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2016 IL App (3d) 150720-U

Order filed October 7, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-15-0720
)	Circuit No. 13-CF-505
KAREEM GREEN,)	
Defendant-Appellant.)	Honorable David M. Carlson, Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice O'Brien and Justice McDade concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in denying the defendant's motion to suppress statements.

¶ 2 The defendant, Kareem Green, appeals from his convictions of aggravated battery, attempted kidnapping, unlawful restraint, and battery, arguing that his pretrial motion to suppress statements was improperly denied as he was deprived of his right to have an attorney present with him during police questioning under *Miranda v. Arizona*, 384 U.S. 436 (1966).

FACTS

¶ 4

¶ 5

The defendant was charged by indictment with burglary (720 ILCS 5/8-4(a), 19-1(a) (West 2012)), aggravated battery (720 ILCS 5/12-3.05(c) (West 2012)), attempted kidnapping (720 ILCS 5/10-1(a)(2) (West 2012)), two counts of unlawful restraint (720 ILCS 5/10-3(a) (West 2012)), and battery (720 ILCS 5/12-3(a)(2) (West 2012)). He filed a motion to suppress the statements he had made to law enforcement officers and a hearing was held on the motion.

¶ 6

Lieutenant Jeffrey Lockard testified that he was employed with the Bolingbrook police department where he had worked for 24 years. He had been the lieutenant in charge of investigations for seven years. On March 5, 2013, he, along with Detectives Kenneth Simpson and Nicholas Azzo, located the defendant in his vehicle at Adventist Bolingbrook Hospital, where he worked. Azzo approached the defendant, said he wanted to talk to him about a case, and asked if he would come to the police department. The defendant asked “what it was about.” Azzo said that they would explain once they got back to the police department. The defendant agreed to come to the police department. No one indicated that the defendant was under arrest. The defendant got in the officers’ vehicle and went to the police department with them. Once they arrived at the police department, Azzo and Simpson took the defendant to an interview room.

¶ 7

Detective Azzo testified that he was employed with the Bolingbrook police department for 13 years and had been a detective for approximately 5 years. Azzo said the officers went to the hospital where the defendant worked to follow up with the defendant as he was “the suspect of the incident [they] were investigating, two incidents of attempt kidnapping.” On the way to the police station and interview room, the defendant never stated that he wanted to leave or wanted a lawyer. He was free to leave. Once Azzo, Simpson, and the defendant were in the

interview room, Azzo read the defendant his constitutional rights from a preprinted *Miranda* form. The defendant signed the *Miranda* form at 2:55 p.m. Azzo asked the defendant if he understood his rights. The defendant agreed that he did. After his rights were read, the defendant still did not ask for a lawyer or make any mention of a lawyer.

¶ 8 The first interview was not recorded. Azzo explained why the defendant was being questioned. The defendant denied involvement. Azzo and Simpson interviewed the defendant for about half an hour during which the defendant never asked for a lawyer.

¶ 9 Eventually Azzo and Simpson left the interview room. They told the defendant that they were done, as they were not getting anywhere with the defendant. They left the defendant in the interview room. Azzo and Simpson went into another room where they decided that they had probable cause to place the defendant under arrest for battery. They returned to the interview room and placed the defendant under arrest. The defendant's booking photo was included in a photographic line-up, the victims came to look at the line-up between 4 and 5 p.m., and they identified the defendant.

¶ 10 The defendant was then informed that he was going to be charged with aggravated battery. The defendant was allowed to call his mother. The defendant asked Azzo and Simpson if they could tell his mom what was going to happen. Simpson explained the procedure to the defendant's mother. Azzo then testified to the following interaction he had with the defendant:

“[The defendant said] his mom told him that he should get a lawyer.

* * *

I said, are you telling me you want a lawyer right now? Are you invoking your rights to a lawyer? [The defendant] goes, ‘no, no, my mom is saying that, I am not saying that.’ I went back, said, if you are telling me, I can’t answer anything else

you ask me anymore, I am done, I don't want to have any conversation with you if that's what you wish. He goes, 'no, my mom is telling me that, I don't want'—I said, are you sure. He goes 'yeah.' I say okay."

