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SECOND DIVISION  
June 21, 2011

No. 1-10-1819

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	07 CR 17393
	)	
ANDY GEMSKIE,	)	Honorable
	)	Steven J. Goebel,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE CONNORS delivered the judgment of the court.  
Presiding Justice Cunningham and Justice Harris concurred in the judgment.

**ORDER**

*Held:* Where defendant asked detective during interrogation how he could obtain an attorney, defendant's question was not a clear and unequivocal request for an attorney that constituted an invocation of the right to counsel that required suppression of defendant's subsequent confession. However, trial court erred by imposing an indeterminate mandatory supervised release term at sentencing and certain fines and fees.

Defendant Andy Gemskie appeals from his conviction at a bench trial on two counts of criminal sexual assault. Defendant argues on appeal that the trial court erroneously failed to suppress defendant's confession, improperly imposed an indeterminate term of mandatory supervised release (MSR), and improperly assessed certain fines and fees. We affirm the trial

court's order denying suppression and affirm defendant's conviction, but we vacate the fines and fees and remand for imposition of a determinate MSR term.

## I. BACKGROUND

In 2007, defendant was arrested for and later indicted on 10 counts of criminal sexual assault and aggravated criminal sexual abuse. Defendant allegedly carried on a sexual relationship with his teenage stepdaughter for about two years, starting when she was 13 years old.

Following his arrest, defendant was transported to a police station and was placed in an interview room. Detective Robert Midlowski, a Chicago Police detective, was assigned to interrogate defendant. Defendant later filed a motion to suppress statements that he made during this interview. According to testimony at that hearing, Detective Midlowski entered the interrogation room and advised defendant of his *Miranda* rights before commencing the interview. At the hearing, Detective Midlowski testified that he read defendant the *Miranda* warnings as they appeared in his 2007 Fraternal Order of Police handbook. The following exchange occurred at the hearing:

“[STATE’S ATTORNEY]: Please demonstrate for [the court] this afternoon the way in which you advised [defendant] of his *Miranda* rights.

[WITNESS]: Before we ask you any questions, it is our duty to advise you of your rights. You have the right to remain silent. Anything you say can and may be used against you in a court or other proceedings. Do you understand that you have the right to talk to a lawyer before we ask you questions and that you

have the right to have him with you during questioning? If you cannot afford or otherwise obtain a lawyer and you want one, a lawyer will be appointed for you and we will not ask you any questions until he or she has been appointed.

[STATE'S ATTORNEY]: Detective, before you continue reading, going back to that first right that you advised [defendant] of, did [defendant] say anything to you after the first right?

[WITNESS]: After each right I asked him if he understood or not, and he responded yes, that he understood it.

[STATE'S ATTORNEY]: Please continue reading the rights as you gave them to him.

[WITNESS]: We will not ask you any questions until he or she has been appointed. If you decide to answer now with or without a lawyer, you still have the right to stop questioning at any time or to stop the questioning for the purposes of consulting with a lawyer.

You may waive the right to advice of counsel and the right to remain silent and you may answer questions or make a statement without consulting a lawyer if you so desire.

Do you understand each of these rights? Do you wish to answer questions at this time?

[STATE'S ATTORNEY]: You stated that after each right [defendant] stated what?

[WITNESS]: Yes, that he understood each right as it was given to him.”

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[STATE’S ATTORNEY]: At any time did [defendant] ask you to explain any of the Miranda rights?

[WITNESS]: Not after I advised him, no.”

During his own testimony, defendant confirmed that Detective Midlowski had read the *Miranda* warnings to him and that he had acknowledged that he understood them. However, defendant also testified that, after Detective Midlowski advised him of his rights, defendant asked a question. Defendant testified as follows:

“[DEFENSE COUNSEL]: \*\*\* When he asked if you had a lawyer, was that after he had read you these warnings?

[DEFENDANT]: Yes.

Q: When he asked you if you had a lawyer, what did you say to him?

A: I said, no, I don’t. I said, I don’t even know how to obtain one. I have never needed one before. I have never had a reason to use a lawyer. I don’t know how to get one.

Q: Did you ask him how to get one?

A: I said, how do I get a lawyer; I don’t even know where to start. He said, if you don’t have one, one is appointed by the Court.

Q: Did he tell you - - so he told you that one would be appointed for you by the Court?

