

No. 1-15-3627

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | No. 12 CR 7318 |
| |) | |
| LUIS HERNANDEZ, |) | Honorable |
| |) | Stanley J. Sacks, |
| Defendant-Appellant. |) | Judge, presiding. |

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* We reverse the defendant's convictions and remand for a new trial because he was denied effective assistance of counsel when counsel failed to use available evidence during a suppression hearing showing that his confession occurred after officers ignored the invocation of his right to remain silent.

¶ 2 Following a bench trial, the defendant, Luis Hernandez, was convicted of first-degree murder and aggravated discharge of a firearm. The defendant, who was 16 years old at the time of the offense, was sentenced to consecutive terms of 55 years' imprisonment for first-degree

murder and 10 years' imprisonment for aggravated discharge of a firearm, for a total of 65 years' imprisonment. On appeal, he contends that (1) during the hearing to suppress his confession, trial counsel was ineffective for failing to argue that his confession was involuntary or utilize available video evidence showing that he invoked his right to remain silent; (2) his *de facto* life sentence is unconstitutional because it was imposed without complying with the factors set forth in *Miller v. Alabama*, 567 U.S. 460 (2012); and (3) his sentencing order should be modified to reflect ten additional days of sentencing credit. For the following reasons, we reverse and remand this cause for a new trial.

¶ 3 The State charged the defendant and codefendant, Juan Barraza, with, *inter alia*, first-degree murder (720 ILCS 5/9-1(a)(1) (West 2010)) and aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2010)), based upon the March 17, 2012 shooting of six-year-old Aliyeh Shell. The defendant waived his right to a jury and elected a bench trial.¹

¶ 4 Prior to trial, defense counsel filed a motion to suppress the defendant's videotaped confession, alleging that the defendant was not properly informed of his *Miranda* rights and his confession was obtained after he invoked his right to silence.

¶ 5 In his testimony at the suppression hearing, the defendant claimed that the arresting officers told him he had the right to remain silent but did not inform him of his other rights. He also testified that, once at the police station, he was placed in a room and interviewed by officers without having first been informed of his rights. He acknowledged that he answered their questions and that, after 15 to 30 minutes, the officers left to bring him food. The defendant was subsequently interviewed by two different officers who also failed to advise him of his rights.

¹ Codefendant was tried in a simultaneous, but severed, jury trial.

The defendant stated that, although he initially did not answer the second set of officers' questions, he eventually did so.

¶ 6 Officer Vincent Francone and Detective Roberto Garcia testified for the State. Officer Francone testified that, about 3:45 p.m., he was a member of the team that arrested the defendant in the vicinity of 32nd and Millard. According to Officer Francone, a "paddy wagon" transported the defendant to Area Central station and he followed in an unmarked squad car. Officer Francone testified that he did not question the defendant or advise him of his *Miranda* rights.

¶ 7 Detective Roberto Garcia testified that the defendant arrived at the Area Central station at 5:30 p.m. and was placed in an interview room. At about 5:50 p.m., Detective Garcia learned that the defendant was 16 years old. Upon learning this information, another officer contacted the defendant's mother and informed her of his arrest. Five minutes later, Detective Garcia learned of Aliyeh's death and so he activated the electronic recording device in the room holding the defendant.

¶ 8 At 6:25 p.m., Detective Garcia advised the defendant of his *Miranda* rights, including the warnings pertaining to his juvenile status, and began questioning him. Also present in the interview room was Detective Mary Isaacson, a "youth detective." The interview ended at 7:11 p.m., when the defendant's mother arrived at the station. Detective Garcia met with the defendant's mother, during which he obtained her consent to a buccal swab of the defendant and asked if she wished to be present during further interviews. According to Detective Garcia, she declined and left the station.

