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No.3-09-0046

Order filed May 5, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee, Illinois,
Plaintiff-Appellee,)	
v.)	No. 07-CF-506
PATRICK J. MARCOTTE,)	Honorable Kathy Bradshaw-Elliott, Judge Presiding.
Defendant-Appellant.)	

JUSTICE WRIGHT delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment.

ORDER

Held: Defense counsel's failure to file a motion to suppress the teenaged defendant's statement fell below the reasonable standard of reasonableness and caused prejudice to the outcome of the 17-year-old defendant's trial.

The State, and subsequently the Kankakee grand jury, charged defendant Patrick J. Marcotte with committing the offenses of burglary, a Class 2 felony, on August 4, 2007, and

attempted burglary, a Class 3 felony, on August 10, 2007. Defendant was 17 years old at the time of his arrest. As part of the investigation, police obtained a videotaped statement from defendant but did not provide the videotape to defense counsel until the day of trial. After delaying the trial, the court granted defense counsel leave to file a motion to suppress the videotaped statement.

In lieu of a motion to suppress, defense counsel filed a motion *in limine* asking the court to exclude the videotaped statement on several grounds, one being the failure to give *Miranda* warnings prior to questioning defendant, because the prejudice created by the videotape outweighed its probative value. The trial judge denied the motion *in limine*, but redacted certain portions of defendant's videotaped statement to reduce the prejudicial effect of the inadmissible discussions with the officers including, but not limited to, defendant's prior contacts with law enforcement. The court allowed the edited videotape to be admitted as evidence against defendant during the jury trial.

After the jury convicted the defendant, the court sentenced defendant to serve two years of probation with conditions. Defendant filed a timely notice of appeal raising the ineffectiveness and deficient performance of his trial attorney for failing to file a motion to suppress defendant's confession.

On appeal, defendant argues counsel was ineffective for failing to file a motion to suppress on the grounds that the statement was not voluntary because the police did not attempt to allow defendant to contact a parent or concerned adult before requesting the minor to waive his *Miranda* rights and speak to the officers in this case. We reverse defendant's convictions and remand for a new trial.

BACKGROUND

The Kankakee County grand jury issued an indictment against defendant Patrick J. Marcotte charging him with committing the offenses of burglary, a Class 2 felony, on August 4, 2007, and attempted burglary, a Class 3 felony, on August 10, 2007. At the time of his arrest, defendant was 17 years old.

The court set the case for a jury trial on July 28, 2008, and, on that date, an issue arose concerning a videotaped statement made by defendant to the police at the time of his arrest. Although this videotape was referenced in the State's production of discovery, the defense did not receive a copy of the videotape or review it prior to the jury trial date.

On the date originally set for the jury trial to begin, the court and both attorneys viewed the videotape together to determine if redactions would be necessary prior to presenting the videotaped statement to the jury. The defense attorney asked leave to file a motion to suppress the videotape because he did not feel that redactions would cure the possible prejudice in the tape. Consequently, the court postponed the jury trial date and scheduled a hearing date for defendant's motion to suppress.

Defendant filed a "Motion *in Limine*," rather than a motion to suppress, on August 7, 2008. The court held a hearing on defendant's motion on August 13, 2008. By agreement of the parties, the court reviewed defendant's videotaped statement prior to the hearing. At the hearing, the attorneys presented no additional evidence and only presented argument to the court.

Defense counsel argued that the videotape should be suppressed because it was more prejudicial than probative based on several considerations. First, the videotape contained references about defendant's previous contacts with law enforcement officers. Second, the audio

quality of the videotape was poor and there were times when the officer interjected his own opinion as part of the questioning, but due to the poor quality of the recording, defendant's answers to those questions were inaudible. Additionally, defense counsel felt defendant would be prejudiced by portions of the interview when the police officer referred to statements and actions of other codefendants. Finally, defense counsel argued that, after redacting all of the improper portions of the videotape, viewing the remainder of the videotape would be more confusing than helpful to the jury. Therefore, defense counsel asked that the entire videotape be excluded as evidence.

The State did not dispute that some portions of the videotape had poor audio quality, but argued that the poor audio quality should not bar the whole video. The State also agreed that the portions of the videotape that referred to prior police contacts with defendant or prior convictions should be redacted. The State argued that an edited version of the videotape should be admissible.

The court found that there was "absolutely no question" that the police had defendant in custody when the videotape statement began. According to the judge, the videotape demonstrated that the police officer did not give *Miranda* warnings to defendant until after some initial questioning. The court specifically noted the *Seibert v. Missouri* case (*Missouri v. Seibert*, 542 U.S. 600 (2004)) and a new *Lopez* case (*People v. Lopez*, 229 Ill. 2d 322 (2008)), that held that officers cannot question a defendant and obtain some incriminating statements, subsequently recite *Miranda* warnings following the incriminating admission, and later claim the pre-*Miranda* admissions should be admitted as evidence.

