

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
LOGAN COUNTY**

STATE OF OHIO

CASE NUMBER 8-04-36

PLAINTIFF-APPELLEE

v.

OPINION

JAMES E. INSKEEP

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: December 5, 2005

ATTORNEYS:

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For Appellee.**

CUPP, PJ.

{¶1} Defendant-appellant, James Inskeep (hereinafter “Inskeep”), appeals the judgments of the Logan County Court of Common Pleas which denied his motion to suppress and sentenced him to a prison term of four years.

{¶2} On January 23, 2003, Inskeep contacted the Logan County Sheriff’s Department at approximately 4:00 a.m. Inskeep reported a fire at his home, which was located in West Liberty, Ohio, and was partially owned by his estranged wife Julia. The local volunteer fire department extinguished the fire, but the home was rendered uninhabitable.

{¶3} Cincinnati Insurance Company (hereinafter “Cincinnati”) insured Inskeep’s residence. A Cincinnati insurance adjuster interviewed Inskeep to determine whether his policy should be honored. Following the interview, Cincinnati employed an independent examiner to investigate the fire. The independent examiner concluded the fire was intentional. Shortly thereafter, Cincinnati requested that law enforcement officers assist with the investigation.

{¶4} Sergeant Frank Galyk (hereinafter “Sergeant Galyk”) and Deputy Mike Wisner (hereinafter “Deputy Wisner”), members of the Logan County Sheriff’s Department, interviewed Inskeep together on May 18 and May 20, 2003. During the second interview, Inskeep confessed, both orally and in writing, to starting the fire.

{¶5} On October 17, 2003, Inskeep pleaded “not guilty” to one count of aggravated arson, a violation of R.C. 2909.02(A)(2) and a felony of the second degree. Inskeep moved to suppress all oral and written statements made during the second interview. Following an evidentiary hearing, the trial court denied Inskeep’s motion.

{¶6} The case proceeded to a jury trial. At trial, the prosecution introduced as evidence and played for the jury recordings of both interviews. The jury found Inskeep “guilty.” On August 30, 2004, the trial court sentenced Inskeep to a term of four years incarceration.¹

{¶7} It is from the denial of the motion to suppress and the imposition of sentence that Inskeep appeals, setting forth two assignments of error for our review.

ASSIGNMENT OF ERROR NO. 1

The trial court erred when it denied Mr. Inskeep’s motion to suppress.

{¶8} In his first assignment of error, Inskeep argues the trial court erred in denying his motion to suppress because his confession was involuntary and the product of undue coercion. More specifically, Inskeep contends certain events during the first interview, taken in conjunction with events that occurred off of the

¹ The trial court also ordered that Inskeep reimburse the sheriff’s department for costs associated with his confinement and that he pay Cincinnati \$148,715.13 in restitution. The restitution figure is the amount Cincinnati expended in paying Inskeep’s mortgages after the fire rendered the home uninhabitable.

record during the second interview, rendered his confession inadmissible. For the reasons that follow, we find Inskeep's first assignment of error lacks merit.

{¶9} A review of the denial of a motion to suppress involves mixed questions of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, at ¶ 8. At a suppression hearing, the trial court assumes the role of trier of fact and, as such, is in the best position to evaluate the evidence and the credibility of witnesses. See *State v. Carter* (1995), 72 Ohio St.3d 545, 552, 651 N.E.2d 965.

{¶10} When reviewing a ruling on a motion to suppress, deference is given to the trial court's findings of fact so long as they are supported by competent, credible evidence. *Burnside*, 2003-Ohio-5372, at ¶ 8. With respect to the trial court's conclusions of law, however, our standard of review is de novo and we must decide whether the facts satisfy the applicable legal standard. *State v. McNamara* (1997), 124 Ohio App.3d 706, 710, 707 N.E.2d 539.

{¶11} Once the admissibility of a confession has been challenged, the prosecution has the burden of proving by a preponderance of the evidence that the confession was voluntary. *State v. Melchior* (1978), 56 Ohio St.2d 15, 25, 381 N.E.2d 195, citing *Lego v. Twomey* (1971), 404 U.S. 477, 489, 92 S.Ct. 619, 30 L.E.2d 618. "A statement is voluntary if it is 'the product of an essentially free and unconstrained choice by its maker.'" *State v. Wiles* (1991), 59 Ohio St.3d 71,

81, 571 N.E.2d 97, quoting *Culombe v. Connecticut* (1961), 367 U.S. 568, 602, 81 S.Ct. 1860, 6 L.Ed.2d 1037.