¶ 11 After the phone conversation, the detectives finished booking the defendant and brought him to a cell. The defendant then said he wanted to give a statement. The defendant agreed to allow the statement to be videotaped. The defendant was taken to a different interview room with Simpson and Azzo. Azzo agreed that the videotape fairly and accurately depicted the interview. Prior to the interaction displayed on the videotape, the defendant had not made any incriminating statements. The videotape was then played in court.

¶ 12 The videotape showed that Azzo said he had previously read the defendant his rights, which the defendant agreed. Azzo began reading the defendant his *Miranda* rights again, and the following interaction occurred:

“AZZO: You have the right to consult with a lawyer and to have a lawyer present with you while you are being questioned. Do you understand that?

THE DEFENDANT: Actually, yes I understand it, but is there a way I can get my lawyer while I talk to you?

AZZO: No, I can't do that.

THE DEFENDANT: Okay, okay. Well that's fine, I understand it, I understand it, I do understand it, yes.

AZZO: We're ready to get up and go right now, you're sure you want to keep talking?

THE DEFENDANT: No, no, no, I was just making sure. I do understand, and I'm okay with it. I'm okay with talking to you guys.”

Azzo then continued to read the defendant the rest of his *Miranda* rights. The defendant signed the *Miranda* rights form again. The exchange then continued:

“SIMPSON: Can I just ask one more thing? I just wanted to clarify. He read this to you, ‘If you want a lawyer present but are unable to pay for one a lawyer will be appointed to represent you free of any cost to you.’ Understand that it’s your option, alright, and I need to be clear that you understand all of these rights and that you are doing this statement willingly. If you are not, tell me now because I don’t want to play the game is what it comes down to, and I need to know perfectly clear what you understand, what you don’t understand, if you’re confused, everything like that. I just need to make sure because the tape’s rolling, everyone is going to interpret things differently. I want to make sure that everybody understands that you understand what was read to you.

THE DEFENDANT: Yes.

SIMPSON: Okay. Do you wish to make a statement now without a lawyer present?

THE DEFENDANT: Yes, but I have a question. I do understand it, I understand it—

SIMPSON: My question is—

THE DEFENDANT: But I, but I—

SIMPSON: Go ahead.

THE DEFENDANT: But I have a question. Is there a way that I can— because my mom told me that she got me a lawyer—is there a way that my lawyer can come into the room now? Or you guys—can’t—

AZZO: No, we can't talk to you here with a lawyer present. If that is your wish like my partner said—

THE DEFENDANT: No, that's not my wish, I'm just asking a question. I'm just asking a question.

AZZO: No, we can't do that. We can't talk to you right here with your lawyer present at this time.

THE DEFENDANT: Okay, but I understand. Just ask me the questions.

SIMPSON: I just wanted to make sure that we were clear on that.”

¶ 13 The defendant never expressly stated that he was willing to give a statement without an attorney. The officers continued with the interview. The defendant subsequently made incriminating statements.

¶ 14 Azzo testified that when he first told the defendant “No” he was saying, “That we were not going to interview him with his lawyer present.” Azzo said he was not denying the defendant access to a lawyer. He meant, when he said no, “Just like I said, no, we are going to get up and leave and terminate the interview if that's what he wished. If he invoked his right to a lawyer, we were going to stop the interview.” He did not believe that the defendant was invoking his right to counsel.

¶ 15 On cross-examination, Azzo agreed that he specifically read to the defendant, “you have the right to have a lawyer present with you while you are being questioned.” Azzo further agreed that the defendant asked, “[M]ay I have my lawyer here while I'm being questioned?” Azzo stated, “I said, no, that I wasn't going to conduct the interview but—not that he can't have his lawyer.” Azzo agreed that it might have been confusing. He further stated that when a defendant “unequivocally asks for a lawyer” he had been trained that the interview ends and he would not

attempt to elicit a waiver after that point. Azzo was asked, “At what point do you draw the line between unequivocally asking for a lawyer and saying, can I have my lawyer present?” Azzo stated, “If he is waiving his right. I read to him his right and he waives his right. He waived that specific right about the lawyer. That third phrase that you made me read, he waived that. When he waives that, I have to respect his wishes.” Azzo stated that he believed the defendant did not wish to have a lawyer present.

