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2013 IL App (3d) 120208-U

Order filed September 19, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the Circuit Court
) of the 10th Judicial Circuit,
Plaintiff-Appellee,) Tazewell County, Illinois,
)
v.) Appeal No. 3-12-0208
) Circuit No. 11-CF-571
DESHAWN B. REGAN,)
) Honorable
Defendant-Appellant.) Scott A. Shore,
) Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Carter and Holdridge concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) The use of defendant's statement did not violate his right to a fair trial. (2) Defendant's DNA analysis fee is vacated.
- ¶ 2 Defendant, Deshawn B. Regan, was convicted of armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)) and home invasion (720 ILCS 5/12-11(a)(3) (West 2010)). The trial court sentenced him to concurrent terms of 35 years in prison. Defendant appeals, arguing that: (1) the State's use of a statement he made when he was arrested violated his right to a fair trial; and (2) his \$250

deoxyribonucleic acid (DNA) analysis fee should be vacated. We vacate defendant's DNA analysis fee and otherwise affirm.

¶ 3

FACTS

¶ 4 Defendant was arrested and charged with armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)) and home invasion (720 ILCS 5/12-11(a)(3) (West 2010)). Prior to trial, defendant filed a motion *in limine*, seeking to bar the admission of a statement he made to Scott Camp while they were being arrested. The statement, "Don't talk. We'll get a lawyer[.]" was overheard by Officer Tim Ricci as he handcuffed defendant. Following a hearing, the trial court denied defendant's motion and held that the statement could be used by the State.

¶ 5 At trial, evidence established that defendant and Camp pushed their way into a home, pointed a gun at an individual, and demanded drugs and money. After the incident, the occupants of the home gave a description of the two intruders. A few hours later, defendant and Camp were apprehended and taken to the victims for identification. After they were positively identified, defendant and Camp were placed under arrest. Ricci testified that, as defendant was being handcuffed, defendant said to Camp, "Don't talk. We'll get a lawyer." The statement was admitted over defendant's objection.

¶ 6 At the conclusion of the trial, the jury found defendant guilty of both offenses. The trial court sentenced defendant to concurrent terms of 35 years in prison. The sentencing order also included a \$250 DNA analysis fee. Defendant appeals.

¶ 7

ANALYSIS

¶ 8

I

¶ 9 Defendant first argues that his statement, "Don't talk. We'll get a lawyer[.]" was an

invocation of his constitutional rights and therefore the State's use of it violated his right to a fair trial. Because the statement is not in dispute and the question is strictly a legal one, our review is *de novo*. See *People v. Aguilar*, 265 Ill. App. 3d 105 (1994).

¶ 10 It is well established that the State's use of a defendant's exercise of his fifth amendment rights is a constitutional violation. See *Doyle v. Ohio*, 426 U.S. 610 (1976). However, after our review of the statement in this case, we conclude that defendant's comments did not amount to an invocation of his constitutional rights. The United States Supreme Court has held that a right to counsel is invoked only if the defendant unambiguously requests counsel. *Davis v. United States*, 512 U.S. 452 (1994). Here, defendant's statement was not made to the police but rather to Camp, an individual getting arrested at the same time as defendant. Defendant's statement could not be reasonably construed as a request for counsel at that time. Further, it did not imply that defendant wished to remain silent. At most, the statement simply indicated that, at some unspecified point in the future, defendant would attempt to obtain an attorney. As such, the statement did not meet the strict dictates of an invocation of defendant's fifth amendment rights as pronounced in *Davis*, and it is not allowed the same protection as a statement invoking fifth amendment rights. Therefore, we find that the trial court did not err in denying defendant's motion *in limine*, and the use of the statement did not violate defendant's right to a fair trial.

¶ 11

II

¶ 12 Defendant next argues that the \$250 DNA analysis fee assessed against him at sentencing should be vacated because he had previously provided a DNA sample. The State agrees with defendant that the fee should be vacated. Section 5-4-3 of the Unified Code of Corrections mandates that all individuals convicted of an offense that is classified as a felony under Illinois law after

January 1, 1998, submit to the taking, analyzing, and indexing of their DNA, and the payment of an analysis fee. 730 ILCS 5/5-4-3(a), (j) (West 2010). However, a defendant is only required to submit to and pay for the DNA assessment when he is not currently registered in the DNA database. *People v. Marshall*, 242 Ill. 2d 285 (2011). Here, defendant has provided a record from the Illinois State Police Forensic Services which states that, pursuant to a prior felony, defendant's DNA was received on August 4, 2006, and a profile was obtained for the DNA database. We take judicial notice of that record. See *People v. Jimerson*, 404 Ill. App. 3d 621 (2010). Because defendant's DNA was previously registered, we vacate the DNA analysis fee assessed against him at sentencing.

¶ 13

CONCLUSION

¶ 14 The judgment of the circuit court of Tazewell County is affirmed in part and vacated in part.

¶ 15 Affirmed in part and vacated in part.