

NOTICE  
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2018 IL App (5th) 130476-UB

NO. 5-13-0476

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Williamson County.
	)	
v.	)	No. 11-CF-241
	)	
JOSHUA M. DALLACOSTA,	)	Honorable
	)	John A. Speroni,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE CATES delivered the judgment of the court.  
Justices Goldenhersh and Chapman concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court erred in denying defendant’s motion to suppress where defendant’s incriminating statements made during a custodial interrogation were not voluntary under the totality of the circumstances, and the error requires that the conviction and sentence be vacated and the cause remanded for a new trial. Under *People v. Hunter*, 2017 IL 121306, the amendment to the Juvenile Court Act raising the age of automatic transfer from 15 to 16 does not apply retroactively in this case as the defendant is now 22 years old and no longer subject to the jurisdiction of the juvenile court, making a remand to the juvenile court for a discretionary transfer hearing impracticable.

¶ 2 Following a stipulated bench trial, the defendant, Joshua M. Dallacosta, was found guilty of first degree murder while personally discharging a firearm. He was sentenced to a prison term of 45 years. His sentence included a 25-year enhancement for use of a

firearm. On appeal, the defendant claimed that the 45-year sentence was a *de facto* life sentence for an offense he committed when he was 15 years old, and thereby violated the eighth amendment; that the trial court erred in denying his motion to suppress where the statements he made during a custodial interrogation were not knowingly or voluntarily made; and that the automatic transfer of a 15-year-old from juvenile court to criminal court, with respect to harsh sentencing consequences, violated the eighth amendment. During the pendency of this appeal, the Illinois legislature raised the age of automatic transfer for defendants charged with first degree murder and other enumerated crimes from 15 to 16 years of age. See Pub. Act 99-258, § 5 (eff. Jan. 1, 2016) (amending 705 ILCS 405/5-130(1)(a) (West 2014)). The legislature also adopted additional sentencing guidelines for defendants under the age of 18. See Pub. Acts 99-69, 99-258 (eff. Jan. 1, 2016) (adding 730 ILCS 5/5-4.5-105 (West 2016)). In a supplemental briefing, the defendant claims that his sentence must be vacated and his case transferred to juvenile court for further proceedings because the amendments apply retroactively.

¶ 3 In our initial order, entered on July 28, 2017, we found that the trial court erred in denying the defendant's motion to suppress where the defendant's incriminating statements during a custodial interrogation were not voluntary under the totality of the circumstances. We also found that under *People ex rel. Alvarez v. Howard*, 2016 IL 120729, ¶¶ 32-35, 72 N.E.3d 346, the amendment raising the age of automatic transfer from 15 to 16 applied retroactively to cases pending on appeal when the amendment took effect. We vacated the defendant's conviction and sentence, and remanded the matter to the juvenile court for further proceedings, noting that the State may elect to file a petition

for discretionary transfer to criminal court. *People v. Dallacosta*, 2017 IL App (5th) 130476-U (July 28, 2017).

¶ 4 Subsequently, the State filed a petition for leave to appeal in the Illinois Supreme Court. On January 18, 2018, the supreme court denied the State's petition for leave to appeal and entered a supervisory order directing this court to vacate our judgment and consider the effect of the supreme court's recent decision, *People v. Hunter*, 2017 IL 121306, \_\_ N.E.3d \_\_, on "the issue of whether the amendments to section 5-130 of the Juvenile Court Act (705 ILCS 405/5-130 (amended by P.A. 99-258 (eff. Jan. 1, 2016))), apply to a case pending on appeal at the time the amendments became effective, and determine if a different result is warranted." *People v. Dallacosta*, No. 122637 (Ill. Jan. 18, 2018) (supervisory order).

¶ 5 In accordance with the supreme court's directions, we vacated our prior judgment on April 20, 2018, and have reconsidered our order in light of *Hunter*. Initially, we note that our determination that the trial court erred in denying the defendant's motion to suppress, and that a new trial is required, is not impacted by *Hunter* and remains unchanged. However, after considering the supreme court's opinion in *Hunter*, we conclude that the amendments to the automatic transfer provision will not apply to the defendant's case on remand. For the reasons stated herein, we vacate the defendant's conviction and sentence, and remand this case to the circuit court for a new trial, without the confession, and for further proceedings consistent with this decision.

