2017 IL App (1st) 150730-U

No. 1-15-0730

November 15, 2017

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 16868
	)	
ROLANDO CALDERIN,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: Where defendant initiated further conversation with detectives after being advised of and invoking his right to counsel under *Miranda*, defendant waived his right to have counsel present during the continuation of the interview in which he admitted to shooting the victim. Therefore, the trial court's denial of defendant's motion to suppress his statements is affirmed.

¶ 2 Following a jury trial, defendant Rolando Calderin was convicted of first degree murder and sentenced to 51 years in prison. On appeal, defendant contends his conviction should be reversed because the trial court erred in denying his motion to suppress statements he made to

police after he had invoked his right to have counsel present during a custodial interrogation. We affirm.

¶ 3 Defendant was charged with the July 14, 2012, shooting death of Mark Carney. In interviews by Chicago police detectives on August 13 and 14, 2012, defendant initially denied being the gunman but eventually admitted to shooting the victim.

¶ 4 Defendant moved to suppress his inculpatory statements, asserting he was interrogated after he had asserted his fifth amendment rights to remain silent and to have counsel present during questioning. Defendant also argued that detectives coerced his statements with promises of leniency.

¶ 5 At the hearing on defendant's motion to suppress, Chicago police detective Daniel Stanek testified defendant was arrested for this offense at 12:15 p.m. on August 13, 2012. Defendant was 27 years old. Detective Stanek and two other detectives, including Detective Dale Potter, began interviewing defendant at about 4 p.m. at the Area 1 police station. Defendant was advised of his *Miranda* rights at the beginning of each day of interviews and indicated he understood those rights.

¶ 6 In the August 13 interview, defendant told the detectives he had been a member of the La Raza gang since he was 14 years old and was in the area of the shooting. Defendant saw Eric Salgado drive up in his car, which was blue or black; another person defendant described as a "Pisan" was also in the car. Detective Stanek told defendant that witnesses had placed defendant in Salgado's car, and defendant denied being in his car. Defendant said he saw Salgado that night and they did cocaine. Salgado had a gun on his lap.

¶ 7 On August 14, Detective Stanek and Detective Potter interviewed defendant again. Defendant said Salgado was not driving the black car; the "Pisan" was driving. Defendant also denied that a person named Lupe was in the car. Detective Stanek told defendant that "we have evidence telling us one thing and you're telling us the exact opposite. Right now, it's making you appear like you're not telling us the truth."

¶ 8 When Detective Stanek was asked if it was "clear to [him]" whether defendant asked for a lawyer during his interview, the detective responded that he "attempted to clarify because it was not clear to me," at which point defendant indicated he wanted to speak to the detectives.

¶ 9 The interviews with defendant were audio- and video-recorded and were published to the court during Detective Stanek's testimony. A copy of that recording is included in the record on appeal and depicts the following exchange:

"DETECTIVE POTTER: Was it something that got out of control?

DEFENDANT: It just got out of control.

DETECTIVE POTTER: Was it something to do with do with dope? Were you just f---ed up? Drinking too much or were you just letting your temper get the best of you?

DEFENDANT: I just --

DETECTIVE STANEK: Did it have to do with the Ambrose [gang] ramming your car and causing sh-- with you guys?

DEFENDANT: Yep.

DETECTIVE STANEK: So tell us what happened, dude.

DEFENDANT: Think I can make a phone call?

DETECTIVE STANEK: Not right now. You know I can't do that. Who do you want to call?

DEFENDANT: Call my girl, see if I could get a lawyer.

DETECTIVE STANEK: Do you -- if you want a lawyer, our conversation is over and done with.

DEFENDANT: Why is that?

DETECTIVE STANEK: Because if you want a lawyer, we can't talk to you. That's the procedure. If you want a lawyer, we're done, we walk out of here and we conduct our investigation without talking to you and your side of the story doesn't come out. It's as simple as that. If you want to keep talking to us, we can do that. If you want an attorney, we're done. So what do you want to do?

DEFENDANT: You gonna give me that call?