¶ 16 Detective Simpson testified that he had been a detective with the Bolingbrook police department for a little over 12 years. He stated that in the video-taped interview, he clarified the right to an attorney to the defendant because “The answer was confusing that was given, and the statements [given by Azzo and the defendant] that—surrounding the incident—was in [his] mind needed to be ironed out one way or the other.” Simpson asked the defendant if he wanted to make a statement without a lawyer present, and the defendant stated that he had a question about that. Simpson said:

“Basically [I] told him that I didn’t want to play any games and that everybody was going to interpret this differently. We needed to be clear on whether he understood the rights. If he understood the rights, that’s fine. If he wanted an attorney there, that’s fine. The interview would be terminated.

I just wanted to make sure that he knew what he was doing and that everybody who was listening to the tape would understand that: Hey, we’re not going forward without making this clear.”

It was Simpson’s understanding that the defendant wanted to make a statement without having an attorney present.

¶ 17 In denying the defendant’s motion, the court said “[i]t [was] the defendant himself who wishe[d] to continue the conversation by saying: No, I want to talk to you. I don’t know what else these officers could have done.” The court further stated that it was clear that the defendant did not want an attorney, but wanted to ask the question. The court said, “I didn’t see anything in this where the officer—where that defendant’s rights were violated, where the officers overstepped the *Miranda* prophylactic measures that were ensured to every defendant. As such, the motion to suppress these statements are denied.” The defendant filed a motion to reconsider, which was also denied.

¶ 18 The court ultimately found the defendant guilty of aggravated battery, attempted kidnapping, two counts of unlawful restraint, and battery. The defendant was sentenced to six years in the Department of Corrections.

¶ 19 ANALYSIS

¶ 20 On appeal, the defendant argues that he was denied his *Miranda* right to have an attorney present with him during police questioning where he unambiguously invoked his right to counsel twice, but was ignored by the detectives.

¶ 21 Under *Miranda*, an individual subject to interrogation is entitled to have counsel present during the questioning. *Miranda*, 384 U.S. at 444-45; *People v. Schuning*, 399 Ill. App. 3d 1073, 1081-82 (2010). Once counsel is requested, at any time during the interview, the accused may not be subject to further questioning until a lawyer has been obtained or the accused himself reinitiates the conversation. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981); *People v. Harris*, 2012 IL App (1st) 100678, ¶ 69. “Where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease.” *Smith v. Illinois*, 469 U.S. 91, 98 (1984). The invocation of the right to counsel “must be

sufficiently free from indecision or double meaning so as to reasonably inform authorities that the accused wishes to speak to counsel.” *Harris*, 2012 IL App (1st) 100678, ¶ 69.

¶ 22 In *Harris*, a detective entered the holding cell where defendant was located, and the following exchange occurred:

“DEFENDANT: I was gonna say uh—is it possible if I can uh—have a few days to get an attorney.

[DETECTIVE]: A what?

DEFENDANT: A few days to get an attorney.

[DETECTIVE]: We can’t give a few days, no.

DEFENDANT: How long can I—

[DETECTIVE]: Look, I’ll be right back in okay. Let me get rid of this

***.” *Id.* ¶ 17.

The detective exits and returns less than a minute later and the exchange continues:

“[DETECTIVE]: Okay. Are, are you, are you requesting—were you requesting an attorney because if you are we’re done talking. Okay.

[DETECTIVE]: I mean that’s it if you—

DEFENDANT: But I don’t know how I can call, make no call (inaudible) all my numbers at the county.

[DETECTIVE]: Pardon?

DEFENDANT: All my phone numbers is at the county.

[DETECTIVE]: Do you no longer want to answer questions?

DEFENDANT: Yeah, I want to answer questions.

[DETECTIVE]: Okay. That's fine then." *Id.*

Defendant was subsequently questioned. *Id.* ¶ 18. The trial court found that defendant's invocation of her right to counsel was ambiguous and the questioning that followed did not violate *Miranda*. *Id.* ¶ 19. The appellate court reversed, concluding that defendant's query about whether it was "possible" to "have a few days to get an attorney" was an unequivocal invocation of her right to counsel. *Id.* ¶ 72. The court further stated:

