

IN THE CRIMINAL COURT FOR MONROE COUNTY, TENNESSEE

STATE OF TENNESSEE,)

Plaintiff,)

VS.)

NO. 11058)

JESSICA KENNEDY,)

Defendant.)

MEMORANDUM AND ORDER

Before the Court is the defendant's motion to suppress a confession made by the defendant on November 10, 2010. In that confession she states that she shot and killed the victim in July 2010.

The motion seeks to suppress the confession by contending that the confession was not voluntary. While the written motion raised a *Miranda* issue, defense counsel now concedes that the November 10, 2010 confession does not raise a *Miranda* issue.

It is difficult to follow this defendant and her statements; from a source of information; to an admitted participant in the crime; to the person who killed the victim; and finally to a partial recantation. Furthermore, the participants in the crime she names change and then change again. Between July 2010 and January 2011 it is a journey through eleven (11) separate statements none of which are the same. Of course, it is only the November 10, 2010 statement which the State plans to introduce and the defendant wishes to suppress.

The burden of proof is on the State to prove the voluntariness of a confession by the preponderance of the evidence. *Lego v. Twomey*, 404 U.S. 477, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972).

The standard to be applied is well set out by Judge Tipton as:

"The test of voluntariness for confessions under article I, § 9 of the Tennessee Constitution is broader and more protective of individual rights than the test of voluntariness under the Fifth Amendment." *State v. Smith*, 933 S.W.2d 450, 455 (Tenn. 1996) (citing *State v. Stephenson*, 878 S.W.2d 530, 544 (Tenn. 1994)); see *State v. Marco M. Northern*, 262 S.W.3d 741 (Tenn., 2008). For a confession to be considered voluntary, it must not be the product of "any sort of threats or violence, . . . any direct or implied promises, however slight, nor by the exertion of any improper influence." *State v. Smith*, 42 S.W.3d 101, 109 (Tenn. Crim. App. 2000) (quoting *Bram v. United States*, 168 U.S. 532, 542-43, 18 S. Ct. 183, 187, 42 L. Ed. 568 (1897)). The essential question therefore is "whether the behavior of the [s]tate's law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined. . . ." *State v. Kelly*, 603 S.W.2d 726, 728 (1980) (quoting *Rogers v. Richmond*, 365 U.S. 534, 544, 81 S. Ct. 735, 741, 5 L. Ed. 2d 760 (1961)). The Supreme Court has held that in order for a confession to be involuntary, it must be the product of coercive state action. See, e.g., *Colorado v. Connelly*, 479 U.S. 157, 163-64, 107 S. Ct. 515, 520, 93 L. Ed. 2d 473 (1986).

State v. Saint, 284 S.W.3d 340, 343 (Tenn. Crim. App. 2008).

A respected Treatise describes it as follows:

Tennessee adopts the federal constitutional standard that, in determining the admissibility of an alleged confession, the court must inquire whether the behavior of the state's law enforcement officials was such as to overbear the defendant's will to resist and bring about confessions not freely self-determined, a question to be answered with complete disregard of whether or not the defendant, in fact, spoke the truth.

In determining whether a statement of the defendant is voluntary the judge must examine the "totality of the circumstance" surrounding the giving

of the statement. The "totality of the circumstances" can usually be divided into two categories each containing various factors. The first category includes the characteristics of the defendant such as: age, intelligence, education, criminal experience, and his mental and physical condition at the time of the interrogation. The second category concern the methods of interrogation used by the police which include: any physical or mental coercion, threats, promises or inducements, delay in bringing the defendant before a magistrate, and the extent to which the police used deceit or trickery in questioning the suspect.

Raybin, TENNESSEE CRIMINAL PRACTICE AND PROCEDURE, § 19:30 (Test for voluntariness) (2008).

On a motion to suppress a confession a criminal defendant can testify about the circumstances of the confession and the testimony cannot be used at trial except to impeach. See TENNESSEE RULES OF EVIDENCE 104(d); *Simmons v. U.S.*, 390 U.S. 377, 88 S. Ct. 967 (1968); and Cohen, Sheppard and Paine, TENNESSEE LAW OF EVIDENCE, § 1.04[4][c] (2011).