¶ 6 On May 24, 2011, at approximately 9:40 p.m., the Williamson County Sheriff's Department responded to a reported shooting at a residence on Freeman Spur Road in

Herrin, Illinois. The responding officers discovered the body of 73-year-old Charles R. James in the yard. He had been shot several times. A second victim, Ly Johnson, had also been shot, but she managed to flee. She ran to a neighbor's home, and the neighbor called for emergency assistance. Ly was taken to Herrin Hospital for evaluation and treatment. She sustained a wound to the side of her head, which was not life-threatening.

¶ 7 Detective Karl Gusentine, an officer who had more than 10 years of service with the Williamson County Sheriff's Department, was driving toward the Freeman Spur Road residence when he was redirected to the hospital to interview Ly Johnson. Detective Gusentine arrived at the hospital at 10:41 p.m. He located Ly Johnson. She agreed to an interview and offered the following account.

¶ 8 Ly stated that she and her companion, Charles James, were attending a poker tournament at a casino in Evansville, Indiana, on May 24, 2011. While there, Charles received a call from his adult daughter, Cindy Stearns. Cindy asked Charles to return home that evening to meet with an insurance adjuster. Cindy indicated that the adjuster would give Charles a check for several thousand dollars in settlement of a storm damage claim. Ly and Charles left the tournament and drove to Herrin, Illinois. They arrived at the residence on Freeman Spur Road around 7:45 p.m. Cindy greeted them and invited them inside. Charles, Ly, and Cindy conversed and played cards while they waited for the insurance adjuster. A short time later, Charles' former daughter-in-law, Kate Bodie, and Bodie's son, Joshua Dallacosta (defendant), entered the room. Each had a handgun. Kate and the defendant took Charles' cell phone and Ly's purse and cellphone. Charles

told Kate that he could help her; that she did not have to hurt anyone. Kate replied that she and her family would get hurt if she did not shoot Charles.

¶ 9 Ly recalled that Kate appeared nervous, and that Cindy and Kate walked in and out of the room together on three or four occasions. After about an hour, Ly and Charles were directed to walk to a field in the back of the house. When they reached the field, she and Charles pled with Kate and the defendant. Ly recalled that the defendant walked up behind her, “cocked” his gun, and pointed it at her, and that Charles started to run toward his car. The defendant turned and fired a shot at Charles. Charles began screaming, and fell to the ground. Kate ran over to Charles and shot him four or five times. Ly stated that the defendant then turned and fired at her. The shot hit her on the side of her head. She started to run, but she fell. The defendant fired at her again, but missed. She remained on the ground. She did not move, pretending to be dead. The defendant walked up to her and pushed on her leg. He told Kate and Cindy that she was dead. Ly watched as Kate and the defendant began to drag Charles’ body across the yard. At that point, she escaped. She ran to a neighbor’s house, and the neighbor called for help.

¶ 10 Ly stated that she thought Cindy had lured Charles to the residence. Detective Gusentine asked why Cindy would be involved. Ly said that Charles had recently accused Cindy of stealing money from him, and that Charles was considering whether to report her theft to the police. Ly also noted that Charles indicated that he was going to kick Cindy and her husband out of the Freeman Spur Road residence. Detective Gusentine also asked Ly why Kate and the defendant were involved, but Ly had no

answers. Following the interview, Detective Gusentine obtained a medical release and photos of Ly's injuries. He left the hospital and reported to the Williamson County Sheriff's Department. He later prepared a written report documenting Ly's statement.

¶ 11 Meanwhile, officers discovered the defendant in an upstairs bedroom in the residence on Freeman Spur Road. He did not have a shirt on. The officers handcuffed the defendant and escorted him outside. At 11:39 p.m., Deputy Rob Ahne transported the defendant, still shirtless, to the Williamson County Sheriff's Department. The defendant was escorted to a squad room. He was seated in a chair, and handcuffed to a handcuff bar. Noting that the defendant did not have a shirt, Deputy Ahne provided a blanket. The defendant remained seated and handcuffed for 4½ hours. A few minutes before 4:30 a.m., Captain Brian Thomas escorted the defendant to Detective Gusentine's office.