DETECTIVE STANEK: I'm not gonna talk to ya. You can contact your attorney after we're done with our investigation. But at this point if you got an attorney and you got a phone number, I'll call him and let him know you're here. But I cannot let you make a phone call while you're in custody here. [T]he reason being, I don't know who you're gonna call on that phone. So I just can't let you make a phone call. I'll contact an attorney for you if you got his name and number.

DEFENDANT: No, I don't.

DETECTIVE STANEK: Okay. Well, then -

DEFENDANT: I just wanna see if I could get a lawyer.

DETECTIVE POTTER: So you're, at this point you're asking for an attorney, is that correct?

DEFENDANT (nodding): Yeah."

¶ 10 At that point, both detectives stood up and Detective Stanek said, "Okay." Defendant then stated: "No, I'm saying, I'm not done talking." The detectives sat down and Detective Stanek said "Okay, all right."

¶ 11 The following exchange then took place:

"DETECTIVE POTTER: Well, here's the deal. This is a procedural thing.

DEFENDANT: I understand. I understand. I understand. But you're saying -

DETECTIVE POTTER: We could call the, contact an attorney for you, all right? I mean, I could, I would need someone to call. You could give me a name of someone to call, but once that happens, we're done talking to you. That's just the way it works. If you feel that you want to talk to us without an attorney, you've got to tell us that now.

DEFENDANT: It doesn't do me any good. That's what I'm telling you.

DETECTIVE POTTER: It's basically -- I'm going to bundle it down to a yes or no answer. You either want us to contact an attorney for you or -

DEFENDANT: I just want man, know what I'm saying. F--- it, man. We all going down, I guess. Know [what] I'm saying? Cause I know, I know ya'll could just -

DETECTIVE POTTER: You're trying to put this to sleep, trying to put this to bed. I know that's what you're trying to do.

DEFENDANT: Who?

DETECTIVE POTTER: You are. You're just trying to get it over with. Is that what you're trying to do? Is that what you're trying to tell me?

DEFENDANT: Trying to get what over?

DETECTIVE POTTER: This whole deal.

DEFENDANT: Yeah, I'm trying to get all that sh-- over with, man.

DETECTIVE POTTER: Do you want us -- I got to put it out there, I gotta do it again.

DEFENDANT: Come on. I want to talk to you, man."

¶ 12 After that exchange, defendant made statements inculpating himself in Carney's shooting. Defendant said there was a history between the La Raza gang and the Ambrose gang and some of his friends had been shot due to conflicts with the Ambrose gang. Detective Stanek asked defendant if that was why he "got out and shot the dude" and defendant replied, "Something like that." Detective Stanek testified he thought defendant "wanted to see about an attorney" but did not assert his right to counsel.

¶ 13 The trial court denied defendant's motion to suppress his statements, finding defendant did not make an unequivocal request to have an attorney present. The court also found that defendant waived his right to counsel when he called the detectives back into the room after the discussion about an attorney. According to the court, "the telltale event" occurred when the detectives got up to leave the room and defendant "said no and brought them back in." In addition, the court found the State did not promise leniency in exchange for a statement.

¶ 14 At trial, Salgado provided the main eyewitness testimony for the State. Salgado testified he was formerly a member of the La Raza gang and that he knew defendant "from the neighborhood." Salgado agreed to drive defendant to buy marijuana, and defendant told Salgado

to park on Sangamon. Defendant got out of the car carrying a gun and fired the weapon four times; however, Salgado could not see where the weapon was aimed. Defendant ran back to the car and they left the scene; defendant told Salgado not to tell anyone about what just occurred. Salgado identified defendant to police as the gunman on August 12, 2012. Detective Potter testified about defendant's interrogation, and the video recording was published to the jury.

¶ 15 The jury found defendant guilty of first degree murder. The jury also found that defendant personally discharged a firearm causing death.

¶ 16 Defendant filed a motion for a new trial, asserting the trial court should have granted his motion to suppress because he requested counsel during his interrogation and also because the detectives implied they would treat him with leniency if he admitted to shooting the victim. The trial court denied the motion for a new trial. The court sentenced defendant to a total of 51 years in prison, which included a 25-year sentence enhancement for personally discharging a firearm resulting in death.

