[Cite as *State v. Feaster*, 2009-Ohio-2558.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C. A. No. 24367
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
TERRANCE J. FEASTER	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 07 12 4318

DECISION AND JOURNAL ENTRY

Dated: June 3, 2009

WHITMORE, Judge.

{¶1} Defendant-Appellant, Terrance Feaster, appeals from his convictions in the Summit County Court of Common Pleas. This Court affirms.

I

{¶2} On the night of December 15, 2007, police received a 911 call from the apartment of Dustin Cline regarding a shooting that had just occurred. Officers learned that Cline and another individual became involved in a shoot out after the individual came to Cline's apartment with a firearm and Cline answered his front door with a firearm of his own. Cline died as a result of the injuries he sustained.

{¶3} Several minutes after the 911 call, Feaster arrived at Akron City Hospital with multiple gunshot wounds. Feaster received treatment for his wounds over the next few days. The gun shot residue test that police performed on Feaster returned a positive result, and the bullet that doctors extracted from Feaster was consistent with the firearm that Cline had used on

the night of the shooting. Moreover, police found two firearms, one of which was Cline's firearm, in the vehicle that Feaster routinely drove. Police found the vehicle abandoned on Route 8 on the night of December 15, 2007 and later connected the vehicle with Feaster.

{¶4} On December 20, 2007, Officers Christopher Church and James Phister received a phone call, indicating that Feaster was conscious and alert. The two officers arrived at Akron City Hospital at about 5:00 p.m. and interviewed Feaster for approximately fifteen minutes. Feaster told the officers that he had been robbed and shot over a small amount of marijuana that he had been carrying. When asked how his vehicle came to be abandoned on Route 8, Feaster responded that the car must have been taken in the robbery. At that point, the officers asked Feaster for a DNA sample, and he refused. The officers then stopped the interview and left the hospital.

{¶5} On January 7, 2008, the grand jury indicted Feaster on the following counts: (1) aggravated murder, in violation of R.C. 2903.01(A); (2) attempted aggravated murder, in violation of R.C. 2903.01(A)/R.C. 2923.02; (3) aggravated burglary, in violation of R.C. 2911.11(A)(1)/(2); and (4) felonious assault, in violation of R.C. 2903.11(A)(2). Each count also contained a firearm specification, in violation of R.C. 2941.145.

{¶6} On February 8, 2008, Feaster filed a motion to suppress the oral statements that he made to Officers Church and Phister during his interview at the hospital. After a suppression hearing, the trial court denied Feaster's motion, and the matter proceeded to trial. On July 9, 2008, the jury found Feaster guilty of murder, felonious assault, and two firearm specifications. The trial court sentenced Feaster to a total of twenty-six years to life in prison.

{¶7} Feaster now appeals from the trial court's judgment and raises two assignments of error for our review.

II

Assignment of Error Number One

"THE TRIAL COURT ERRED IN NOT SUPPRESSING THE ORAL STATEMENTS APPELLANT FEASTER MADE TO AKRON POLICE OFFICERS WHEN, UNDER THE TOTALITY OF THE CIRCUMSTANCES, DURING A CUSTODIAL INTERROGATION, THE INTERROGATING LAW ENFORCEMENT OFFICERS FAILED TO GIVE APPELLANT FEASTER THE WARNINGS REQUIRED BY *MIRANDA V. ARIZONA* (1966), 384 U.S. 436, THEREFORE VIOLATING APPELLANT FEASTER'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION."

{¶8} In his first assignment of error, Feaster argues that the trial court erred in denying his motion to suppress. Specifically, Feaster argues that the statements he made to officers while in the hospital were the product of custodial interrogation, necessitating a *Miranda* warning. We disagree.

{¶9} The Ohio Supreme Court has held that:

"Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. *State v. McNamara* (1997), 124 Ohio App.3d 706." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8.

Accordingly, this Court reviews the trial court's factual findings for competent, credible evidence and considers the court's legal conclusions de novo. *State v. Conley*, 9th Dist. No. 08CA009454, 2009-Ohio-910, at ¶6, citing *Burnside* at ¶8.

{¶10} The trial court denied Feaster's motion to suppress on the basis that Feaster was not in custody at the time of his brief interview. The trial court found that Officers Church and

Phister interviewed Feaster without the presence of guards or the use of handcuffs and that Feaster understood what was happening and voluntarily engaged in the interview with the officers. The trial court also found that during the interview Feaster "was not able to go anywhere due to his own medical situation," not because of any action on the part of the officers. Further, the trial court pointed to the fact that Feaster refused a buccal swab as evidence that Feaster understood the situation and had the ability to stop cooperating at anytime. The trial court noted that the officers immediately terminated the interview and left Feaster's hospital room after Feaster refused the buccal swab.