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A: Yes. Just to make me have a better understanding on how to obtain a lawyer. I wasn't aware that I could have one right there at the police station.

Q: When you asked him, how do I get a lawyer, did you ask him if you could use the phone to get a lawyer?

A: No.”

Defendant went on to testify at length that he had not understood that appointed attorneys are available at the time of questioning. According to defendant, it was his understanding that his appointed attorney would only be available to him after he appeared in court. Based on the record, however, defendant did not communicate this misunderstanding of his rights to Detective Midlowski.

After Detective Midlowski answered defendant's question, defendant agreed to talk to him. Defendant confessed to having an ongoing sexual relationship with the victim, which included somewhere between 25 and 50 instances of oral and vaginal intercourse. Following the arrival of an attorney from the felony review section of the State's Attorney's Office, defendant again waived his *Miranda* rights and repeated his confession. The assistant State's Attorney memorialized the confession in a handwritten statement, which defendant reviewed and signed.

Defense counsel argued that defendant's question to Detective Midlowski, that is, “how do I get a lawyer,” constituted an invocation of defendant's fifth amendment right to counsel. Defense counsel argued that, because Detective Midlowski did not immediately terminate the interrogation, defendant's confession must be suppressed pursuant to *Edwards v. Arizona*, 451 U.S. 477 (1981). The trial court disagreed, finding that defendant's statement was not a “clear

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and unequivocal invocation of counsel” that would require cessation of the interrogation. The trial court consequently denied defendant’s motion to suppress the confession.

At a bench trial, the State presented the testimony of the victim, who stated that she had begun a sexual relationship with defendant shortly after she turned 13 and continued for over two years. The victim estimated that the relationship involved approximately 75 instances of vaginal intercourse and 50 instances of oral intercourse, although she was unable to verify the specific times and dates of the various acts. The State also presented the testimony of Dr. Emily Stifferman, who testified that the victim had a tear in her hymen that was consistent with vaginal penetration. Finally, the State introduced defendant’s confession.

The trial court found defendant guilty of two counts of criminal sexual assault, as well as two counts of criminal sexual abuse that were later merged into the criminal sexual assault counts. Defense counsel moved for a new trial and assigned several points of error, including allowing the confession into evidence. The trial court denied defendant’s motion for a new trial. At sentencing, the trial court sentenced defendant to four years’ incarceration on each of the two counts, to be served consecutively, for a total of eight years’ incarceration. The trial court also imposed several fines and fees. Finally, the trial court included an indeterminate MSR term of three years to life.

Defendant timely filed a notice of appeal, and this appeal followed.

## II. ANALYSIS

Defendant raises three issues on appeal: (1) whether the trial court's ruling on the suppression motion was correct, (2) whether the trial court properly imposed certain fines and fees, and (3) whether the trial court properly imposed an indeterminate term of MSR

### A. Suppression Motion

Defendant first argues that the trial court should have suppressed his confession because it was obtained after he had invoked his right to counsel. Motions to suppress present issues of both law and fact. “[W]e apply a deferential standard of review to the court's factual determinations and credibility assessments, reversing those findings only for manifest error.” *People v. Watson*, 214 Ill. 2d 271, 279 (2005). However, we review *de novo* “the ultimate legal question of whether the evidence should be suppressed.” *Id.*

Initially, we must determine what facts are in evidence on this issue because the parties do not agree on what findings of fact the trial court made during the suppression hearing. The supreme court has explicitly cautioned that, in order to permit proper review of decisions on motions to suppress,

“trial courts must exercise their responsibility to make factual findings when ruling on motions to suppress. Reviewing courts should not be required to surmise what factual findings that the trial court made. Instead, the trial court should make clear any factual findings upon which it is relying. It is only through this synergy between the trial and reviewing courts that appellate courts can develop a uniform body of precedent to guide law enforcement officers in their

determination of whether their actions may violate the constitution.” *People v. G.O.*, 191 Ill. 2d 37, 50 (2000).

The trial court in this case did not heed the supreme court’s admonishment and it failed to make explicit factual findings. However, “the absence of such findings does not require a remand,” and we “must presume that in the absence of such express findings of fact the trial court credited only the testimony that supports its ruling.” *People v. Winters*, 97 Ill. 2d 151, 158 (1983).