{¶12} In determining whether a defendant’s confession was voluntary, a court “should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.” *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, 796 N.E.2d 506, at ¶ 13, citing *State v. Edwards* (1976), 49 Ohio St.2d 31, 358 N.E.2d 1051, paragraph two of the syllabus, vacated as to death penalty (1978), 438 U.S. 911, 98 S.Ct. 3147, 57 L.E.2d 1155. However, this assessment is not limited to these specific factors; other criteria, such as the receipt of *Miranda* warnings, factor in the analysis as well. See *State v. Barker* (1978), 53 Ohio St.2d 135, 141, 372 N.E.2d 1324, fn. 3.

{¶13} In sum, a reviewing court considering the confession must determine whether the “totality of the circumstances” surrounding the confession indicates that a defendant’s “will was overborne and his capacity for self-determination was critically impaired because of coercive police conduct.” *State v. Otte* (1996), 74 Ohio St.3d 555, 562, 660 N.E.2d 711, citing *Colorado v. Connelly* (1986), 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473; *State v. Dailey* (1990), 53 Ohio St.3d 88, 559 N.E.2d 459, paragraph two of the syllabus.

{¶14} Given the facts of this case, we cannot say Inskeep’s written and recorded confessions were the result of coercion and duress. Instead, the “totality of the circumstances” supports the conclusion that Inskeep confessed on his own accord.

{¶15} Inskeep was forty-four years old at the time of the two interviews. Inskeep testified he had twelve years of education, as well as some special schooling related to “robots” and “hydraulic systems.” He performed maintenance work at Honda of America (hereinafter “Honda”) for approximately twenty-two years, and had no prior criminal experience.

{¶16} In regards to the format of the interviews, the first and second meetings lasted approximately three and a half hours and two hours and twenty minutes, respectively. There was no physical deprivation during either interview, nor was there any evidence of physical coercion. Rather, Sergeant Galyk and Deputy Wisner offered Inskeep coffee, took several short breaks, and advised Inskeep on multiple occasions that he was free to leave if he so desired.

{¶17} Furthermore, Sergeant Galyk and Deputy Wisner never arrested Inskeep. He came to both interviews voluntarily. Therefore, there was no “custodial interrogation” requiring Inskeep to be apprised of his *Miranda* rights. See *State v. Bradley* (Dec. 5, 1996), 3d Dist. No. 8-95-15, citing *State v. Roe* (1989), 41 Ohio St.3d 18, 22, 535 N.E.2d 1351. Regardless of these facts, both

interviews included detailed recitations of Inskip's rights. After his rights were recited, Inskip explained them back to the officers. If Inskip did not understand his rights or explained them incorrectly, the officers discussed them with him. Inskip then proceeded to waive his rights during each meeting.² We find that the cumulative effect of these repeated warnings, as well as Inskip's deliberate decisions not to heed them, substantially weakens any suggestion that the statements which followed were involuntary. See *Wiles*, 59 Ohio St.3d at 82.

{¶18} Inskip points to a collection of statements made by Sergeant Galyk and Deputy Wisner to bolster his claim. Inskip contends that he was subjected to deceptive practices during each interview. For example, Inskip notes Deputy Wisner admitted at trial that he lied during the first interview when he said that they had followed Inskip on several occasions and that "chemical tests" were performed at the West Liberty residence.

{¶19} Although the record does contain evidence that Sergeant Galyk and Deputy Wisner were not entirely forthright during the first interview, the use of deceit is not dispositive when determining whether a confession is involuntary; it is simply one factor to consider in the "totality of the circumstances." See *Wiles*, 59 Ohio St.3d at 81; *State v. Weeks* (Sept. 18, 2000), 3d Dist. No. 8-2000-07, at

² We note that whether Inskip knowingly, intelligently, and voluntarily waived his *Miranda* rights is an analytically distinct question from whether Inskip's statements were not voluntary and, therefore, violative of the Due Process Clause. Inskip's challenge is to the latter.

