

2016 IL App (1st) 131973-U

SIXTH DIVISION
April 29, 2016

No. 1-13-1973

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellee,)	
)	No. 08 CR 00238
v.)	
)	
ROBERT HILL,)	
)	Honorable
)	Frank Zelezinski,
Defendant-Appellant.)	Judge Presiding.
)	

JUSTICE HALL delivered the judgment of the court.
Justices Hoffman and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred when it denied the defendant's motion to dismiss the indictment on the ground that, absent the participation of the State, a cooperation agreement between the police and the defendant was not enforceable. We ordered the defendant's convictions vacated. The case was remanded to the trial court for completion of the hearing on the defendant's motion to dismiss the indictment.

¶ 2 Following a bench trial, the defendant, Robert Hill, was found guilty of first degree murder, attempted first degree murder, and armed robbery. The defendant appeals contending that: (1) the trial court erred when it granted the State's motion for a directed finding and denied the defendant's motion to dismiss the indictment; (2) the defendant was denied the effective assistance of counsel in connection with the motion to dismiss the indictment; (3) the evidence was insufficient to convict the defendant of the charges beyond a reasonable doubt; (4) the State's adversarial participation denied the defendant a proper hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984); (5) the defendant was denied the effective assistance of counsel during trial; and (6) the prosecutor's pattern of misconduct denied the defendant a fair trial.

¶ 3 The defendant's claim that the trial court erred when it granted the State's motion and denied the defendant's motion to dismiss the indictment is dispositive of this appeal. We hold that the trial court erred when it found that a cooperation agreement was not enforceable absent the participation of the State in the agreement. Because an error of law formed the basis of the trial court's decision to deny the defendant's motion to dismiss the indictment, we vacate his convictions and remand for further proceedings.

¶ 4 BACKGROUND

¶ 5 On November 25, 2005, Ghada Elayyan was killed and her father, Fakhri Elayyan, was wounded, during an armed robbery at Frank's Liquor Store (Frank's). On November 26,

2007, the defendant was arrested and charged with the armed robbery and murder. On December 26, 2007, a grand jury indicted the defendant on multiple counts of first degree murder, attempted first degree murder, armed robbery and aggravated battery of a senior citizen.

¶ 6 On May 29, 2009, the defendant filed a motion to dismiss the indictment against him. The motion alleged that the defendant had been arrested on three different occasions on charges stemming from the November 25, 2005, robbery at Frank's. His second arrest took place on October 29, 2007. At that time, the police made the defendant the following offer; if he took and passed a polygraph test, he would not be rearrested on the charges or charged with them. The defendant signed a document setting forth the terms of the agreement. After taking and passing the polygraph test, the defendant was released. A month later, the defendant was rearrested and charged with the same offenses he was arrested for on October 29, 2007.

¶ 7 The motion to dismiss was supported by a copy of the polygraph examiner's report stating that defendant was telling the truth on the polygraph test. The defendant further alleged that he made the agreement with the police in good faith and surrendered his constitutional privilege against self-incrimination. A copy of the document he signed memorializing the agreement had not been turned over in discovery.

¶ 8 On July 9, 2009, the trial court held an evidentiary hearing on the defendant's motion to dismiss the indictment. The defendant was the only witness to testify at the hearing. His testimony is summarized below.

¶ 9 The defendant was first arrested in connection with the charges in this case two days after the November 25, 2005, robbery. He was held in custody for three days and then released.

The defendant understood he was released because a codefendant confessed to the robbery and told the police the defendant was not involved. On October 29, 2007, the defendant was arrested by sheriff's police. He was taken to the sheriff's department in Maywood where he was questioned by Officer Frank. When asked if he knew why he was arrested, the defendant told Officer Frank that a man named "Keyonte" told him that Keyonte was given probation in exchange for his testimony against certain individuals alleged to be involved in the robbery at Frank's. The defendant believed that he was one of those individuals. The defendant denied knowing anything about the robbery at Frank's. Officer Frank asked the defendant if he would take a polygraph test to prove that he was telling the truth. If the defendant agreed to take the test and passed, he could never be arrested or questioned about the robbery at Frank's again. Prior to taking the test, the defendant signed a form. The agreement was set forth at the bottom of the form.

¶ 10 After taking the polygraph test, Detective Frank told the defendant he passed. The defendant was then released. A month later, the defendant was leaving work when he was rearrested and charged with the offenses in this case.

¶ 11 When questioned about the document he signed, the defendant stated that it was the authorization form to take the polygraph test and at the bottom of the form, the terms of the agreement were written out. The defendant acknowledged that he never spoke with an assistant State's Attorney at the time he entered into the agreement with the police and that the form he signed said nothing about the involvement of the State's Attorney's office in the agreement.