{¶11} At the suppression hearing, Officer Church testified that he and Officer Phister arrived at Feaster's room in the intensive care unit at approximately 5:00 p.m. Officer Church testified that he and Officer Phister were dressed in plain clothes, but had their badges visible and identified themselves to Feaster as Akron Police Detectives. According to Officer Church, the purpose of the interview with Feaster was to ask him how he had sustained his gunshot wounds. Officer Church specified that neither he, nor Officer Phister, asked Feaster about Cline during the interview or went to the hospital to arrest Feaster. Officer Church described Feaster as being conscious and alert throughout his interview. He testified that Feaster was cooperative throughout the interview and never indicated that he was uncomfortable or wanted to end the interview. The officers never pushed Feaster for additional information after he answered a question and terminated Feaster's interview as soon as he indicated that he did not want to submit to a buccal swab. Finally, Officer Church testified the officers never restrained Feaster or closed off his hospital room for his interview. Officer Church specified that a nurse attended to Feaster at least once during the course of the interview.

{¶12} Officer Phister confirmed Officer Church's testimony regarding the purpose and tone of the interview. Officer Phister testified that Feaster maintained a calm demeanor during the interview and that neither officer ever pushed Feaster to cooperate. Officer Phister also testified that the officers only asked Feaster about the circumstances surrounding his own injuries, not about Cline, and that the officers immediately terminated the interview when Feaster indicated that he did not want to submit to a buccal swab. Officer Phister testified that Feaster was not placed under any type of restraint during the interview and was attended to by a nurse immediately before and during the interview.

{¶13} The record contains competent, credible evidence in support of the trial court's factual findings. Both officers testified that Feaster was not restrained during the interview and was cooperative throughout the interview process. Moreover, both officers testified that as soon as Feaster refused the buccal swab, indicating that he was not comfortable with the officers' request, the officers terminated the interview and left Feaster's room. Because the record supports the trial court's factual findings, the only remaining issue is whether the trial court reached the correct legal conclusions based on those findings. *Burnside* at ¶8.

{¶14} "Pursuant to the Fifth Amendment of the United States Constitution, no person shall be compelled to be a witness against himself. *** [S]tatements resulting from custodial interrogations are admissible only after a showing that law enforcement officers have followed certain procedural safeguards." *North Ridgeville v. Hummel*, 9th Dist. No. 04CA008513, 2005-Ohio-595, at ¶27, citing *Miranda v. Arizona* (1966), 384 U.S. 436, 444. "Interrogation" is defined as "'any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *State v. Knuckles* (1992), 65 Ohio St.3d 494, 496, quoting *Rhode*

Island v. Innis (1980), 446 U.S. 291, 301. "Custody" for purposes of entitlement to *Miranda* rights exists only where there is a "'restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler* (1983), 463 U.S. 1121, 1125, quoting *Oregon v. Mathiason* (1977), 429 U.S. 492, 495. "Whether a suspect is in custody depends on the facts and circumstances of each case." *State v. Butler*, 9th Dist. No. 23786, 2008-Ohio-781, at ¶27, quoting *State v. Dunn*, 9th Dist. No. 04CA008549, 2005-Ohio-1270, at ¶24. The test is "whether, under the totality of the circumstances, a reasonable person would have believed that he was not free to leave." *Butler* at ¶27, quoting *Dunn* at ¶24.

{¶15} As previously noted, the trial court denied Feaster's motion to suppress on the basis that he was not in custody at the time of his interview. Feaster argues that he was in custody because he was in a private room in intensive care, unable to leave, surrounded by both Officers Church and Phister, on medication, and without his parents despite the fact that he was only nineteen years old. Feaster relies upon *State v. Brand*, 1st Dist. No. C-030388, 2004-Ohio-1490, and *Mincey v. Arizona* (1978), 437 U.S. 385, in support of his argument that he was in custody during his interview. Both cases, however, are distinguishable from this case.