"Any ambiguity in her statement was with regard to how long it would take and the process of acquiring an attorney, not with regard to whether defendant wanted one. *** [The detective's] response that defendant could not have a few days to get an attorney and his lack of a response to defendant's query about how she would secure telephone numbers, presumably for the purpose of contacting an attorney, gave defendant the erroneous impression that counsel could not be made available or appointed then or in the near future. [The detective] should have ceased questioning defendant. Defendant's postrequest responses to further interrogation cannot be used to cast retrospective doubt on her earlier request for counsel." *Id.*

¶ 23 The exchange between the defendant and the detectives here is very similar to the statement in *Harris* ("I was gonna say uh—is it possible if I can uh—have a few days to get an attorney"). See *id.* ¶ 17. The defendant here asked, "is there a way I can get my lawyer while I talk to you?" This was an unambiguous invocation of the defendant's right to counsel, therefore, the detectives should have ceased the interview until the defendant's attorney could have been located. Any ambiguity in the defendant's statement was with regard to whether the defendant could have an attorney present during the interview, not with regard to whether the defendant

wanted one. See *id.* ¶ 72. Azzo’s response of “No, we can’t do that” gave the defendant the erroneous impression that he could not have an attorney present while the detectives questioned him. The response also directly contradicted the *Miranda* right that Azzo had just read to the defendant: that he had “a right to consult with a lawyer and to have a lawyer present with [him] while [he] was being questioned.” Though Simpson may have tried to clarify the defendant’s right, his statements ultimately added to the confusion. This conclusion is borne out by the fact that the defendant immediately and unequivocally asked again whether he could have his attorney present. Azzo, for the second time, incorrectly told the defendant he could not.

¶ 24 Because the defendant unambiguously invoked his right to counsel, Simpson and Azzo were obligated to terminate the interrogation. Their failure to do so necessitates the suppression of any incriminating statements made beyond this point.¹

¶ 25 In coming to this conclusion, we reject the State’s argument that the defendant showed a “strong desire to continue the interview even when detectives were going to terminate the questioning.” As stated above, the defendant’s invocation of his right to counsel was unambiguous. Once the unambiguous invocation was made, all questioning should have ceased. See *Smith*, 469 U.S. at 98. Any subsequent “desire to continue the interview” shown by the

¹ We do not find that the admission of the defendant’s interrogation was harmless error. “Confessions carry ‘extreme probative weight,’ and therefore the admission of an unlawfully obtained confession rarely is harmless error.” *People v. St. Pierre*, 122 Ill. 2d 95, 114 (1988); see also *People v. R.C.*, 108 Ill. 2d 349, 356 (1985) (“[A] confession is the most powerful piece of evidence the State can offer, and its effect on a [trier of fact] is incalculable.”). Further, the State does not even argue that any error was harmless.

defendant was based on his belief that he could not have an attorney while being questioned, a belief inaccurately promoted by Azzo.

¶ 26 We also reject the State’s argument that “the detectives only proceeded with questioning once defendant reinitiated the conversation, insisting that they continue.” In order to reinitiate the interview, it would have had to have been terminated in the first place, which did not happen here. *Harris* is again analogous. There, the detective said, “Are, are you, are you requesting—were you requesting an attorney because if you are we’re done talking.” *Harris*, 2012 IL App (1st) 100678, ¶ 17. The detective later asked, “Do you no longer want to answer questions?” *Id.* The defendant stated that he did want to answer questions and the questioning continued. *Id.* The court did not hold that this was a termination and reinitiation by the defendant. Instead, the court clearly held that the detective should have terminated the interview. *Id.* ¶ 72.

¶ 27 We find the case law the State cites inapplicable. In all three cases, the defendant invoked the right to counsel, the interview was immediately terminated, and then some time passed and/or defendant was moved to a different location when defendant then reinitiated the conversation. *Oregon v. Bradshaw*, 462 U.S. 1039, 1041-42 (1983); *People v. Crotty*, 394 Ill. App. 3d 651, 653-54 (2009); *People v. Outlaw*, 388 Ill. App. 3d 1072, 1075-77 (2009). Here, the interview was not terminated and no time had passed nor had the defendant been taken back to his cell. The whole exchange was part of one continuous conversation.

¶ 28 CONCLUSION

¶ 29 The defendant’s convictions are vacated, the denial of the defendant’s motion to suppress is reversed, and the cause is remanded for further proceedings.

¶ 30 Vacated in part and reversed in part.

¶ 31 Cause remanded.