In its ruling on the suppression motion, the trial court stated that it had reviewed three cases that dealt with the standard for reviewing an alleged invocation of the right to counsel, and it stated that the “crux” of defendant’s motion was “whether or not Defendant did invoke counsel.” The trial court also stated, “I find in assessing the testimony of all the witnesses that there was not a clear and unequivocal invocation of counsel in this case. They may have talked about an attorney, what it does, when it happens, those types of things, but the Defendant did not invoke his right to counsel.” Additionally, at the hearing on defendant’s motion to reconsider, the following exchange occurred:

“[DEFENSE COUNSEL]: Only, Judge, just to supplement my motion I believe that based on the cases that Your Honor cited, it seems to me - - I’m not trying to read your mind, but it seems to me that you believed [defendant] testified to, that he did say “how do I get a lawyer” or words to that effect. And somebody in his position, who had never been arrested before, essentially has a request for a lawyer.

This, Judge, I believe was derailed when the officer indicated that that [sic] would be done at court. And for those reasons, Judge, I think this was a request for a lawyer by [defendant].

THE COURT: I don't think it was, and I think my prior ruling should stand. And the reason for that is not only looking at what the defendant says, but looking at his intellectual capacity, the way he testified. I think something like that could easily been [sic] done and the right words, not that there is the right words as such, but to make an unequivocal assertion of counsel could easily have been done by [defendant] if that's what he wanted to do."

Based on these exchanges in the record, it is apparent that the trial court found that defendant asked the question, "How do I get a lawyer?" Although the State argues that Detective Midlowski's testimony demonstrates that this exchange never occurred, the trial court's statements on the record and ultimate ruling indicate that it considered the sole issue to be whether defendant's statement was sufficiently clear to invoke his right to counsel, not whether the statement had ever occurred. The trial court therefore implicitly but necessarily found as a matter of fact that defendant had asked the question. Such a factual finding is not against the manifest weight of the evidence based on the testimony of all the witnesses, and we therefore accept the trial court's implicit findings on this point.

Based on these factual findings, we now examine whether defendant's statement should have been suppressed. As the trial court noted, the dispositive issue is whether defendant invoked his right to counsel. Before criminal suspects can be interrogated by police, they must

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be advised of certain constitutional rights, including the right to counsel. See *People v. Villalobos*, 193 Ill. 2d 229, 233 (2000) (citing *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)). “A suspect who expresses the desire to deal with police only through counsel is not subject to further interrogation until counsel has been made available, unless the suspect initiates further communication with the police.” See *People v. Christopher K.*, 217 Ill. 2d 348, 376 (2005) (citing *People v. Olivera*, 164 Ill. 2d 382, 389-90 (1995), *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981)).

In Illinois, this issue is controlled by our supreme court’s decision in *Christopher K.*, 217 Ill. 2d at 376-82. In that case, the supreme court set forth the proper standard for determining whether a suspect’s statement constitutes an invocation of the right to counsel. The supreme court adopted the test set forth by the U.S. Supreme Court in *Davis v. United States*, 512 U.S. 452, 458-59 (1994):

“ ‘[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel,’ the officer is not required to cease questioning the suspect. [Citation]. \*\*\* [A] suspect ‘must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.’ [Citation.]” (Emphasis in original.) *Christopher K.*, 217 Ill. 2d at 378 (quoting *Davis*, 512 U.S. at 459).

Although *Davis* dealt with invocation of the right to counsel after a suspect has initially waived the right to counsel, our supreme court found that “the objective test set forth in *Davis* can be applied to situations where, as here, the suspect makes a reference to counsel immediately after he has been advised of his *Miranda* rights.” See *id.* at 381 (citing cases). The court summarized the proper analysis for a prewaiver situation as follows:

“In such a case, the relevant inquiry should remain whether a reasonable officer in the circumstances would have understood only that the suspect might be invoking the right to counsel [citation], or stated alternatively, whether the suspect's articulation of the desire to have counsel present was sufficiently clear that a reasonable officer in the circumstances would have understood the statement to be a request for an attorney [citation]. The fact waiver has not yet occurred can simply be subsumed into the objective test. That is, a trial court may consider the proximity between the *Miranda* warnings and the purported invocation of the right to counsel in determining how a reasonable officer in the circumstances would have understood the suspect's statement. The primary focus of the inquiry, however, should remain on the nature of the actual statement at issue.” See *id.* (citing *Davis*, 512 U.S. at 459).