¶ 9 At approximately 12:30 a.m., after the defendant's mother left the station, Detective Garcia, Detective Ernesto Cato, and Detective Cartegena, who was also a youth officer, returned

to the interview room and questioned the defendant a second time.² During the second interview, the defendant was not advised of his *Miranda* warnings or reminded that he had been given the warnings in the past.

¶ 10 The parties stipulated that, if called, Assistant State's Attorney (ASA) Attila Bogdan would testify that, on March 18, 2012, he questioned the defendant at approximately 4:00 a.m. at Area Central station. Also present for the interview were Detectives Cato and Cartegen. ASA Bogdan would testify that the People's Exhibit 2 fairly and accurately depicted the conversation with the defendant.

¶ 11 The State played video recordings of the first and third interrogations. The recordings show that the defendant was advised of his *Miranda* rights by Detective Garcia prior to the first interrogation and again by ASA Bogdan prior to the third interrogation. No footage from the second interrogation was shown.

¶ 12 Defense counsel maintained that the video of the first interrogation depicted the defendant hesitating and being "prodded along" when Detective Garcia read him his *Miranda* rights. Counsel also argued that the officers did not wait a reasonable amount of time after contacting the defendant's mother before questioning him.

¶ 13 At the conclusion of the hearing, the circuit court denied the defendant's motion to suppress his statements. In so ruling, the circuit court found that the officers waited a reasonable amount of time after calling the defendant's mother before they began to question him, the defendant knowingly and intelligently waived his rights during the first interrogation, and the

² Detective Cartegen's first name is not contained within the record.

officers' failure to advise the defendant of his rights before the second interrogation did not justify suppression because the "rights were still fresh."

¶ 14 The following facts were adduced at the defendant's trial. On March 17, 2012, Diana Aguilar, her fiancé, Armando Gallardo, and Aguilar's three daughters—Kaitlin, age two, Aliyeh, age six, and Desiree, age 14—resided on the first floor of a house located near the intersection of 31st Street and Springfield Avenue. Roy Aguilar, Diana's brother, resided in the basement with his wife and four children. The Aguilers lived within the territory of the Two-Six street gang, with which Roy was associated.

¶ 15 About 3:30 p.m., Diana, Gallardo, Aliyeh, and Kaitlin were sitting on the front steps of the house. A gray pickup truck, traveling southbound on Springfield, stopped in front of their residence. Two men were in the truck. Gallardo testified that he heard the passenger in the truck say "what's up motherf*****s;" whereas, Diana testified that she heard the passenger say "TSK," which she understood to mean "Two-Six Killer." Diana saw the passenger extend his arm out of the passenger side window with a gun in his hand and fire two to three shots toward the residence. The truck pulled forward and the passenger again fired. The truck drove away, heading eastbound on 32nd Street. Diana noticed that Aliyeh was bleeding and ran inside to dial 9-1-1. An ambulance arrived and transported Aliyeh to Mount Sinai Hospital, where she was pronounced dead.

¶ 16 When the shooting occurred, Sergeant Joseph Pulido was in the alley between Harding Avenue and Springfield, investigating a separate matter. He heard gunfire and ran toward the scene where a bystander told him that the perpetrators were driving a "gray Jeep Cherokee." Sergeant Pulido relayed a flash message over his radio.

¶ 17 Stanley Rapacz, who was working at the Meyer Steel Drum facility located on the 3200 block of Millard Avenue on that afternoon, testified that he saw a “silverish gray” pickup truck turn south at a high rate of speed onto Millard. The truck came to an abrupt stop, and Rapacz saw two men exit the truck and then walk toward the intersection of Millard and 32nd.