The motion hearing took place in Madisonville on July 25-26, 2012. The Court heard from twelve (12) witnesses, and received a number of documents and CDs in evidence. Most of the witnesses were law enforcement officers and former law enforcement officers. Ms. Kennedy chose not to testify at the hearing. The motion was then taken under advisement.

James Miller was killed on July 17, 2010. The defendant was indicted and charged with felony murder and related crimes on January 5, 2011.

The investigation of the Miller killing was conducted by the TBI and the Monroe County Sheriff's Office. In the summer of 2010 there were a number of leads and suspects.

Jessica Kennedy was originally only thought to be a source of information. She claimed to have overheard some individuals discuss the crime. She had been taken into custody for shoplifting and in midsummer 2010 told the police about what she had heard. She denied participating in the crime. She was later released from custody but continued to talk to the police about the Miller murder sometimes on her own initiative. She told the police a number of conflicting stories and provided inconsistent information. However up until early November 2010 she was not a suspect but rather a source of this confusing and conflicting information about the crime and the alleged participants. These pre-November 2010 interviews principally took place at the Monroe County Sheriff's Office and they were videotaped and were all made exhibits at the hearing.

Defense counsel correctly argues that the critical period in assessing the voluntariness of the November 10, 2010 confession is the period from October 29, 2010 to November 10, 2010.

Jessica Kennedy was rearrested on a probation violation on October 29, 2010 and placed in a small holding cell on a corridor at the Monroe County Jail. The cell had no toilet, no water, and a mattress on the floor. It was explained that while she was classified as "detective hold" waiting for transfer to the general population of this small jail, this related to charges in other counties. There was constant traffic along the hallway and Ms. Kennedy was taken out any time she needed to go to the bathroom. The record before this Court

indicates no complaints by Ms. Kennedy regarding the conditions of her confinement. She was, however, fearful because of the threats she received.

According to a former jailor who testified, Ms. Kennedy did have trouble sleeping in this cell. Furthermore, one of the persons she had identified as possibly involved in the murder and other criminal activity was also an inmate. Brandon Steele would come down the hallway and threaten her with statements like "You better keep quiet" and "I can get to you." She even told the deputies and TBI agents that she was afraid of Steele. Steele was a former boyfriend of Kennedy and their relationship had been off and on. Ms. Kennedy had given information about Brandon Steele and Boonie Stokes' involvement in other criminal activity and both had been arrested as a result of that information. Both appeared to know that they were in custody as a result of information supplied by Ms. Kennedy. The former jailor told her supervisors about threats, but Ms. Kennedy was not moved. Ms. Kennedy, however, never asked to be moved.

On November 3, 2010, Ms. Kennedy said she wanted to again talk to officers about the Miller crime. This initiation culminated on November 4, 2010 in a four-page, single space statement in which Ms. Kennedy admitted participating in what she thought would be the robbery of Mr. Miller.¹ She would be the "bait" for Mr. Miller, posing as a prostitute and

¹The day before November 3, 2010, she had also made a statement which contained facts significantly conflicting with the November 4 statement. She later took the officers to the location of the "Yellow house" where the killing took place, and there was even a reenactment.

Boonie Stokes and Shawn Corn would rob Miller. Boonie however shot Mr. Miller and then Jessica helped Boonie and Shawn put the body in the trunk of Miller's car.

On November 10, 2010, there was still another interview by the TBI in the Sheriff's office in Madisonville. A summary of that interview (the CD is Exhibit 4) is as follows.

Jessica Kennedy (JK) has been offered a polygraph this date and has refused at the point of the test starting—she has been interviewed afterwards and has admitted that she was the person that fired the shots that killed Jim Miller. She has given several variations of events to this point over period of days. This interview is a recap of these previous statements.

The interview begins with Miranda Rights being reminded—a continuation of the interviews previous, JK acknowledges that she understands her rights. She acknowledges that she pulled the trigger and killed Jim Miller. She says that the event was to be a prior planned robbery—arranged by Brandon Steele to take place at the “Yellow House on Creek Rd owned by Bo Cole.”

She describes the gun she used as a .38 revolver given to her by Brandon Steele. She says when asked that she had never seen or met Jim Miller before, that she did not ever have sexual relations with him.

She says that at the time she was 2-3 feet away from Jim Miller when the shots were fired—that she had blood splatter on her afterwards.