{¶16} In *Brand*, officers interrogated a DUI suspect at the hospital directly after her car accident. Brand was in a neck brace, lying on a backboard, and unable to move during the interrogation. Officers testified that Brand was "irritated[,] *** did not want to answer questions[, and] complained of pain during the questioning." *Brand* at ¶36. The First District concluded that Brand was in custody based on the fact that she was confined to a backboard, expressed an unwillingness to answer questions, and complained of pain throughout the interrogation. Id. at ¶38. Accordingly, the First District affirmed the trial court's decision to grant Brand's motion to suppress. Id. at ¶40.

{¶17} Although Feaster's medical condition virtually confined him to his hospital bed, his limited mobility is the only similarity that he shares with Brand. Unlike Brand, Feaster was alert and cooperative throughout his interview. He never expressed any unwillingness to answer questions. Moreover, Feaster never gave any indication that he was in pain during the interview. He fully cooperated up until the point that he refused a buccal swab, at which point, the officers stopped the interview and left Feaster alone. As such, we must conclude that *Brand* is factually distinguishable from the instant case.

{¶18} In *Mincey*, an officer interrogated Mincey at the hospital where he was being treated for the gun shot wound that he had received earlier that day. During the interrogation in Mincey's intensive care room, Mincey was intubated and unable to speak, so he responded to the officer's questions by writing down his answers. Mincey repeatedly indicated during the interrogation that he was in unbearable pain, that he wanted the interrogation to stop, and that he wanted a lawyer. Moreover, his answers were "not entirely coherent," demonstrating that he was "confused and unable to think clearly" during the interrogation. *Mincey*, 437 U.S. at 398-99. Even so, the interrogating officer questioned Mincey for a period of almost four hours. Based on all the foregoing, the Supreme Court concluded that Mincey's statements were inadmissible because his confession was involuntary and not "the product of free and rational choice." Id. at 401, quoting *Greenwald v. Wisconsin* (1968), 390 U.S. 519, 521.

{¶19} Unlike Mincey, Feaster never indicated that he was in pain or that he wanted his interview to stop. Both officers described Feaster as being alert and receptive to their questions. There is no indication that Feaster was ever confused or even minimally incoherent during the interview. Although Feaster was connected to several machines in his intensive care room, Officers Church and Feaster testified that Feaster was sitting up in bed and watching television

when they arrived. Moreover, while Mincey's interview took place on the day of his injury and lasted for almost four hours, Feaster's interview took place five days after his injury and lasted for approximately fifteen minutes. As soon as Feaster indicated that he did not wish to comply with the officers' request for a buccal swab, the officers terminated the interview. As such, we must also conclude that *Mincey* is factually distinguishable from this case.

{¶20} The fact that Feaster was confined to his hospital bed during his interview was due to his need for medical treatment, not due to any action on the part of the officers. Consequently, we do not consider Feaster's confinement to be custodial in nature for purposes of *Miranda*. *State v. Pierce*, 2d Dist. No. 21776, 2007-Ohio-2364, at ¶41. See, also, *State v. Pyle*, 2d Dist. No. 2003-CA-35, 2003-Ohio-6664, at ¶16. Feaster's interview did not take place in a locked ward or under the supervision of guards, and the nursing staff was still able to attend to Feaster during the interview. See *State v. Young* (Apr. 27, 2001), 5th Dist. No. 00CA84, at *2 (concluding that defendant was not in custody during a hospital interview because he was not formally restrained, his girlfriend was allowed to remain in the room, and he received phone calls during the interview). Officers Church and Phister interviewed Feaster in plain clothes, never indicated that Feaster was under arrest or even a suspect in a crime, and never asked Feaster any questions regarding his involvement with Cline's murder. During the entire interview, Feaster was cooperative and gave coherent responses to the officers' questions. There was no indication that Feaster was uncomfortable during the interview, or that his responses were a function of any coercion that he felt as a result of the officers' presence. Indeed, when officers finally did ask Feaster for something that he felt uncomfortable giving (a buccal swab), Feaster expressed his discomfort and refused the officers' request. The officers honored Feaster's refusal and terminated his interview. Based on the totality of the circumstances, we

cannot conclude that Feaster was in custody at the time of his interview. *Beheler* (1983), 463 U.S. at 1125; *Butler* at ¶27.

{¶21} Because Feaster was not in custody, Officers Church and Phister were not required to Mirandize him, and the trial court did not err in denying Feaster's motion to suppress. *Hummel* at ¶27 (noting that *Miranda* applies in instances of custodial interrogation). Feaster's first assignment of error is overruled.