¶ 12 The office was equipped with audio and video recording devices. A video camera was mounted overhead, and a microphone was on the desk. The interview was recorded. The video shows Detective Gusentine seated behind a desk, his back to the camera. The defendant was seated in a chair, on the other side of the desk. He was not handcuffed. He wrapped the blanket around his upper body and shoulders, and held onto the edges. Captain Thomas was seated a few feet from the defendant.

¶ 13 As the interview began, Detective Gusentine noted the time, 4:30 a.m., and the date, May 25, 2011. Detective Gusentine then read the *Miranda* rights from a printed form to the defendant. He read all of these rights, without pausing. When he finished, he asked the defendant if he understood the rights. The defendant replied, "Yes, sir." Detective Gusentine next read the "waiver of rights" from the same form. He told the

defendant that the waiver “means that we’re not here yelling at you, screaming that you’re going to have to talk to us, we are just asking you to talk to us, okay?” The defendant was asked if he understood, and the defendant replied, “Yes, sir.” Detective Gusentine asked the defendant to read the first two lines of the *Miranda* warnings aloud. The defendant read the words, speaking in a quiet, at times inaudible, voice. When the defendant finished reading the first two lines on the form, Detective Gusentine directed the defendant to read the remaining paragraphs to himself, and to initial each paragraph to show that he understood it. The defendant asked, “My initials?” Both detectives replied in the affirmative. Captain Thomas then pointed to something near the bottom of the form, and stated, “It just shows that we have read them to you, okay?” The defendant then wrote something near the bottom of the form.

¶ 14 Captain Thomas asked the defendant whether he had been in trouble before. The defendant said, “Yeah.” Captain Thomas asked the defendant if he had ever had his rights read to him before. The defendant said, “Yes.” Captain Thomas asked, “So you understand what those are, right?” The defendant said, “Yes.” The detectives did not ask whether the defendant had ever been charged with a crime or whether he had been given *Miranda* rights on more than one prior occasion. The defendant was asked to provide his date of birth, residence, and level of education. The defendant stated that he was born November 21, 1995, that he was 15 years old, that he lived with his mom, and that he was a freshman in high school.

¶ 15 Detective Gusentine then began questioning the defendant about the events of the previous evening. Detective Gusentine asked whether the defendant knew Charles

James, Ly Johnson, and Cindy Stearns. The defendant stated that he knew them. Detective Gusentine asked the defendant to describe his day, from the time he awoke until the time of his arrest. The defendant stated that he woke up around 11 a.m. and watched television. He said that Charles James came to the house that evening, and that when Charles arrived, the defendant's mother told the defendant to go upstairs and lie down. The defendant stated that he did as he was told. At that point, Captain Thomas told the defendant that he needed to be truthful, that his mother has been "spoken to," and that she told them "everything," including the defendant's involvement. Captain Thomas told the defendant that the "laying down and knowing nothing, that's not—that's not the truth, right?" The defendant said, "No." The defendant then gave his account of the events leading up to the shooting.

¶ 16 The defendant stated that his mom and Cindy Stearns approached him two days before the shooting, and they told him to do whatever they needed. They wanted him to help shoot Charles James and Ly Johnson, and they promised to give him money for his help. The defendant outlined the plan. He stated that Cindy provided two handguns that she had taken from Charles James' home. Cindy lured Charles James and Ly Johnson to the residence on Freeman Spur Road. The defendant admitted that he fired a shot at Ly Johnson, but missed. He then saw Charles James running, so he fired a shot at Charles. The defendant did not think he hit Charles because Charles continued to run for a short distance before he fell down. The defendant stated that his gun jammed, and that his mom went up to Charles and fired several shots at him. The defendant walked over to check on Ly. He placed his hand near her nose, but he could not feel her breath. The

defendant told Cindy and his mom that Ly was dead. He helped his mom move Charles' body. He then told his mom and Cindy that he was not going to help anymore, that this was their idea, and that he did not want to get in trouble. The defendant stated that his mom gave him some money that she had taken from Charles' pocket. The defendant hid the money in an upstairs bedroom. He removed his soiled shirt and lay on the bedroom floor. He heard sirens. Officers with machine guns entered the bedroom, handcuffed him, and took him outside.