The judge then found that everything discussed prior to the *Miranda* warnings should be

redacted, as well as statements concerning the acts of codefendants and defendant's prior police involvement. The court also noted that, in the videotape presented to the court, when the interrogation started, the court could hear somebody crying in the background of the videotape. After ordering the tape to be edited to remove the objectionable content identified in the motion *in limine*, the court denied the motion and indicated an edited version of the videotape would be admitted at trial

After an initial mistrial on September 8, 2008, a new jury trial began on October 27, 2008. At the trial, Donna Martin testified that she was the assistant manager at the Dollar Tree store in August of 2007. She testified that on August 4, 2007, someone gained entrance into the back of the store without permission and a case of soda was missing from the store's inventory.

Ms. Martin testified that, on August 10, 2007, someone again gained entrance to the rear of the store without permission. The State showed her a case of "Sour Punk" candy, marked as People's Exhibit No. 1, which was candy received by her Dollar Tree store because it bore her store number, 1346.

Officer James Knapp of the Village of Bradley police department testified that, on August 4, 2007, around 4:00 a.m., he was checking doors of businesses and found the Dollar Tree store's door, which opened into a large garage area, was not locked. He said that he and another officer checked inside and made sure everything was secure, noticed nothing unusual, and notified the manager about the unlocked door.

Again, on August 10, 2007, Officer Knapp checked the Dollar Tree store during his midnight shift and saw a red car backed up to the loading ramp. Two people were inside the car, and defendant stood near the loading dock. The officer asked defendant what he was doing back

there, and defendant told the officer that he was going to the bathroom. The officer asked defendant and the two people in the car for identification when a fourth person came out from behind a dumpster near the store. Officer Knapp testified that he identified the female sitting in the driver seat was A.H., a 16-year old, and defendant's brother, A.M., who was about 14 years old, was a passenger. The man behind the dumpster was Eldridge Toliver, 17 years old, and defendant Patrick Marcotte, the fourth person, was also 17 years old.

The officer said he noticed a car jack and a dark T-shirt located three to four feet from the loading ramp and observed the garage door to the Dollar Tree store was propped open approximately six to twelve inches off the ground. The trunk of the red car was open and, inside the trunk, the officer observed a box of "Sour Punks" candy containing six smaller packs of candy. Inside the car, there was an individual package of the same "Sour Punks" candy.

Sergeant James Jeck testified that he was dispatched to the scene around 12:15 a.m. on August 10, 2007. When he arrived, he observed Officer Knapp and three individuals and watched a fourth individual walk up from behind one of the dumpsters. He said he also observed the raised overhead garage door, the car jack, and the red car with the open trunk, and the box of candy inside the trunk.

Bradley police detective Robert Mason testified that he was assigned to investigate the Dollar Tree break in on August 10, 2007, and determined that A.H. was the owner of the vehicle parked near the loading dock. According to the detective, the patrol officers brought defendant to the police station from the Dollar Tree store. The detective testified that he knew defendant was 17 years old at the time and did not talk to defendant prior to beginning the videotape recording. Detective Mason said that, after defendant arrived at the station, defendant waited in a

locked, processing room for approximately one hour before Detective Mason began the interview. Detective Mason testified that defendant was not free to leave this locked processing area before the interview began. Detective Mason stated that his interview with the defendant started around 2:00 a.m. The detective explained that he read defendant his *Miranda* rights and then began the interview with the defendant.

During the detective's testimony, the State presented the redacted videotape as evidence to the jury. In the videotape, defendant originally made an exculpatory statement claiming he was present outside the Dollar Tree store because he had to urinate. Defendant claimed, in this videotape, the candy in the trunk was purchased in Momence, Illinois. Defendant denied removing the car jack from the car. Defendant also denied being in this general area in the past. In the redacted videotape, the detective told defendant that defendant's story differed from that of the passengers. Then, later in the videotaped interview, defendant admitted to the detective that he had been to this Dollar Tree loading dock previously with four other persons, including the person named Eldridge. The videotape included defendant's admission that, together, defendant and Eldridge opened the overhead garage door sufficiently for Eldridge to slide under the door. On the videotape, defendant said Eldridge removed soda and candy from the store on August 4, 2007.