Consequently, the test in this case is whether an objectively reasonable officer in Detective Midlowski's situation would construe defendant's question, “How do I get a lawyer,” to be a request for an attorney.<sup>1</sup> Based on the circumstances, it was not. Defendant's question

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<sup>1</sup> This test applies to this case even though defendant posed his question before he had waived his *Miranda* rights. We are aware that a significant debate exists in other jurisdictions about the

came immediately after Detective Midlowski read the *Miranda* warnings to him, and the question was phrased as a request for advice rather than a demand for counsel. *Cf. Christopher K.*, 217 Ill. 2d at 383-84. Moreover, after Detective Midlowski answered defendant's question, defendant did not pose any additional questions or otherwise indicate that he wanted to obtain counsel. Based on the testimony in the record, defendant's question merely implied that he wanted to clarify the process for obtaining a lawyer if he wanted one.

Although defendant testified at the suppression hearing that he subjectively did not understand that he was entitled to have a lawyer present during questioning, this is irrelevant to our inquiry. The *Davis* test examines a suspect's statement based on its objective meaning to a reasonable police officer, not based on its subjective meaning to a suspect. See *id.* Regardless of whether defendant subjectively misunderstood his right to have counsel present during questioning, he did not communicate this misunderstanding to Detective Midlowski. From an objective perspective, Detective Midlowski was confronted with a suspect who acknowledged that he understood his rights, asked a single question about his right to counsel that Detective Midlowski answered, and then waived his rights and agreed to speak with Detective Midlowski. Under these circumstances, defendant's request was not clear and unequivocal enough that it could only reasonably be understood as a request for counsel.

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effect of *Davis* and whether different standards should apply to prewaiver and postwaiver invocations. See *State v. Turner*, 305 S.W.2d 508, 515-19 (Tenn. 2010) (discussing the prewaiver/postwaiver distinction and citing cases from various jurisdictions); *United States v. Rodriguez*, 518 F.3d 1072 (9th Cir. 2008) (same). *Christopher K.*, however, does not recognize a distinction between these situations and it is the controlling precedent for Illinois courts on this point. *Cf. People v. Artis*, 232 Ill. 2d 156, 164 (2009).

Finally, we observe that defendant's position relies heavily on *People v. Rafac*, 51 Ill. App. 3d 1 (1977), in which the defendant waived his *Miranda* rights and agreed to an interview with the police but then later asked how he could get a lawyer. See *id.* at 3. Similarly to this case, the officer responded that a public defender would be appointed if the defendant could not afford one. See *id.* In holding that the defendant's confession should have been suppressed by the trial court, the court stated that "[w]hen the defendant Rafac indicated his interest in having legal counsel the interviewing officer should have considered such an interest on the part of the defendant Rafac as a 'red light' which compelled a stopping or cessation of all further inquiry of the defendant." *Id.* at 4.

*Rafac* was decided long before *Davis*, and the court in that case did not employ the objective test as set forth in *Christopher K.*, but instead focused its analysis on the mere fact that the defendant "indicated" his interest in obtaining counsel. As we mentioned above, the supreme court has stated that ambiguous requests for advice such as this are insufficient to constitute invocation of the right to counsel. See *Christopher K.*, 217 Ill. 2d at 383-84 (citing and discussing *People v. Oaks*, 169 Ill. 2d 409, 451 (1996)). We question whether *Rafac*'s analysis survives *Christopher K.*, and we therefore decline to follow it.

Defendant's question to Detective Midlowski was not sufficiently clear and unequivocal that a reasonable police officer would understand it to be a request for counsel. As a result, defendant did not invoke his right to counsel and his confession was not obtained in violation of his constitutional rights. The trial court accordingly did not err in denying defendant's suppression motion.

B. MSR

Defendant next argues that the trial court improperly imposed an indeterminate term of MSR as part of his sentence. Section 5-8-1 of the Unified Code of Corrections states, in pertinent part:

“(d) Subject to earlier termination under Section 3-3-8 [730 ILCS 5/3-3-8], the parole or mandatory supervised release term shall be as follows:

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(4) for defendants who commit the offense of predatory criminal sexual assault of a child, aggravated criminal sexual assault of a child, aggravated criminal sexual assault, or criminal sexual assault \*\*\* the term of mandatory supervised release shall range from a minimum of 3 years to a maximum of the natural life of the defendant.”