¶ 17 Near the end of the interview, the defendant was asked whether he understood that shooting and killing someone was wrong. He answered, "Yes." He was also asked whether he had used any drugs or taken prescription medications that day. He replied that he had not taken medication, but he smoked "a little weed," when he woke up. The interview concluded at 5:15 a.m. on May 25, 2011.

¶ 18 A few hours later, on May 25, 2011, the State filed criminal charges against Kate Bodie, Cindy Stearns, and the defendant. Each was charged with two counts of first degree murder and one count of aggravated battery with a firearm.

¶ 19 On December 14, 2012, the defendant filed a motion to suppress the statements he made during questioning on May 25, 2011. The court held an evidentiary hearing on February 22, 2013. Deputy Rob Ahne testified that he transported the defendant from the residence on Freeman Spur Road to the sheriff's department at 11:39 p.m. on May 24, 2011, and that he had been informed prior to transport that the defendant was around 15 years old. Deputy Ahne stated that during the drive, the defendant asked what was going on. Deputy Ahne told the defendant that they were going to the Williamson County

Sheriff's Department, and that a detective would talk with him when they arrived. Deputy Ahne stated that he did not ask any questions, make any threats or promises, or engage the defendant in any conversation during the ride to the sheriff's department. Deputy Ahne said that upon arrival, he escorted the defendant to a squad room. The defendant was placed in a chair and handcuffed to the handcuff bar. Deputy Ahne noted that the defendant was not wearing a shirt, so he offered the defendant a blanket. The defendant asked for water at 12:30 a.m. and 1:55 a.m., and Deputy Ahne provided water on both occasions. Deputy Ahne stated that he stayed with the defendant until 4:30 a.m., when the defendant was summoned for questioning.

¶ 20 Captain Brian Thomas, a 23-year veteran of the sheriff's department, testified that he and Detective Karl Gusentine interviewed the defendant on May 25, 2011. Captain Thomas admitted that he knew, prior to the interview, that the defendant was only 15 years old, and that the defendant's mother had been arrested in the same incident. Captain Thomas testified that the interview began at 4:30 a.m. and ended at 5:15 a.m. He recalled that he and Detective Gusentine were dressed in street clothes, and they both had sidearms. He stated that they spoke in conversational tones and made no threats or promises to the defendant. Captain Thomas testified that the defendant was given his *Miranda* rights, that the defendant seemed to understand them, and that the defendant voluntarily waived his rights and agreed to answer questions. Captain Thomas stated that he asked the defendant whether he had ever had *Miranda* rights read to him, and the defendant answered in the affirmative. Captain Thomas acknowledged that he asked no further questions about the circumstances under which the defendant was read his rights.

¶ 21 Captain Thomas testified that the defendant was asked to speak up several times during the interview, and that the defendant appeared to be nervous and scared. Captain Thomas recalled a point during the interview when he thought the defendant began to lie about what had happened. He told the defendant that the defendant's mother had already told them everything, and that the defendant needed to be truthful. Captain Thomas admitted that the officers made no attempt to contact the defendant's father, another relative, or a juvenile officer before or during the defendant's interview. When asked why a juvenile officer was not summoned, Captain Thomas replied that that the defendant is "treated as an adult at 15 years old and charged with first degree murder."

¶ 22 Detective Gusentine also testified during the suppression hearing. His testimony basically corroborated the testimony of Captain Thomas. Detective Gusentine, however, testified that the defendant was only a suspect in a first degree murder case at the time of questioning. The disc containing the defendant's recorded interview was authenticated by Captain Thomas, and admitted as part of the State's evidence. The State did not offer the *Miranda* waiver form.

¶ 23 After the proofs were closed, the trial court asked counsel whether the protections of the Juvenile Court Act applied in the defendant's case. The court noted that Captain Thomas had indicated that the defendant had been charged with murder prior to the interview. The court, however, assumed that the defendant had not been charged because the questioning occurred during the early morning hours of May 25, 2011. The assistant State's Attorney acknowledged that the defendant had not been charged at the time he was interviewed. The defense argued that regardless of whether the defendant had been

charged or was about to be charged, he was a minor, and that under Illinois law, minors are to be treated differently during questioning than adults.