*4. After reviewing the record, we do not find that the officers' deceptive practices, whether standing alone or taken in the context of the both meetings, rendered Inskip's statements involuntary.

{¶20} Inskip also contends Sergeant Galyk and Deputy Wisner made numerous direct and implied promises during the first interview that if he confessed: he would not go to jail; the officers would fight to help him keep his job at Honda; and he would not lose custody of his son.³ In particular, Inskip testified at the suppression hearing that Sergeant Galyk reiterated those promises during the second interview, before the tape recorder was running, and stated the felony charge of aggravated arson could be "dropped down to a misdemeanor."

{¶21} We find the evidence in the record weighs against Inskip's assertions. Notably, Inskip specifically stated at the end of the first interview that the officers had not mistreated or coerced him or made any promises prompting him to answer questions in any particular manner.

{¶22} Moreover, other than the conflicting testimony of the witnesses, we are unable to locate in the record any definitive account of what transpired before Sergeant Galyk turned on the tape recorder during the second interview. The

³ Following the fire, authorities located a variety of items at Inskip's home that bore Honda stickers. Upon questioning during the May 18, 2003 interview, Inskip admitted to stealing those items from Honda. Although Sergeant Galyk testified at the suppression hearing that he contacted Honda representatives prior to the second interview, he stated that he did not know until after the interview that Honda planned to forego theft charges and dismiss Inskip. Furthermore, Inskip was in the midst of a divorce proceeding during the events in question, and one of the issues in that proceeding involved the custody of his fifteen-year-old son.

record reflects Inskeep apparently offered several incriminating statements that prompted the officers to stop him. After turning on the tape recorder, the officers advised Inskeep of his rights, Inskeep then described how he set the fire, and the following exchange ensued:

[Deputy Wisner]: Have we made you any kind of promises? Have we promised that—that we can guarantee anything for you?

[Inskeep]: Well, I don't know about that or—

[Deputy Wisner]: I guess what I'm saying is, has there been discussion at all that promises that no matter what happens that we guarantee that you're going to have a job, that we guarantee that you're not going to go to jail, we guarantee that you're not going to lose your son? Alls [sic] we said, we would do the best we can to help you; is that correct?

[Inskeep]: Yeah, yeah.

[Deputy Wisner]: And that's what I mean by guarantees. I mean, there's—at this juncture—

[Inskeep]: Uh-huh.

[Deputy Wisner]: —There's been nothing that says no matter what happens, everything's fine now, right?

[Inskeep]: Yeah.

[Deputy Wisner]: The only actual guarantee that we have given you that is a fact is that tonight we're not going to take you to jail, correct?

[Inskeep]: Yeah.

{¶23} In all, the events of the first interview, taken in conjunction with the evidence presented regarding the second interview, were not sufficient to render Inskeep's confession inadmissible. The recording of the first interview does contain several false statements by the officers. The recording of the first interview also includes some veiled references to jail time, as well as Inskeep's job, his pending divorce, and the institution of theft charges for the items Inskeep stole from Honda. Under the "totality of the circumstances," however, we cannot find that Inskeep's "will was overborne" or that "his capacity for self-determination was critically impaired because of coercive police conduct."

{¶24} We must, therefore, conclude Inskeep's confession is admissible, and the trial court did not err in denying his motion to suppress.

{¶25} Accordingly, Inskeep's first assignment of error is overruled.

ASSIGNMENT OF ERROR NO. 2

The trial court's imposition of a term of imprisonment and one which was greater than the statutory minimum were contrary to law.

{¶26} In his second assignment of error, Inskeep argues the trial court erred when it failed to impose a community control sanction under R.C. 2929.13(D). Additionally, Inskeep argues that there were no facts to support a prison sentence beyond the two year statutory minimum, and that the trial court violated his right to a trial by jury when it made the findings necessary to impose

such a sentence. For the reasons that follow, we find Inskeep's second assignment of error unavailing.