¶ 18 Officer Ramiro Gonzalez, who was on patrol with his partner, testified that he responded to a radio call of shots fired in the vicinity of 31st and Springfield. The officers drove westbound on 32nd Street, towards 31st and Springfield. As the officers approached the intersection of Millard, Officer Gonzalez saw two Hispanic men walking northbound on Millard. Officer Gonzalez made eye contact with the men and told his partner to stop the car. The two men looked toward the officers and then ran. Officer Gonzalez exited the vehicle and gave chase. During the pursuit, Officer Gonzalez saw the man closest to him, who was wearing a white t-shirt and blue shorts, throw a gun into a nearby yard. As the men continued to flee, they turned west into a fenced-in yard. As Officer Gonzalez approached that yard, the men emerged in front of him. He drew his weapon and ordered them to the ground. One of the men, who Officer Gonzalez identified as co-defendant, complied and was arrested. The man in the white shirt and blue shorts fled to the northeast.

¶ 19 Officer Salcedo responded to a radio call of shots fired near 31st and Springfield.³ On the way to that location, Officer Salcedo received a flash message that officers were pursuing two Hispanic males on 32nd and Millard. Officer Salcedo adjusted his heading and traveled Southbound on Millard. There, he saw a Hispanic male, whom he identified as the defendant, wearing a white t-shirt and blue shorts and running eastbound across Millard toward an empty

³ Officer Salcedo’s first name is not included in the record.

lot. Officer Salcedo stopped his vehicle and gave chase. Following a brief pursuit, Officer Salcedo apprehended the defendant. Following the defendant's arrest, Officer Salcedo transported him to the scene of the shooting to participate in a "show-up" identification with Gallardo, who was unable to identify him.

¶ 20 Detective John Halloran arrived at the 3200 block of Millard and testified that he saw officers securing a parked pickup truck. Gallardo and Reynaldo Navarro, who lived across the street from the Aguilar residence, identified a photograph of the truck in open court as the one driven by the perpetrators. Officers subsequently learned that the truck had been reported stolen on March 16, 2012.

¶ 21 The defendant was ultimately transported to the Area Central station. That evening, Diana viewed a lineup, where she identified the defendant as the shooter and the codefendant as the driver. Diana also identified the defendant and the codefendant in open court.

¶ 22 Detective Cato testified that he arrived at Area Central station just after midnight on March 18, 2012. When he arrived, the defendant's mother was at the station. Detective Cato informed her that she had the right to be present during the interrogation and she declined. He stated that she was "visibly upset" and "wanted to leave." Five minutes later, at 12:30 a.m., Detective Cato began questioning the defendant. The interrogation lasted for an hour. Detective Cato testified that People's Exhibit 183 was a DVD that fairly and accurately depicted his interrogation of the defendant. The DVD was then played in open court.

¶ 23 The DVD depicts Detectives Cato, Garcia, and Cartegana entering the interview room. Detective Cartegana informed the defendant that he was his "youth advocate;" at which point, Detective Garcia told the defendant that his mother was at the station but had since left.

Detective Cato began questioning the defendant without advising him of his *Miranda* rights. Five minutes into the interrogation, Detective Cato told the defendant that “we could talk, on the real, you and I could talk.” The defendant, who was looking down throughout the interview, raised his head and responded. The defendant’s exact words are obscured because Detective Cato spoke over the response; however, the last word the defendant said was “talk.” After the defendant’s response, Detective Cato immediately asked the following: “You don’t want to talk about it at this point because you feel bad about it. Am I right?” The defendant again lowered his head and did not respond. Detective Cato continued questioning the defendant, who ultimately began to answer. Initially, the defendant indicated that he was the driver, not the shooter, and the intended target was a rival gang member. Eventually, the defendant confessed to firing a .38 caliber weapon five times at the porch because he believed a “Two-Sixer” lived there.

¶ 24 Three hours later, at about 4:00 a.m., the defendant was questioned by ASA Bogdan. The defendant provided ASA Bogdan with a detailed confession, admitting that he was the shooter. ASA Bogdan testified that People’s Exhibit 183 was a DVD that fairly and accurately depicted the interrogation of the defendant and the DVD was played in open court.