¶ 24 On June 21, 2013, the trial court issued a written order denying the defendant's motion to suppress. The court found that the provisions and protections of the Juvenile Court Act did not apply in the defendant's case because the defendant was "in custody and charged by the police officers with first degree murder, even though a formal information had not been filed by the State's Attorney" at the time the defendant made the incriminating statements. The court also found that the State had shown by a preponderance of the evidence that the defendant knowingly and voluntarily waived his *Miranda* rights and that the defendant's subsequent statements to the police during a custodial interrogation were voluntary.

¶ 25 On September 10, 2013, the defendant appeared in court, waived his right to a jury trial, and agreed to a stipulated bench trial. Before presenting any evidence, the State dismissed the aggravated battery charge against the defendant. The State presented Detective Gusentine's report of his interview with Ly Johnson, the autopsy report on Charles James, and the forensic report on the projectile that was removed from James' abdomen during the autopsy. The State also offered the digital recording of the defendant's interview, which was admitted over the defendant's objection. The defendant did not offer any additional stipulated evidence. Following a brief recess, the trial court issued its decision. The court found that the State proved beyond a reasonable doubt that the defendant was guilty of first degree murder while personally discharging a firearm.

¶ 26 Following the verdict, the State and the defense announced that they had reached an agreed disposition and were prepared to proceed with sentencing. The defendant formally waived the presentence investigation and the sentencing hearing. The court approved the proposed disposition and sentenced the defendant to a term of 45 years in prison, encompassing 20 years for first degree murder, plus a 25-year enhancement for use of a firearm. The defendant's posttrial motion was denied. This appeal followed.

¶ 27 On appeal, the defendant contends that he received a *de facto* life sentence for an offense he committed when he was 15 years old, and that his sentence violates the constitutional prohibition on cruel and unusual punishment; that the trial court committed reversible error in denying his motion to suppress because the statements he made during the custodial interrogation were not knowingly and voluntarily made; and that the automatic transfer of a 15-year-old to adult court, with respect to the harsh sentencing consequences, violates the eighth amendment. In a supplemental brief, the defendant claims that the amendment to the automatic transfer statute, raising the age for automatic transfer to 16 years old, applies retroactively to his case on appeal, and requires that his sentence be vacated and his case transferred to juvenile court for further proceedings.

¶ 28 Initially, we consider whether the trial court erred in denying the defendant's motion to suppress the incriminating statements he made during the custodial interrogation on May 25, 2011. The defendant contends that given the totality of the circumstances, his statements were not knowingly and voluntarily made.

¶ 29 In determining the voluntariness of a confession, a court considers the totality of the circumstances, including the defendant's age, education, intelligence, background,

experience, mental capacity, physical condition, the time and duration of the questioning, whether there was any physical or mental abuse, and whether there were any threats or promises by the police. *People v. Murdock*, 2012 IL 112362, ¶ 30, 979 N.E.2d 74. Our supreme court has long recognized that the taking of a juvenile’s confession is a “sensitive concern,” and that the “greatest care” must be taken to assure that the confession was not a product of coercion, suggestion, or adolescent fantasy, fright, or despair. *In re G.O.*, 191 Ill. 2d 37, 54, 727 N.E.2d 1003, 1012 (2000). When analyzing the voluntariness of a juvenile’s confession, courts consider additional factors, such as whether the juvenile had an opportunity to consult with a concerned adult either before or during the interrogation, whether the police prevented the juvenile from conferring with a concerned adult, and whether the police frustrated the attempts of a concerned adult to confer with the juvenile. *G.O.*, 191 Ill. 2d at 55. That said, a juvenile’s confession should not be suppressed simply because he was denied the opportunity to confer with a parent or other concerned adult before or during his interrogation. *G.O.*, 191 Ill. 2d at 55. The “concerned adult” factor is one of many factors to be examined in determining whether a juvenile’s confession was voluntarily made, and no single factor is dispositive. *G.O.*, 191 Ill. 2d at 54-55. The test of voluntariness is whether the individual made the confession freely and without compulsion or inducement of any kind, or whether the individual’s will was overborne at the time of the confession. *G.O.*, 191 Ill. 2d at 54.

¶ 30 When a defendant challenges his confession, the burden falls to the State to show by a preponderance of the evidence that the confession is voluntary. *People v. Richardson*, 234 Ill. 2d 233, 254, 917 N.E.2d 501, 514 (2009). In reviewing a ruling on

the voluntariness of a confession, the trial court's findings of fact will be reversed only if they are against the manifest weight of the evidence, but the court's ultimate determination of the voluntariness of the confession is reviewed *de novo*. *Murdock*, 2012 IL 112362, ¶ 29.