Additionally, on the videotape, defendant said it was Eldridge's and his idea to return to the Dollar Tree store to get more candy on August 10, 2007. Defendant claimed that A.H. and his brother, A.M., were the other two passengers and they stayed in the car the whole time. Defendant said that he took the car jack out of the trunk, on August 10, to raise the overhead garage door, but they did not get the chance to remove any items before the police officer arrived.

After closing arguments and deliberation, the jury found defendant guilty on both counts. The court sentenced defendant to two years of probation with conditions, to be served consecutively to a term of imprisonment defendant was sentenced to in an unrelated matter.

Defendant filed a timely appeal and the court appointed the appellate defender to represent defendant on appeal. The appellate defender filed a motion for leave to withdraw as counsel on appeal pursuant to *Anders v. California*, which this court denied, and ordered the parties to address the potential merit of defendant's argument relating to his interrogation and his videotaped statement.

ANALYSIS

On appeal, the sole issue raised by defendant involves the purported ineffectiveness of trial counsel resulting from counsel's failure to file a motion to suppress defendant's videotaped confession as an involuntary statement. In response, the State argues that defendant received effective assistance of counsel because defense counsel filed a motion *in limine* in an attempt to exclude the defendant's statement.

The determination of effective assistance of counsel is reviewed using the two-pronged *Strickland* test (*Strickland v. Washington*, 466 U.S. 668 (1984)). According to this test, defendant must first demonstrate that his counsel's performance was deficient in that it fell below an objective standard of reasonableness and, second, that his counsel's deficient performance prejudiced the defense in that, absent counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. *People v. Houston*, 229 Ill. 2d 1,11 (2008). Defendant must satisfy both prongs to prevail on a claim of ineffective assistance of counsel. *Houston*, 229 Ill. 2d at 11.

On review, there is a strong presumption that counsel's performance was within the wide range of reasonable professional assistance and defendant must overcome the presumption that, under the totality of the circumstances, the attorney's actions were sound trial strategy. *People v. Albanese*, 104 Ill. 2d 504, 526 (1984). Generally, the law in Illinois is well-settled that the decision whether to file a motion to quash arrest and suppress evidence is viewed as a trial strategy and trial counsel benefits from a strong presumption that his failure to seek the suppression of certain evidence was proper and, in hindsight, is not *per se* incompetence. *People v. Little*, 322 Ill. App. 3d 607, 611 (2001).

In the instant case, defendant's private counsel filed a motion *in limine*, instead of a motion to suppress. The motion *in limine* alleged that the videotape included inadmissible discussions that would prejudice defendant during trial, such as defendant's prior contact with police, and the conduct and statements of his codefendants. In addition, defense counsel pointed out that it was obvious from the videotape itself that a portion of the interview was conducted by the detective before he advised defendant of his *Miranda* rights. Therefore, defense counsel asked the court to exclude the videotaped statement.

With a motion *in limine*, the movant seeks an order to exclude inadmissible evidence, thereby avoiding the prejudicial impact of asking objectionable questions concerning the evidence in the presence of the jury. *People v. Williams*, 188 Ill. 2d 365, 368-69 (1999). A motion *in limine* may allow the court to strike portions of the objectionable exhibit, in order to reduce prejudice to the defense, without excluding the entire statement from evidence. The court's ruling on a motion *in limine*, regarding whether to admit or exclude evidence, is discretionary and reviewed under an abuse of discretion standard. *Williams*, 188 Ill. 2d at 369.

Unlike a motion *in limine*, a motion to suppress a confession filed by the defense places the burden on the prosecution to establish the voluntariness of the confession. 725 ILCS 5/114-11 (West 2006). If the movant prevails, the entire statement may be suppressed as a matter of law. A trial judge's decision regarding a motion to suppress is reviewed under a bifurcated standard of review. Great deference is given to the trial judge's findings of fact, but the voluntariness issue and the application of the law to those findings of fact are reviewed based on a *de novo* standard of review. *In re G.O.*, 191 Ill. 2d 37, 50 (2000).

Here, the trial judge noted that the videotape itself documented that the *Miranda* warnings were not timely as a matter of law. Thus, if the court had been presented with a motion to suppress, the burden would have fallen on the prosecution to present evidence the confession was both voluntary and admissible. 725 ILCS 5/114-11 (West 2006). Since defense counsel did not file a motion to suppress this confession, the court did not receive evidence from either party pertaining to all the circumstances surrounding this confession such as: defendant's intelligence, background, experience, mental capacity, education, and physical condition at the time of questioning; the legality and duration of the detention; the duration of the questioning; and any physical or mental abuse by police, including the existence of threats or promises. *G.O.*, 191 Ill. 2d at 54. In addition, the defense contends that the trial court could have considered whether the 17-year-old defendant was offered an opportunity to speak with a concerned adult prior to agreeing to speak to the detective if defense counsel had filed a motion to suppress. See *People v. Westmoreland*, 372 Ill. App. 3d 868, 881-82 (2007).