{¶27} On appeal from the imposition of sentence, an appellate court may not remand the case, or increase, reduce, or otherwise modify the sentence, unless it clearly and convincingly finds that the record does not support the trial court's findings or is otherwise contrary to law. R.C. 2953.08(G)(1)(a), (b). An appellate court should not, however, simply substitute its judgment for that of the trial court, as the trial court is "clearly in the better position to judge the defendant's dangerousness and to ascertain the effect of the crimes on the victims." *State v. Jones* (2001), 93 Ohio St.3d 391, 400, 754 N.E.2d 1252.

{¶28} R.C. 2909.02(B)(3) classifies aggravated arson as a felony of the second degree. An offender who commits such a felony may be sentenced from two to eight years in prison. R.C. 2929.14(A)(2). In fact, a conviction for a felony of the second degree carries a presumption that a prison term is necessary to comply with the purposes of felony sentencing.⁴ R.C. 2929.13(D).

{¶29} Despite this presumption, a trial court "may impose a community control sanction * * * instead of a prison term * * * for a felony of the * * * second degree" if, after weighing the applicable seriousness and recidivism factors under R.C. 2929.12, it finds a community control sanction would both (1)

⁴ The two overriding purposes of felony sentencing, as found in R.C. 2929.11(A), are "to protect the public from future crime by the offender and others and to punish the offender."

“adequately punish the offender and protect the public from future crime” and (2) “not demean the seriousness of the offense.” R.C. 2929.13(D)(1), (2). Emphasis added.

{¶30} If a trial court elects to follow the presumption, however, R.C. 2929.14(B) requires the trial court to impose the shortest prison term authorized under R.C. 2929.14(A), unless:

(1) The offender was serving a prison term at the time of the offense, or the offender previously had served a prison term.

(2) The court finds on the record that the shortest prison term will demean the seriousness of the offender’s conduct or will not adequately protect the public from future crime by the offender or others.

R.C. 2929.14(B)(1), (2).

{¶31} In the case sub judice, Inskeep argues the trial court was required to deviate from the presumptive term of imprisonment for a felony of the second degree. A deviation was mandatory, Inskeep asserts, because the trial court could have made the necessary findings under R.C. 2929.13(D)(1) and (2) after considering the applicable seriousness and recidivism factors. Even assuming, *arguendo*, the necessary findings could have been made, we find no merit in Inskeep’s argument. The clear language of R.C. 2929.13(D) provides the trial court *may* impose a term of community control in lieu of the presumptive prison

sentence. The statute does not require the trial court to do so. We must, therefore, conclude the trial court did not err when it elected to follow the presumption.

{¶32} Similarly, we find unpersuasive Inskeep’s argument that there were no facts to support a prison sentence beyond the two year statutory minimum. At the sentencing hearing, the trial court complied with R.C. 2929.14(B)(2) when it specifically found the minimum sentence “would demean the seriousness of the offense and would not adequately protect the public.” Although Inskeep maintained no prior criminal history and his potential for future violations was minimal, the trial court reasoned the increased sentence was warranted due to the fact that Inskeep engaged in a great deal of planning before committing the arson. For example, the trial court noted Inskeep kept his automobile running when he started the fire and used an accelerant to make sure the fire intensified. The trial court also noted that Inskeep’s actions caused a substantial risk to the firemen who responded to his emergency call, as well as others willing to lend assistance.

{¶33} Given the trial court’s assessment, we find there were facts to support a prison sentence beyond the two year statutory minimum. Consequently, we find that Inskeep has not demonstrated, by clear and convincing evidence, that the trial court erred when it imposed a four year term of imprisonment.

{¶34} In addition to challenging the factual basis supporting the trial court’s findings under R.C. 2929.14(B), Inskeep contends the trial court violated

his right to a trial by jury when it made those findings. Inskeep relies on the holdings of *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, and *State v. Bruce*, 159 Ohio App.3d 562, 2005-Ohio-373, 824 N.E.2d 609, for this proposition.

{¶35} This court has previously ruled that the holding in *Blakely* and the reasoning of *Bruce* do not apply to Ohio's sentencing framework. *State v. Trubee*, 3d Dist. No. 9-03-65, 2005-Ohio-552, at ¶16-38. Therefore, Inskeep's contention in this regard is without merit.

{¶36} Accordingly, Inskeep's second assignment of error is overruled.

{¶37} Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment affirmed.

BRYANT and SHAW, JJ., concur.

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