She describes being close enough to see clearly the diamond ring on his hand. She denies that she received any money or property from Jim Miller. She did refer to Brandon being short \$130.00 for rent prior to the murder—“but he had the money later”—referring obliquely to his having gotten money from somewhere.

She acknowledges that she had help putting JM in the trunk, he was a big man—she weighs 135 pounds. She says “they left me there” and Shawn came and got me . . . Danny Faye mentions the eyewitness information—she replies that Brandon drove the car (JM Black car). She says that she texted Shawn to come and get her . . . Brandon and Shawn helped put him in the trunk (? They waited for Shawn to show up?) She says that Brandon, Garrett and herself

were present when the event started—Shawn showed up when the shots were fired???? Brandon was mad at her that day . . .

TBI report (Exhibit 14). Thus she is saying for the first time that she killed Mr. Miller.

Subsequent to this statement Ms. Kennedy was moved (later in the day) into the general population and then later to Meigs County jail to face charges there. On November 29, 2010 she was interviewed by TBI Agent Legg for approximately one hour. In that interview she partially recants her November 10, 2010 confession. She says she was present during the Miller killing but Brandon Steele killed Mr. Miller. She explained that the reason she confessed on November 10, 2010 was to protect her children and she had received threats against her children from Steele and Boonie Stokes.

This statement is the only direct evidence of Ms. Kennedy's state of mind about when she gave the November 10, 2010 statement. She never says anything about the conditions of her confinement or about any threats or promises from law enforcement, but rather explains her willingness to take the "rap" as a result of threats from Steele and Stokes.

Still later (January 6, 2011) Kennedy was interviewed by an FBI agent regarding information she might have about crimes in Indiana. Kennedy insisted about talking about the Miller case. She first said she did it but was forced to kill Mr. Miller by Brandon Steele. Then she decided that someone named Helton was the real killer. When asked why she would confess to a crime she did not commit, she said "she was concerned for her safety and the safety of her children and did not want Helton or others involved to harm them. Kennedy

also stated that is why she turned herself in as the murderer, knowing she did not commit it.” (Exhibit 16).

There is no proof that the November 10, 2010 confession was the result of threats or promises made by law enforcement. The defense argues that the law enforcement officials purposely placed Ms. Kennedy in a small uncomfortable holding cell and purposely exposed her to threats of her confederates until she confessed. The Court rejects this assertion for several reasons.

1. There is no direct evidence of such an intent regarding her conditions of confinement. No statement of Ms. Kennedy on either the November 29, 2010, or January 6, 2011 interviews even mentions the conditions of her confinement as a reason for her November 10, 2010 confession.

2. The threats testified to by the former jailor was for Ms. Kennedy to keep quiet. Obviously, those threats did not work because Ms. Kennedy did the opposite from keeping quiet. Furthermore, the proof was that no matter where she was in the jail she received word of threats from Steele and Stokes. The evidence does not allow the Court to conclude that she was purposely exposed to threats.

The testimony from the law enforcement officials was that they did not purposely expose her to threats nor did they place her in the holding cell to force a confession. That testimony is essentially un rebutted. The Court notes that Ms. Kennedy chose not to testify. Several cases have noted that the failure of the defendant to testify to relevant facts at a

suppression hearing can at least be noted as a failure to rebut. See *U.S. v. Male Juvenile*, 121 F.3d 34, 42 (2nd Cir. 1997); *U.S. v. Mullens*, 536 F.2d 997, 1000 (2nd Cir. 1976).

The Court has observed the defendant's demeanor and the tapes in evidence and especially on November 10, 2010. She is sometimes emotional, she sometimes seems tired, but she is articulate in her own way, and responsive.² She was often given and reminded of her rights under *Miranda*. The Court concludes that the State has carried its burden by a preponderance of the evidence to show that the Statement of November 10, 2010 was voluntary. The motion to suppress is denied.³

This the 30 day of July, 2012.


WALTER KURTZ
SENIOR JUDGE

FILED
TIME 3:05 AM/PM

JUL 30 2012

MARTHA M. COOK^{Am}
CIRCUIT COURT CLERK

²The audio on the CDs is not of high quality.

³Just what weight the jury will accord the confession given the number of statements and their inconsistency remains to be seen. See *TPI, Crim.*, 42.12. That is a different issue, however, than the one resolved by the Court above.