The record reflects that at sentencing the trial court imposed an MSR term of “3 YRS TO LIFE – TO BE DETERMINED.” Defendant argues that section 5-8-1 requires the trial court to impose a determinate term of MSR at the time of sentencing, while the State contends that an indeterminate term is proper.

A split in the appellate court has recently developed on this issue. In *People v. Schneider*, 403 Ill. App. 3d 301 (2010), which was a case of first impression, the court held that the trial court is required to impose an indeterminate term of MSR of three years to life and that the Department of Corrections then has the authority to impose a determinate period of MSR within that term. See *id.* at 308-09. The court based this holding on a finding that section 5-8-

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1(d)(4) is ambiguous and its comparison of this subsection with other subsections in section 5-8-1(d) under the doctrine of *in pari materia*. See *id.* at 307-08.

In contrast, *People v. Rinehart*, 406 Ill. App. 3d 272, 281-82 (2010), *petition for leave to appeal allowed*, 2011 Ill. LEXIS 808 (May 25, 2011), expressly disagreed with *Schneider* and held that the trial court has a duty to impose a determinate MSR term at the time of sentencing within the statutory range of three years to natural life. See *id.* at 281-82. The court found that although the Prison Review Board had the discretion to set the conditions of MSR and to authorize early termination of MSR, the Board has no authority to set the initial determinate term of MSR under section 5-8-1(d). See *id.* at 281 (citing 730 ILCS 5/3-3-8(b) (West 2008)).

After reviewing the analyses presented in these two cases, we are persuaded by *Rinehart*. In particular, there are two points that weigh in favor of a finding that section 5-8-1(d) requires the trial court to set a determinate MSR term at sentencing. First, section 5-8-1(d) is located in the article of the Unified Code of Corrections that enumerates the powers and duties of the trial court during sentencing, not the article of the Code that deals with the powers of the Prisoner Review Board. See *Rinehart*, 406 Ill. App. 3d at 281; compare 730 ILCS 5 art. 3 (West 2008) (Parole and Pardon Board), with 730 ILCS 5 art. 5 (West 2008) (Sentencing). Second, as *Schneider* noted, “in 1977, Illinois generally replaced its system of indeterminate sentences with a system of determinate sentences, to reduce sentencing disparities by limiting the discretion of parole officials.” *Schneider*, 403 Ill. App. 3d at 306.

Taking these two points into account along with the plain language of section 5-8-1(d), we believe that *Rinehart* is correct that the legislature intended for the trial court to impose a

determinate term of MSR at the time of sentencing. The legislature gave the trial court wide discretion by allowing it to impose a term of anywhere between three years to natural life as part of a sentence, and there is no indication in either the plain language or the structure of the statute that the legislature intended to vest the initial MSR decision with the Prisoner Review Board.

We note that this issue is currently pending before the supreme court. See 2011 Ill. LEXIS 808 (May 25, 2011) (granting leave to appeal in *Rinehart*). Absent a contrary decision by the supreme court, however, we follow *Rinehart* and find that the trial court erred by imposing an indeterminate MSR term.

### C. Fines and Fees

Finally, defendant argues that he should not have been assessed a \$500 sex offense fine under section 5-9-1.15(a) of the Unified Code of Corrections (730 ILCS 5/5-9-1.15(a) (West 2008)), a \$30 Children's Advocacy Center Fund fine under section 5-1101(f-5) of the Unified Code of Corrections (730 ILCS 5/5-1101(f-5) (West 2008)), and a \$5 fine under section 5-1101(a) of the Illinois Vehicle Code (55 ILCS 5/5-1101(a) (West 2008)). The State concedes that the sex offense fine and the Children's Advocacy Fund fine are improper *ex post facto* fines because the laws authorizing those two fines were not enacted by the legislature until after the time period covered by defendant's indictment. The State additionally concedes that the Vehicle Code fine was improper because defendant was not convicted of an offense under the Code. We accept the State's concessions and vacate those fines without further discussion.

### III. CONCLUSION

For the reasons stated above, we affirm the trial court's order denying defendant's motion to suppress his confession, and we accordingly affirm defendant's conviction. However, we vacate the \$500 sex offense fine, the \$30 Children's Advocacy Center Fund fine, and the \$5 Illinois Vehicle Code fine. Finally, we vacate that part of the trial court's sentencing order imposing an indeterminate MSR term, and we remand for entry of a determinate MSR term.

Affirmed in part, vacated in part; cause remanded.