¶ 25 The DVD depicts ASA Bogdan interviewing the defendant alongside Detectives Cato and Cartegena. ASA Bogdan began by advising the defendant of his *Miranda* rights. During the interview, the defendant admitted that he was a member of the Latin Kings gang and that he was “trying to get a Two Six,” a rival gang member. The defendant and a fellow gang member drove a stolen pickup truck to a home where they believed a rival gang member lived. The defendant rode in the passenger seat and was armed with a .38 caliber revolver. When the truck pulled up to

the home, the defendant saw a rival gang member sitting in front of the house with an older woman and two kids. The defendant fired three to four shots in that direction.

¶ 26 Officer David Ryan, a forensic investigator, testified regarding the forensic evidence recovered from the various locations. After processing the pickup truck, Officer Ryan found a palm print on the front interior passenger window matching the defendant's palm print, a fingerprint on the front exterior passenger window matching the defendant's left little finger, and a fingerprint on the front exterior passenger window matching the defendant's left index finger. The pickup truck tested negative for gunshot residue.

¶ 27 Officers processing the scene also recovered the following: a revolver from the yard of a residence on the 3100 block of South Millard; a bullet and a spent cartridge from the Aguilar's residence; a glove from a parkway on the 3200 block of Millard; and a dark t-shirt and hat from the 3200 block of Millard. Officer Gonzalez identified the revolver as the weapon he saw the man in the blue shorts throw into a yard as he ran. According to Officer Ryan, the recovered revolver fired the bullet found in front of the Aguilar residence, the shirt and glove tested positive for gunshot residue, and the defendant tested negative for gunshot residue.

¶ 28 During closing argument, the State argued that there was overwhelming evidence showing that the defendant shot and killed Aliyeh. In response, defense counsel emphasized that Gallardo, who stood next to Diana, failed to identify the defendant as the shooter during the "show-up," which occurred shortly after the shooting took place. Counsel also highlighted the fact that none of the forensic evidence connected the defendant to the revolver or the discarded clothing that tested positive for gunshot residue. The State argued, in rebuttal, that the "most damning evidence in this case comes from the mouth of [the defendant]."

¶ 29 The circuit court found the defendant guilty of first-degree murder and aggravated discharge of a firearm, stating that the evidence “showed beyond any doubt” that the defendant shot and killed Aliyeh.

¶ 30 The circuit court then conducted a simultaneous sentencing hearing for the defendant and codefendant. The defendant’s presentence investigative (PSI) report confirms that he was 16 years old at the time of the shooting. The circuit court noted this during the sentencing hearing and acknowledged the possibility that he might not live to serve his entire sentence. The circuit court then sentenced the defendant to consecutive terms of 55 years’ imprisonment for first-degree murder and 10 years’ imprisonment for aggravated discharge of a firearm. This appeal followed.

¶ 31 The defendant first contends that he was denied his constitutional right to the effective assistance of counsel during the hearing to suppress his confession because his trial counsel failed to both raise the argument that his confession was involuntary and utilize video evidence showing that the interrogating officers violated his right to remain silent. He further contends that his trial counsel was ineffective for failing to renew the motion to suppress at trial when testimony revealed that the defendant was not informed that his mother had arrived at the police station, where she remained for more than five hours, until after she left.

¶ 32 Claims of ineffective assistance of counsel are evaluated under the two-pronged test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a defendant must show that his counsel’s representation fell below an objective standard of reasonableness and that the deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687; *People v. Albanese*, 104 Ill. 2d 504, 525 (1984). When a defendant claims that counsel failed to properly

litigate a motion to suppress, he must show both the merit of the unargued claim and a reasonable probability the trial's outcome would have been different had the evidence been suppressed. See *People v. Henderson*, 2013 IL 114040, ¶ 15. The defendant has the burden of establishing both prongs of the *Strickland* test. *People v. Burks*, 343 Ill. App. 3d 765, 775 (2003).