¶ 31 In this case, the trial court concluded that the State had shown by a preponderance of the evidence that the defendant knowingly and voluntarily waived his *Miranda* rights and that the defendant's subsequent statements to the police during the custodial interrogation were voluntary. In considering the voluntariness issue, the trial court initially found that the provisions and protections of the Juvenile Court Act did not apply in the defendant's case because the defendant was "in custody and charged by the police officers with first degree murder, even though a formal information had not been filed" at the time the defendant made the incriminating statements. This was error.

¶ 32 At the time the defendant was questioned, section 5-130 of the Juvenile Court Act of 1987 (Act) exempted from the protections of the Act, "any minor who at the time of an offense was at least 15 years of age and *who is charged* with first degree murder," or other enumerated offenses. (Emphasis added.) 705 ILCS 405/5-130(1)(a) (West 2010). As noted earlier in this decision, the legislature amended section 5-130 of the Act, and the current version exempts "any minor who at the time of an offense was at least 16 years of age and *who is charged* with first degree murder," and other enumerated offenses. (Emphasis added.) 705 ILCS 405/5-130(1)(a) (eff. Jan. 1, 2016). Under either version of section 5-130, a minor remains under the protections of the Act until the point in time when the minor is charged with one of the enumerated offenses. *People v.*

*Plummer*, 306 Ill. App. 3d 574, 583-84, 714 N.E.2d 63, 70 (1999); *People v. Pico*, 287 Ill. App. 3d 607, 612, 678 N.E.2d 780, 783 (1997). In this case, the defendant was not charged with any crime at the time he was questioned. This fact was admitted by the assistant State's Attorney during the suppression hearing. Because the defendant was not charged with first degree murder, or any of the other enumerated offenses in section 5-130, at the time of questioning, he was entitled to the protections of the Act. *Plummer*, 306 Ill. App. 3d at 583-84; *Pico*, 287 Ill. App. 3d at 612.

¶ 33 Having determined that the defendant was entitled to protections of the Act, we next consider the factors relevant to a determination of the voluntariness of the defendant's statements. In this case, the video shows that Detective Gusentine and Captain Thomas spoke in conversational tones during questioning. They did not physically or verbally abuse the defendant, and they made no threats or promises to secure a confession. The interview was not lengthy, 45 minutes in duration, and the defendant was not handcuffed during questioning. The defendant's answers were responsive to the questions asked. The defendant did not appear to have any physical disabilities. These factors weigh in favor of a finding of voluntariness.

¶ 34 There are, however, other factors that weigh against a finding of voluntariness. The 15-year-old defendant was taken into custody by armed, uniformed officers at 11:39 p.m. on May 24, 2011. He was not offered the opportunity to put on a shirt before he was transported to the Williamson County Sheriff's Department. When the defendant arrived at the sheriff's department, he was escorted to a room, placed in a chair, and handcuffed to a bar, where he remained seated and handcuffed for 4½ hours. He was given a blanket

to cover his shoulders and some water during the 4½-hour wait. Shortly before 4:30 a.m., two detectives, bearing sidearms, escorted the defendant to a small office for questioning. The questioning began at 4:30 a.m. By that time, the defendant had been up for more than 17 hours, and he had been seated in place, handcuffed to a bar, and detained for more than 4½ hours.

¶ 35 At the time of questioning, the defendant was 15 years old and a high school freshman, apparently enrolled in some type of special behavioral education classes. The detectives readily admitted they made no attempt to contact a caring adult who could have conferred with the defendant, and they made no attempt to summon a juvenile officer even though juvenile officers were available in Williamson County. Captain Thomas testified that he did not call for a concerned adult or juvenile officer because defendant was 15 years old and was facing a murder charge. As noted by Detective Gusentine, and later confirmed by the State, the defendant was not formally charged with any crime at the time of questioning. Pursuant to section 5-405(2) of the Act, a law enforcement officer was required to immediately notify the defendant's parents or other concerned adult that he had been arrested, and take the defendant, without unnecessary delay, to the nearest juvenile officer. 705 ILCS 405/5-405(2) (West 2010). This did not occur. Detective Gusentine and Captain Thomas are two very experienced officers, with more than 30 years' combined service. The officers either misapprehended the law, as the State has argued, or they ignored the 15-year-old defendant's right to access a basic protection before and during the interview process. We recognize this was not a situation in which the police actively frustrated a parent's attempt to see his or her minor child, but

it does suggest that these officers were conducting an interrogation without due regard for the age of the defendant. As a result, the defendant was deprived of a concerned adult or a juvenile officer to protect his interests.

