 and 4:00 a.m. on May 23. Thus, he was taken before the magistrate in connection with the murder case without unnecessary delay after his arrest for murder. Neither Rule 5(a) nor T.C.A. § 55-10-203 required that the defendant be taken before a magistrate without unnecessary delay after the arrest on the capias on the forgery charges.

We have considered the remaining arguments concerning the motion to suppress and find that the trial Judge committed no error in overruling the motion.

In the next issue, the defendant says that the trial court erred in refusing to allow counsel to use a clear plastic overlay in conducting his closing argument. The defendant argues that the denial unduly restricted him in presenting closing argument to the jury.

Prior to defense counsel's closing argument, the following exchange took place between the court and defense counsel:

"The Court: Is that the only piece of demonstrative evidence you have?

Mr. Brothers: That and the use of the--of a plastic overlay over the --

The Court: Let me see it.

Mr. Brothers: Nothing is done on it, your Honor. It's a piece of clear plastic on top of the drawing of the leg, the outline of the leg, and shows the trajectory path of the bullet.

The Court: Well, the drawing of the leg on the coroner's report is a very small drawing; isn't it? You mean on that?

Mr. Brothers: Yes, your Honor.

The Court: What kind of plastic overlay are you talking about?

Mr. Brothers: Clear acetate, your Honor.

The Court: All right. What are you going to do with it?

Mr. Brothers: Outline the leg on that to show the approximate location of the wound and then be able to turn the chart to show the approximate trajectory path of any bullet that passed through the leg and call out that angle.

The Court: I won't allow the overlay. I will allow you to use the chart and I will allow you to use the board, but not the overlay that you're going to draw and construct yourself."

The argument of defense counsel is not in the record. The record does not reveal that the defendant was unable to show the trajectory path of the bullet because he did not use the plastic overlay. If any error was committed, it was harmless. T.R.A.P. 36(b).

The defendant next states that it was error for the court to have allowed gruesome photographs of the deceased into evidence because the photographs added nothing to the description provided by the witness. The photographs were relevant as they depicted the victim in the position he was found after his death. We concede that the photographs add very little to the testimony of the witnesses, but we hasten to add that there was nothing gruesome about the photographs and they were not of such nature as to present a danger of unfair prejudice. The colored photograph depicts a fully-clothed male sitting on the ground in a corner with a dark substance covering one leg of his pants. The dark substance, according to other evidence, is blood. The wound cannot be seen. This issue is without merit.

The defendant next contends that the court erred when it prohibited the defendant from cross-examining a State's witness with an exhibit which had been introduced into evidence in its entirety by the State.

Dr. Charles Harlan testified that he performed an autopsy on the victim. His testimony was centered on the subject of the entry and exit of the bullet. His report of investigation by the county medical examiner and his autopsy report were introduced into evidence by the State. The defendant sought to bring out on cross-examination that the victim had been stabbed in the back with a broken bottle on April 13, 1984, had lacerations from a gunshot wound in October, 1983, had a bone chip from

jumping in a basketball game on January 20, 1980, and perhaps had other wounds unrelated to this case.

The trial Judge held that these matters, although they were in the medical report, were not material and relevant. We agree with the trial Judge. Those marks on the body of the deceased were in no way connected with the shooting incident. This issue is without merit. See State v. Adkins, ... S.W.2d ... (Tenn.Crim.App. 1986) [filed November 20, 1985 at Jackson].

The defendant next contends that the trial court committed prejudicial error in refusing to charge the jury on the defendant's theory of the case. The special request is as follows:

"THEORY OF DEFENSE

It is the theory of the defendant, Tyrone Eugene Wade, that he is, at most, guilty of involuntary manslaughter. It is his position that the shooting of Van McKinley was accidental and unintentional; however, he admits that the discharge of a firearm pointed in the general direction of someone is an unlawful act and further it is a negligent act without due regard for the safety and well-being of others. It is the theory of the defendant that the evidence at this trial does not show beyond a reasonable doubt that he intended to kill Van McKinley, nor that he acted in a premeditated and deliberate manner, nor that he acted with malice. It is defendant's theory that the proof shows beyond a reasonable doubt that he was extremely intoxicated at the time of the shooting thereby precluding first degree murder.

He further asserts that if Van McKinley had acted as an ordinarily prudent and reasonable person, he would not have died from the bullet wound to his leg, but that because of his extreme intoxication he failed to seek medical attention and thereby contributed to his own death. While this is not a legal defense, to the charge of homicide, it is offered (sic) as a mitigating circumstance."

The trial Judge correctly and completely instructed the jury with respect to the law applicable to this case. This instruction was sufficient. See Holt v. State, 591 S.W.2d 785 (Tenn.Crim.App. 1979). Portions of the requested charge are inaccurate. For example, the intoxication and failure of the victim to seek medical help is not a mitigating circumstance. The special request is no more than an attempt by the defendant to argue his theory through the mouth of the trial Judge. This is not permitted nor required by Tennessee law. Article VI, Section 9 of the Tennessee Constitution prohibits Judges from charging juries with respect to matters of fact. Argument of the theory of the case is a function of counsel. The trial court properly refused to assume the role of an advocate.

Finally, that defendant asserts that the sentence of 27 years imposed by the trial Judge is excessive. The range of punishment for a Range I Standard offender convicted of second-degree murder is not less than 10 years nor more than 35 years. T.C.A. § 40-35-109(a)(d); T.C.A. § 39-2-212. In compliance with T.C.A. § 40-35-402 (d) we have considered the sentencing issue de novo without indulging in any

presumption that the sentence imposed by the trial Judge was correct. We first observe that there was no color of excuse for this killing. The unarmed victim was running from the defendant when the fatal wound was inflicted by means of a firearm. The evidence would have easily supported a conviction of murder in the first-degree.

Moreover, the defendant was a recidivist and had a lengthy and continuous arrest record dating back to the age of 13. He had been convicted of five prior offenses, including two felony offenses in 1982, three misdemeanor grand larceny convictions in 1978, a conviction for dangerous drugs in 1980, and a conviction for burglary in 1982. The defendant's work record was not good; the longest he had been employed on one job was approximately 4 to 7 months. The defendant admitted to using drugs and alcohol excessively. The defendant has not responded positively to the efforts of the juvenile authorities, parole officials, or imprisonment with regard to rehabilitation. Contrary to the defendant's insistence, the defendant's voluntary intoxication is not a mitigating factor. Neither is the intoxication of the victim at the time of the commission of the crime a mitigating factor. Under all of these circumstances, we think that the sentence of 27 years is lenient.

The judgment of court is affirmed.