¶ 12 After the defendant rested, the prosecutor moved for a directed finding on the ground that the defendant failed to show that the State was involved in any manner in the agreement

between the police and the defendant. In ruling on the motion for a directed finding, the trial court stated in pertinent part as follows:

"The Court heard the evidence and basically the Court has to rely on the evidence presented before it, which is solely the testimony of [the defendant].

The Defense motion here requests that the entire indictment and all charges be dismissed based upon a breach of contract, which by the evidence I have before me was created by the police with [the defendant] that if he took the polygraph test and passed it, as he did, he would not be as alleged here prosecuted."

Pointing out that the supreme court had held the State to such agreements where the State was actively involved in the agreement, the trial court stated further as follows:

"The issue which we are seeking here is simply to bar total prosecution of the defendant for a breach of this contract, of which again I accept the defendant's testimony as being the only testimony here.

Therefore, since the evidence has shown that the police were the only ones involved here there was no written agreement, there was no [*sic*] even oral agreement or the presence of a prosecutor involved in any contact communication with [the defendant], as of this point the motion for a directed finding is granted and the motion to dismiss is denied."

¶ 13 Following a bench trial, the defendant was found guilty of first degree murder, attempted first degree murder and armed robbery. The trial court imposed consecutive sentences of 40 years' imprisonment for murder, 30 years' imprisonment for attempted murder, and concurrent sentences of 25 years' imprisonment on each of the two armed robbery convictions. The defendant filed a timely notice of appeal.

¶ 14 After the defendant filed his appellant's brief, the supreme court issued its decision in *People v. Stapinski*, 2015 IL 118278. We granted the defendant's motion to cite *Stapinski* as additional authority.

¶ 15 ANALYSIS

¶ 16 The issue before us is whether a motion to dismiss an indictment alleging the existence of a cooperation agreement is subject to denial on the sole basis that the lack of State involvement in the agreement renders it invalid.

¶ 17 I. Standard of Review

¶ 18 In *Stapinski*, our supreme court set forth the standards of review applicable in cases where a defendant is seeking enforcement of a cooperation agreement. The court stated as follows:

"Generally, a reviewing court considers a trial court's ultimate ruling on a motion to dismiss charges under an abuse-of-discretion standard, but where the issues present purely legal questions, the standard of review is *de novo*. [Citations.] Whether a defendant was denied due process, and whether that denial was sufficiently prejudicial to require the dismissal of the charges, are questions of law, which are reviewed *de novo*. [Citations.] However, once it is determined that a defendant suffered a prejudicial violation of his due process rights, the trial court's decision on the appropriate remedy—whether it be dismissal of the indictment or some other remedy—is reviewed for an abuse of discretion." *Stapinski*, 2015 IL 118278, ¶ 35.

¶ 19 B. Discussion

¶ 20 In *Stapinski*, the trial court dismissed the indictment of the defendant on a drug charge finding that the defendant had an enforceable agreement with the police not to charge him

with the drug offense he had previously been arrested for in exchange for his assistance with other drug cases. *Stapinski*, 2015 IL 118278, ¶ 25. The State appealed, and on review, a divided appellate court reversed and remanded. *Stapinski*, 2015 IL 118278, ¶ 27; see *People v. Stapinski*, 2014 IL App (3rd) 130352-U (Wright, J., specially concurring; Carter, J., dissenting).

¶ 21 Granting the defendant's petition for leave to appeal, the supreme court reversed the judgment of the appellate court and affirmed the circuit court's dismissal of the indictment. The court rejected the State's argument that suppression of the defendant's statements was an adequate remedy for the alleged due process violation. The court determined that in the cooperation agreement situation, "it is the violation of the right not to be haled into court at all *** [which] operate[s] to deny [defendant] due process of law." (Internal quotation marks omitted.) *Stapinski*, 2015 IL 118278, ¶ 46 (quoting *People v. Smith*, 233 Ill. App. 3d 342, 350 (1992), quoting *Blackledge v. Perry*, 417 U.S. 21, 30-31 (1974)). Because the State's breach of the defendant's agreement with the police violated the defendant's substantive due process rights, the dismissal of the indictment was not an abuse of discretion. *Stapinski*, 2015 IL 118278, ¶ 52.

¶ 22 Moreover, the court rejected the State's argument that prosecutors are not bound by an agreement or promise not to prosecute made by law enforcement officers. The court stated as follows:

"Whether or not the cooperation agreement was 'valid' in the sense that it was approved by the State's Attorney, is not important. An unauthorized promise may be enforced on due process grounds if a defendant's reliance on the promise has constitutional consequences." *Stapinski*, 2015 IL 118278, ¶ 55.