¶ 36 In addition, the video shows that during questioning, the defendant was wrapped in the blanket that had been provided by Deputy Ahne. He appeared timid and scared. He spoke in a soft voice, sometimes inaudible, often looking down when he spoke. The defendant was asked to speak up no less than 7 times during the course of a 45-minute interview. There is no indication that the defendant had significant experience with law enforcement or with criminal proceedings. The defendant stated that *Miranda* rights had been read to him on a prior occasion, but there are no specific facts regarding the circumstances under which he received them. Finally, the *Miranda* waiver form that had been presented to the defendant prior to questioning was not offered into evidence. It is not a part of the record for this court's examination.

¶ 37 In this case, the State did not meet its burden to show that the defendant's confession was voluntary. After considering the factors under the totality of the circumstances, we conclude that the defendant did not effectively waive his *Miranda* rights, and therefore his statements were not voluntarily made. Accordingly, we reverse the trial court's order denying the defendant's motion to suppress, vacate the defendant's conviction and sentence, and remand the case for a new trial without the confession.

¶ 38 Next, we consider the defendant's contention that the automatic transfer of a 15-year-old child from juvenile court to criminal court violates the eighth amendment. The defendant raised this issue in his original brief, but he also acknowledged that the Illinois

Supreme Court rejected a similar argument and upheld the constitutionality of the automatic transfer statute in *People v. Patterson*, 2014 IL 115102, 25 N.E.3d 526. The defendant candidly admitted that he raised the issue here to preserve it for federal review. Therefore, following our supreme court's holding in *Patterson*, this point is summarily denied.

¶ 39 In a supplemental brief, the defendant claimed that the recent amendment raising the automatic transfer age from 15 to 16 applies retroactively to his case on appeal. He argued that his sentence must be vacated and his case remanded to the juvenile court for further proceedings. The defendant relied on *People ex rel. Alvarez v. Howard*, 2016 IL 120729, to support his claim of error.

¶ 40 In this case, the defendant was 15 years old on May 24, 2011, the date Charles James was murdered. The automatic transfer statute then in effect provided that a minor, who at the time of the offense was at least 15 years of age, and who is charged with first degree murder or other enumerated offenses, is excluded from the jurisdiction of the juvenile court. 705 ILCS 405/5-130(1)(a) (West 2010). As noted above, the automatic transfer statute was amended while the defendant's appeal was pending. Pub. Act 99-258 (eff. Jan. 1, 2016) (amending 705 ILCS 405/5-130(1)(a) (West 2010)). The legislature raised the minimum age for automatic transfer from juvenile court to criminal court from 15 to 16 years of age, and reduced the number of offenses subject to automatic transfer. 705 ILCS 405/5-130(1)(a) (West 2016). The legislature also amended the Unified Code of Corrections, adding provisions requiring the trial court to consider additional mitigating factors when sentencing individuals under the age of 18 in criminal court (730

ILCS 5/5-4.5-105(a) (West 2016)), and provisions allowing the trial court, in its discretion, to decline to impose firearms enhancements for those individuals (730 ILCS 5/5-4.5-105(b) (West 2016)).