¶ 17 On appeal, defendant contends the trial court erred in denying his motion to suppress his statements because he clearly invoked his constitutional right to counsel at four separate points during his interrogation. He argues the trial court's finding that he asked detectives to remain in the room was not relevant because the "detectives did not cease their interrogation."

¶ 18 As a threshold matter, we note the State's argument that defendant cannot now claim he invoked his right to counsel four times when speaking with the detectives. The State asserts that defense counsel argued in support of the suppression motion that defendant's request to ask his girlfriend to call an attorney was ambiguous but that defendant clearly invoked his right to counsel when he answered "yeah" to Detective Potter's inquiry of "So you're, at this point

you're asking for an attorney, is that correct?" The State asserts that defendant cannot now argue for the first time on appeal that he requested counsel four times. Defendant responds he is not required to assert on appeal the identical grounds on which the suppression motion was based.

¶ 19 When appealing a trial court ruling on a motion to suppress evidence, a defendant may rely on a legal theory that was not raised below that has a factual basis in the record. *People v. Johnson*, 208 Ill. 2d 118, 129-30 (2003) (citing *People v. York*, 29 Ill. 2d 68, 69 (1963)). When reviewing a ruling on a motion to suppress, the trial court's factual findings are reviewed for clear error, but this court "remains free to assess the facts in relation to the issues and draw its own conclusions when deciding what relief should be granted." *People v. Gonzalez-Carrera*, 2014 IL App (2d) 130968, ¶ 15 (quoting *People v. Hackett*, 2012 IL 111781, ¶ 18). The trial court's overall ruling on a motion to suppress is a legal question that this court reviews *de novo*, and this court may affirm the ruling of the trial court on a motion to suppress on any basis in the record. *Id*.; see *Johnson*, 208 Ill. 2d at 130 (and cases quoted therein) ("[T]he question before a reviewing court is the correctness of the result reached by a trial court, and not the correctness of the reasoning upon which that result was reached.") Accordingly, defendant is free to assert on appeal that he invoked his right to counsel at numerous points during the encounter with detectives.

¶ 20 The review of a circuit court's ruling on a motion to suppress presents questions of law and of fact. *People v. Richardson*, 234 Ill. 2d 233, 251 (2009). This court defers to the findings of fact and credibility determinations made by the circuit court, reversing them only if they are contrary to the manifest weight of the evidence. *Id*. However, this court will review *de novo* the ultimate legal question of the ruling on the motion to suppress. *Id*.

¶ 21 An accused undergoing custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, as promised in the familiar warnings of *Miranda v. Arizona*, 384 U.S. 436, 469-73 (1966). An accused who requests counsel at any time during an interview is not subject to further questioning until an attorney has been made available or the accused validly waives his earlier request for the assistance of counsel. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). An accused can waive his earlier request for counsel by initiating further communication with police. *Id*.; *People v. Olivera*, 164 Ill. 2d 382, 389-90 (1995).

¶ 22 A reviewing court first considers whether the accused actually invoked the right to counsel. *Edwards*, 451 U.S. at 485-86 n.9. If it is determined that the accused invoked the right to counsel, his responses to additional questioning will be admitted into evidence only where the accused: (a) initiated further discussions with police; and (b) knowingly and intelligently waived the right to counsel that was earlier invoked. *Id*. The facts of this case require an analysis of all three of those factors.

¶ 23 As to the initial inquiry of whether the accused invoked his right to counsel, *Miranda* advises that questioning must cease if the accused "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking." *Miranda*, 384 U.S. at 444-45. Once an accused has requested counsel, he cannot be subjected to further questioning "until a lawyer has been made available or the individual reinitates conversation." *Davis v. United States*, 512 U.S. 452, 458 (1994); *In re Christopher K.*, 217 Ill. 2d 348, 376 (2005).