¶ 23 In response to the defendant's reliance on *Stapinski*, the State maintains *Stapinski* is not controlling because no cooperation agreement existed in this case. As proof, the State directs this court to various pages of the transcript of the defendant's October 29, 2007, interview with police, which was one of the State's exhibits at the defendant's trial. The State neither introduced the transcript into evidence nor used it to impeach the defendant's testimony at the hearing on the motion to dismiss. While the entire trial record may be considered when the dismissal of an indictment is sought for the first time on appeal, that standard does not apply to a pretrial motion to dismiss an indictment. *People v. Morissette*, 225 Ill. App. 3d 1044, 1046 (1992); see *People v. Reimer*, 2012 IL App (1st) 101253, ¶ 27 (the reviewing court would consider only the transcript of the proceedings before the grand jury in ruling on the defendant's pretrial motion to dismiss the indictment). Therefore, we will not consider the October 29, 2007, transcript of the defendant's interview with the sheriff's police.

¶ 24 Next, the State maintains that *Stapinski* is factually distinguishable. The State points out that, unlike the present case, in *Stapinski* it was undisputed that a cooperation agreement existed between the police and the defendant, and the trial court found that the defendant fulfilled his part of the agreement. The State argues that aside from the defendant's testimony, there was no evidence that a cooperation agreement existed in this case, and no evidence that the defendant fulfilled his part of any alleged agreement. The State further argues that the questions the defendant was asked on the polygraph test did not "shed light on his truthfulness regarding any participation in the shootings and robbery at Frank's," which the State maintains was the purpose behind asking the defendant to take the polygraph test.

¶ 25 While *Stapinski* may be factually distinguishable from the present case, those distinctions do not make the court's holding, that the State's lack of involvement in a cooperation

agreement does not render the agreement invalid, inapplicable to the present case. *Stapinski* supports the defendant's argument that, as a matter of law, the trial court erred in denying his motion to dismiss the indictment solely on the State's noninvolvement in the agreement.

¶ 26 Our review is confined to the hearing on the motion to dismiss the indictment. At the conclusion of the defendant's testimony, the defense rested its case. The State moved for a directed finding solely on the ground that it could not be bound by an agreement it did not authorize. As the trial court acknowledged, the only evidence before it was the defendant's testimony that an agreement existed. No testimony or evidence was presented to contradict the defendant's testimony that a cooperation agreement existed between the police and the defendant, and there was no finding by the trial court that the defendant was not a credible witness. Moreover, the defendant's testimony as to the existence of the agreement and its terms was bolstered by the undisputed fact that following the polygraph test, the defendant was released from custody and remained free until one month later.

¶ 27 The trial court denied the defendant's motion to dismiss the indictment because the State was not involved in the cooperation agreement. The State's lack of involvement in the cooperation agreement did not render it unenforceable. The trial court's ruling was an error of law. *Stapinski*, 2015 IL 118278, ¶ 55. Through his testimony and the exhibit showing the results of the polygraph test, the defendant presented evidence that the police entered into a cooperation agreement with the defendant not to pursue charges against him if he passed the polygraph test.

¶ 28 Even if an enforceable cooperation agreement did exist, the State argues that the denial of the motion to dismiss the indictment was not an abuse of discretion because the dismissal of the indictment would be too severe a remedy in this case. The State's argument is premature.

As the defendant acknowledged at the outset of the hearing, he bore the burden of proving an enforceable agreement and its breach. Because of its error of law, the trial court did not reach the issue of whether the defendant succeeded in carrying his burden of proving the existence of an enforceable cooperation agreement and whether it was breached by his indictment on the charges in this case.

¶ 29 In light of the above analysis, we vacate the defendant's convictions and remand the case to the trial court for completion of the hearing on the defendant's motion to dismiss the indictment. If the trial court finds that the defendant has established an enforceable cooperation agreement not to arrest or prosecute him on the charges set forth in the indictment and that the agreement was breached by the State, the court shall dismiss the indictment. On the other hand, if the trial court finds that the defendant has not established an enforceable cooperation agreement or that the cooperation agreement was not breached, the court should reinstate the convictions pending our further review.

¶ 30 We retain jurisdiction over the case, and we will decide the other issues, if necessary, following the completion of the hearing on the motion to dismiss the indictment. See *People v. Delgado*, 368 Ill. App. 3d 661, 664 (2006) (citing *People v. Garrett*, 139 Ill.2d 189, 194-95 (1990)). The defendant is instructed to file periodic status reports with this court.

¶ 31 Convictions vacated; cause remanded with instructions.