¶ 41 In *People ex rel. Alvarez v. Howard*, 2016 IL 120729, the Illinois Supreme Court considered the retroactivity of the amendment to the automatic transfer provision. In that case, a 15-year-old defendant was indicted on several offenses, including first degree murder. While the defendant's case was pending in criminal court, Public Act 99-258 became effective. The defendant argued that he no longer met the age requirements for automatic transfer to adult court, and that his case should be returned to the juvenile court for a discretionary transfer hearing. The trial court agreed and transferred the case to juvenile court. The State sought a writ of *mandamus* in the Illinois Supreme Court, and argued that the amendment should be applied prospectively. In considering the State's arguments against retroactive application, our supreme court initially determined that the text of the amendment did not indicate its temporal reach, and turned to the general savings provision of section 4 of the Statute on Statutes (5 ILCS 70/4 (West 2014)). *Howard*, 2016 IL 120729, ¶ 21. Employing section 4 of the Statute on Statutes, the supreme court determined that the question of whether a defendant is tried in juvenile court or adult criminal court is a matter of procedure, and that matters of procedure apply retroactively to pending cases so far as practicable, unless doing so would offend the constitution. *Howard*, 2016 IL 120729, ¶ 28. The court concluded that the defendant's case was pending in the trial court when Public Act 99-258 became effective, that the trial court did not err in transferring the 15-year-old defendant's case from criminal court

to juvenile court, and that the defendant's case belonged in juvenile court, unless transferred to criminal court after a discretionary transfer hearing. *Howard*, 2016 IL 120729, ¶ 35.

¶ 42 Subsequently, the Illinois Supreme Court was asked to decide whether the amendment to the automatic transfer provision applied retroactively to cases pending in the appellate court. *People v. Hunter*, 2017 IL 121306. In *Hunter*, the supreme court acknowledged that its retroactivity jurisprudence had not typically distinguished between cases that were pending in the trial court and cases that were pending in the appellate court on direct review at the time a statutory amendment became effective. *Hunter*, 2017 IL 121306, ¶ 27. The court noted that under section 4 of the Statute on Statutes, changes in procedural law will apply to "ongoing proceedings." *Hunter*, 2017 IL 121306, ¶ 31. The court pointed out that in *Howard*, the issue was whether, given the statutory amendment, the defendant should continue to be prosecuted in adult court, and that in *Hunter*, the proceedings in the trial court were completed long before the statute was amended, and the case was not being remanded to the trial court because of any reversible error. *Hunter*, 2017 IL 121306, ¶¶ 30, 32-33. The court concluded that in *Hunter*, there were no "ongoing proceedings" to which the amended statute could apply. *Hunter*, 2017 IL 121306, ¶ 32. The supreme court also rejected the defendant's argument for retroactive application for the additional reason that new procedural rules only apply to ongoing proceedings so far as "practicable." *Hunter*, 2017 IL 121306, ¶ 37. The court further concluded that a discretionary transfer hearing in the juvenile court was no longer

feasible because the defendant was 22 years old, and no longer subject to the jurisdiction of the juvenile court. *Hunter*, 2017 IL 121306, ¶¶ 38, 43.

¶ 43 Here, the defendant's case was pending on appeal when the automatic transfer statute was amended. Unlike *Hunter*, the defendant's case is being remanded for a new trial to which the amendments could apply. But like *Hunter*, the defendant is now 22 years old and no longer subject to the jurisdiction of the juvenile court, making a remand to the juvenile court impracticable. In accordance with *Hunter*, we find that the amendment to section 5-130, raising the age for automatic transfer from 15 to 16, does not apply retroactively to the defendant's case on remand. *Hunter*, 2017 IL 121306, ¶ 43.

¶ 44 The defendant also claims that he is entitled to be sentenced under the sentencing scheme set forth in section 5-4.5-105 of the Unified Code of Corrections (730 ILCS 5/5-4.5-105 (West 2016)). Because this question may arise on remand, we will consider it. Section 4 of the Statute on Statutes expressly provides that if a punishment is mitigated by any provision of a new law, "such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect." 5 ILCS 70/4 (West 2016)). Where, as here, a defendant's conviction and sentence are vacated, and the matter is remanded for a new trial, under section 4 of the Statute on Statutes, the defendant may elect to be sentenced under the law in effect at the time of the new sentencing hearing. See *Hunter*, 2017 IL 121306, ¶ 54; *People v. Reyes*, 2016 IL 119271, ¶ 12, 63 N.E.3d 884. Because we are vacating the defendant's conviction and sentence, we need not consider the defendant's contention that the original 45-year sentence is a *de facto* natural life sentence and unconstitutional.

¶ 45 Accordingly, the defendant's conviction and sentence are vacated, and this cause is remanded to the circuit court for a new trial, without the defendant's confession, and for further proceedings consistent with this decision.

¶ 46 Judgment vacated; cause remanded.