¶ 24 Whether the accused has invoked his right to counsel is an objective inquiry which "at minimum requires some statement that reasonably can be construed as an expression of a desire for counsel." *People v. Harris*, 2012 IL App (1st) 100678, ¶ 69 (citing *Davis*, 512 U.S. at 459).

A reference to an attorney that is ambiguous or equivocal in that the accused "*might* be invoking the right to counsel" does not require the cessation of questioning. *Davis*, 512 U.S. at 459 (emphasis in original); *Christopher K.*, 217 Ill. 2d at 378. 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. *Id*. at 382; *Harris*, 2012 IL App (1st) 100678, ¶ 69.

¶ 25 Here, defendant first mentioned an attorney after Detective Stanek asked defendant if the incident had "to do with the Ambrose [gang] ramming your car and causing sh-- with you guys[.]" Defendant asked to make a phone call. In response to the detective's question of whom he wanted to call, defendant stated: "Call my girl, see if I could get a lawyer." Detective Stanek told defendant the interview would stop if he called an attorney. Defendant then asked if the detective was "gonna give me that call." Detective Stanek told defendant could contact his attorney "after we're done with our investigation."

¶ 26 In that exchange, defendant made an unequivocal assertion of his right to counsel. Defendant stated he wanted to call his girlfriend to "see if [he] could get a lawyer." That unambiguous reference to an attorney was a sufficient invocation of defendant's right to speak to an attorney. Detective Stanek apparently interpreted that request as such, responding that the interview would end if defendant called an attorney.

¶ 27 Defendant's words are comparable to those in *People v. Eichwedel*, 247 Ill. App. 3d 393, 398 (1993) (defendant asked investigator to "call Jeff Williams" who was an attorney), and in *People v. Schuning*, 399 Ill. App. 3d 1073, 1087 (2010) (State stipulated that defendant asked to use the phone to call his attorney). Although defendant asked to contact his girlfriend and not

contact an attorney directly, his request was clear and sufficiently free from hesitation. Defendant's words here are distinguishable from the more tenuous requests summarized in *Schuning*, 399 Ill. App. 3d at 1087, in which the defendants were found not to have invoked their right to counsel. See *Davis*, 512 U.S. at 455 ("maybe I should talk to a lawyer"); *Christopher K.*, 217 Ill. 2d at 374 (minor asked officer, "do I need a lawyer?); *People v. Krueger*, 82 Ill. 2d 305, 311 (1980) ("maybe I ought to have an attorney"). The State contends *Eichwedel* and *Schuning* are distinguishable because the defendants in those cases asked to call a specific attorney; however, the State cites no authority that a defendant is required to provide a particular attorney's name in invoking the right to counsel.

¶ 28 Furthermore, though we find that defendant invoked his right to counsel by stating he wanted to call his girlfriend to see about getting a lawyer, defendant's next statement removed all doubt as to his request. After the detective told defendant they could contact an attorney if defendant had his name and phone number, defendant said: "I just wanna see if I could get a lawyer." Detective Potter responded: "So, you're, at this point you're asking for an attorney, is that correct?" Defendant nodded and said "Yeah." Defendant again invoked his right to counsel by responding affirmatively when asked by Detective Stanek if he wanted an attorney. See *Smith v. Illinois*, 469 U.S. 91, 97 (1984) (after being advised of his rights to consult an attorney and have attorney present during questioning, defendant invoked right to counsel when he answered "Uh, yeah, I'd like to do that").

¶ 29 Having found that defendant invoked his right to counsel, we proceed to consider whether defendant then initiated further communications, exchanges or conversations with the police. See *Edwards*, 451 U.S. at 484-85. The first inquiry is whether the accused, and not the

police, initiated further discussion. *People v. Woolley*, 178 Ill. 2d 175, 198 (1997) (citing *Oregon v. Bradshaw*, 462 U.S. 1039, 1044-45 (1983)). Following the invocation of the right to counsel, any *Miranda* waiver that comes as a result of additional contact must be voluntary and at the behest of the accused, and not instigated by the words or actions of the police. *Maryland v. Shatzer*, 559 U.S. 98, 104 (2010).