Assignment of Error Number Two

> "THE TRIAL COURT ERRED IN ADMITTING REPETITIVE AND CUMULATIVE PHOTOGRAPHS OF THE DECEDENT'S AUTOPSY, IN VIOLATION OF EVID.R. 403(B)."

{¶22} In his second assignment of error, Feaster argues that the trial court erred in admitting seventeen autopsy photographs of Cline over Feaster's objection that the photographs were repetitive and cumulative. Specifically, Feaster argues that the number of photographs admitted prejudiced him, especially in light of the fact that Feaster was willing to stipulate to Cline's cause of death. We disagree.

{¶23} A trial court possesses broad discretion with respect to the admission of evidence. *State v. Maurer* (1984), 15 Ohio St.3d 239, 265. An appellate court will not disturb evidentiary rulings absent an abuse of discretion. *State v. Roberts*, 156 Ohio App.3d 352, 2004-Ohio-962, at ¶14. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶24} "When considering the admissibility of photographic evidence under Evid.R. 403, the question is whether the probative value of the photographic evidence is substantially outweighed by the danger of unfair prejudice to the defendant." *State v. Morales* (1987), 32 Ohio St.3d 252, 257. "[T]he mere fact that [a photograph] is gruesome or horrendous is not sufficient to render it inadmissible if the trial court, in the exercise of its discretion, feels that it would prove useful to the jury." *State v. Likosar*, 9th Dist. No. 03CA0063-M, 2004-Ohio-114, at ¶22, quoting *State v. Woodards* (1966), 6 Ohio St.2d 14, 25. "While it is true that the sheer number of photographs admitted may constitute error where they are needlessly cumulative, Evid. R. 403(B), the mere fact that there are numerous photos will not be considered reversible error unless the defendant is prejudiced thereby." *State v. Davis* (Apr. 18, 1990), 9th Dist. No. 88CA004390, at *24, quoting *State v. DePew* (1988), 38 Ohio St.3d 275, 281.

{¶25} While Feaster generally takes issue with seventeen photographs that the trial court admitted, the record reflects that the State only introduced fifteen photographs through the testimony of Dr. Dorothy Dean, a medical examiner for Summit County. Moreover, one of the fifteen photographs was an identification photograph of Cline that was sent to Dr. Dean's office. Accordingly, only fourteen of the photographs that the State introduced depicted portions of Cline's body as it appeared during his autopsy. The photographs primarily showed the entrance and exit wounds from gunshots to Cline's torso, shoulder, wrist, and knee. Admittedly, these fourteen photographs were gruesome photographs. *State v. Wilson* (Oct. 12, 1994), 9th Dist. No. 92CA005396, at *22 (noting that gruesome photographs are generally those that depict a body or body parts). See, also, *DePew*, 38 Ohio St.3d at 281. However, as noted above, the mere fact that photographs are gruesome does not bar their admission into evidence. *Likosar* at ¶22.

{¶26} The record reflects that the State's fourteen photographs were probative because they illustrated Dr. Dean's testimony and were not cumulative because they depicted different views of Cline's injuries. *Wilson*, at *22; *State v. Phillips* (Aug. 31, 1994), 9th Dist. No. 16487, at *5 (upholding admission of sixty-one photographs of the victim's body because they illustrated the coroner's testimony and depicted different injuries). In addition, the photographs of Cline's body were probative of the fact that Cline was purposefully killed. *Phillips*, at *5. Further, in spite of Feaster's argument to the contrary, the photographs would have remained probative of the purposefulness of Cline's murder even if Feaster had stipulated to the cause of Cline's death. See *State v. Kelly*, 9th Dist. No. 06CA008967, 2008-Ohio-1458, at ¶58 (noting that a defendant's stipulation to a victim's cause of death does not make autopsy photographs per se inadmissible). The fatal shot to Cline's torso was only one of the four gunshot wounds that he suffered. Although the shot to his torso was ultimately the cause of his death, the number of times Cline was shot further demonstrated the purposefulness of his murder. *State v. Santiago* (Mar. 13, 2002), 9th Dist. No. 01CA007798, at *7 (noting that autopsy photographs may be probative of the intent of the accused even if he stipulates to the cause of death).

{¶27} Based on the foregoing, we cannot conclude that the trial court abused its discretion in admitting the photographs from Cline's autopsy. Feaster's second assignment of error is overruled.

III

{¶28} Feaster's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

CARR, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

J. DEAN CARRO, Appellate Review Office, School of Law, Legal Clinic, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.