In addition, appellate defense counsel points out that section 405 of the Juvenile Court Act of 1987 (Juvenile Court Act) (705 ILCS 405/5-405 (West 2006)) requires an officer to make

reasonable efforts to notify the minor's parent or a concerned adult that the minor is being held in police custody. Although defendant's 14-year-old brother would have benefitted from this provision of the Juvenile Court Act, we agree with the defense's concession that this provision of the Act does not apply to defendant who was 17-years-old and charged with a felony offense. However, the "concerned adult" factor applies to this defendant under common law doctrines regarding the voluntariness of the confession. *G.O.*, 191 Ill. 2d at 54-55; *Westmoreland*, 372 Ill. App. 3d at 880.

Moreover, our supreme court has recognized that, when obtaining a confession from a juvenile offender, the greatest care must be taken to assure that a confession did not result from ignoring the rights of the adolescent, was not coerced, and was not unfairly produced from adolescent "fantasy, fright or despair." *G.O.*, 191 Ill. 2d at 54; *People v. Prude*, 66 Ill. 2d 470, 476 (1977). Consequently, in both the juvenile and adult forums, when minors are interrogated by law enforcement officers, the courts must consider the totality of the circumstances to determine whether the adolescent's confession was voluntary. *Westmoreland*, 372 Ill. App. 3d at 876.

In the instant case, the testimony at trial establishes that the interrogation occurred around 2:00 a.m., nearly two hours after the initial police contact with defendant. Nothing in the record indicates that the officers attempted to notify defendant's parents that both of their teenage sons, ages 14 and aged 17, were in custody at the police station and potentially subject to police interrogation procedures. Here, there are many red flags that even the trial court noted, *sua sponte*, during the hearing on the motion *in limine*. First, after viewing the video tape, the trial judge noted defendant made incriminating statements before the detective admonished the

defendant regarding his *Miranda* rights. Second, the judge noted another person could be overhead crying in the background of the audio portion of the videotape as this defendant was being interrogated. Finally, we cannot lose sight of the fact that only soda pop and candy were removed from the Dollar Tree store by the teenagers. Certainly these circumstances suggest a lack of criminal sophistication.

As judiciously pointed out by the court, it appears that the entire statement could have been suppressed based on the case law brought to defense counsel's attention by the trial court. See *Missouri v. Seibert*, 542 U.S. 600 (2004)) and *People v. Lopez*, 229 Ill. 2d 322 (2008). In spite of this discussion of case law initiated by the trial judge, defense counsel did not file a motion to suppress, but only filed a motion *in limine* which did not request the court to consider the totality of the circumstances relevant to an examination of whether the 17-year-old defendant's statement was voluntary.

We conclude this decision fell below the objective standard of reasonableness in this case because there is a strong probability that defendant would have prevailed if his attorney had filed a motion to suppress defendant's confession based on the delayed *Miranda* warnings and the other unusual circumstances of this case. This satisfies the first prong of the *Strickland* test.

Moreover, it was only through defendant's confession that the jury heard that defendant was actually involved in stealing candy from the Dollar Tree store on either occasion. As to the August 4, 2007, incident, there was no other evidence linking defendant to the crime of burglary on that date, since the manager merely testified that soda and candy were stolen from the store on August 4, but no suspects were under investigation before the arrests on August 10, 2007.

As to the August 10, 2007, incident, the officers testified that the red car located at the

rear of the Dollar Tree store with its trunk open and a box a candy in the trunk belonged to A.H., not defendant. At that time, defendant was located outside of the store and there were no fingerprints or other physical evidence linking this defendant to the break in. Defendant did not have any candy from the store on his person when the officers approached him. Additionally, defendant explained to the officer at the scene that defendant was at that location because he had to urinate. Without his confession, the link to the August 10, 2007, burglary was circumstantial and, since no merchandise was removed from the store on that date, the defendant's criminal intent was subject to factual debate. Clearly, the outcome of that trial would have been different if the motion to suppress had been granted. Therefore, the second prong of ineffective assistance of counsel has been satisfied because defendant was prejudiced by his attorney's decision not to file a motion to suppress the confession after the court denied the motion *in limine*.

For the foregoing reasons, we reverse defendant's convictions and remand the matter for a new trial based upon defendant being denied his right to effective assistance of counsel.

CONCLUSION

Accordingly, we reverse defendant's convictions and remand this case to the trial court for a new trial.

Reversed and remanded.