¶ 30 To initiate further discussion, the accused must make a statement that evinces a "willingness and a desire for generalized discussion about the investigation." *Bradshaw*, 462 U.S. at 1045-46; *Woolley*, 178 Ill. 2d at 200. The suspect "does not have to explicitly state that he wishes to resume interrogation." *Woolley*, 178 Ill. 2d at 201. The burden is upon the State to show that events following a defendant's invocation of the right to counsel demonstrate a waiver of his fifth amendment right to have counsel present during the interrogation. *Bradshaw*, 462 U.S. at 1044; *Olivera*, 164 Ill. 2d at 390. Whether the accused has initiated a conversation with police is determined by examining the totality of the circumstances, and the ruling of the trial court on that issue will not be disturbed unless it is manifestly erroneous. *People v. Wright*, 272 Ill. App. 3d 1033, 1042 (1995).

¶ 31 Here, in denying defendant's motion to suppress, the trial court found that even though defendant had invoked his right to counsel, "the telltale event" occurred when the detectives got up to leave the room and defendant "said no and brought them back in." Based upon those events, the trial court's determination that defendant initiated further conversation with the detectives was not manifestly erroneous.

¶ 32 After defendant responded "yeah" to Detective Potter's question of whether he was asking for a lawyer, both detectives got up from their chairs. Defendant then said: "No, I'm

saying, I'm not done talking." In doing so, defendant initiated additional contact with the detectives. This court has found a defendant waived his right to the presence of counsel under *Miranda* where, after requesting an attorney, the defendant initiated further contact with a police detective when the detective started to leave the room. *People v. Weathersby*, 138 Ill. App. 3d 310, 315-16 (1985); see also *People v. Wych*, 248 Ill. App. 3d 818, 828-29 (1993) (the defendant's statement that he would answer questions after invoking his right to an attorney initiated a new conversation with police, and the defendant's subsequent statements were admissible).

¶ 33 After defendant said he was "not done talking," the detectives sat back down, and the conversation resumed. Detective Potter reiterated that an attorney could be called for defendant. Detective Potter told defendant: "If you feel that you want to talk to us without an attorney, you've got to tell us that now." Defendant responded that "doesn't do me any good." Defendant said he was "going down" and that he was trying to "get all that sh-- over with." When Detective Potter said, "Do you want us -- I got to put it out there. I gotta do it again," defendant responded: "Come on, I want to talk to you, man." By those remarks, defendant indicated a willingness to continue discussing the investigation against him.

¶ 34 Because defendant initiated additional communication with the detectives indicating a desire to continue discussing the investigation, we move to the final inquiry: whether defendant's initiation of additional contact with the detectives, combined with the totality of the other circumstances, demonstrated that he knowingly and intelligently waived his right to have counsel present during questioning. *Bradshaw*, 462 U.S. at 1046; *Olivera*, 164 Ill. 2d at 390. Because police may not coerce the suspect into waiving his previously asserted *Miranda* rights, any

waiver by the defendant must be "unbadgered." *Minnick v. Mississippi*, 498 U.S. 146, 150 (1990); see also *McNeil v. Wisconsin*, 501 U.S. 171, 177 (1991).

¶ 35 After asking to call his girlfriend to see if he "could get a lawyer," defendant was told the interview would stop and that an attorney would be called for him. Defendant then responded affirmatively when asked if he wanted a lawyer. However, defendant reinitiated contact by immediately stating he wanted to talk to the detectives as they stood up to leave. Defendant also later reiterated "I want to talk to you" before making statements that implicated him in the shooting. Based upon the totality of the circumstances, defendant knowingly and intelligently waived his right to have an attorney present during questioning.

¶ 36 In conclusion, although defendant invoked his right to have an attorney present during his questioning by Detectives Stanek and Potter, he initiated further contact with the detectives and knowingly and intelligently waived his right to counsel. Therefore, defendant's inculpatory statements following the waiver were admissible at trial.

¶ 37 Accordingly, the judgment of the trial court is affirmed.

¶ 38 Affirmed.