¶ 33 We first review whether the defendant's motion to suppress would have been meritorious but for counsel's alleged errors. "Where a defendant challenges the admissibility of his confession through a motion to suppress, the State has the burden of proving the confession was voluntary by a preponderance of the evidence." *People v. Braggs*, 209 Ill. 2d 492, 505 (2003), citing 725 ILCS 5/114–11(d) (West 2000). The concept of voluntariness includes proof that the defendant made a knowing and intelligent waiver of his privilege against self-incrimination and his right to counsel. *Braggs*, 209 Ill. 2d at 505; see *Miranda v. Arizona*, 384 U.S. 436 (1966). To protect an individual's right not to be a witness against himself, interrogation must cease once the individual indicates during a custodial interrogation that he wishes to remain silent. See *People v. Edwards*, 301 Ill. App. 3d 966, 977 (1998), citing *Miranda*, 384 U.S. at 473-74. "[A]ny statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." *Miranda*, 384 U.S. at 474.

¶ 34 After reviewing the DVD of the defendant's second interrogation, we find, based on Detective Cato's response, that the defendant invoked his right to remain silent. Five minutes into the interrogation, Detective Cato told the defendant to talk to him. The defendant's response is obscured as it occurs while Detective Cato is still talking, but the last word that the defendant says is "talk." Detective Cato immediately responded to the defendant with "[y]ou don't want to talk about it at this point because you feel bad about it. Am I right?" If, as his response suggests,

Detective Cato heard the defendant say something indicating that he did not wish to talk, he was required to cease questioning the defendant. See *Edwards*, 301 Ill. App. 3d at 977 (stating that a defendant has the right to cut off questioning at any time prior to or during a custodial interrogation by informing his interrogator that he wishes to remain silent, and once he so indicates, the interrogation must cease). Detective Cato did not.

¶ 35 The State maintains, however, that the defendant's language was too ambiguous to be a proper invocation of his right to remain silent. We disagree. Although the defendant's exact words are obscured by Detective Cato, we conclude that, based on Detective Cato's response, the defendant expressed a desire not to speak with him. See *Nielson*, 187 Ill. 2d at 287 (looking to how interrogators interpreted the defendant's assertion of his right to silence.); *People v. Hernandez*, 362 Ill. App. 3d 779, 786 (2005) (finding that the defendant clearly and unequivocally invoked his right to remain silent where the video transcript indicated that he answered "No, not no more" when the officer asked if he wanted to talk).

¶ 36 Having concluded that the defendant invoked his right to remain silent, we turn to whether the circuit court could properly consider the defendant's statements that followed his invocation. Statements made after the invocation of the right to silence are admissible only if the interrogators scrupulously honored the defendant's right to cut off questioning. *Hernandez*, 362 Ill. App. 3d at 786, citing *Edwards*, 301 Ill. App. 3d at 977. In determining whether that right was so honored, courts should consider whether (1) the interrogator immediately halted the initial interrogation after the defendant invoked his right to remain silent; (2) a significant amount of time elapsed between the interrogations; (3) a fresh set of *Miranda* warnings were given prior to the subsequent interrogation; and (4) the subsequent interrogation addressed a

crime different from that of the first interrogation. *People v. Nielson*, 187 Ill. 2d 271, 287 (1999), citing *Michigan v. Mosley*, 423 U.S. 96, 104-05 (1975).

¶ 37 Here, the defendant's invocation of his right to remain silent was not scrupulously honored. To begin, Detective Cato did not immediately halt the interrogation but rather continued to question the defendant for nearly an hour after he invoked his right to remain silent, ultimately securing the defendant's confession. Moreover, the defendant was not given a fresh set of *Miranda* warnings following his invocation of his right to silence and the questioning after the invocation concerned the same crime. Since the defendant's invocation of his right to remain silent was not scrupulously honored, any statement he made to Detective Cato after that point was inadmissible.

¶ 38 Applying the same test, we must also determine whether the defendant's later statement to ASA Bogdan was inadmissible. We conclude that it was. Following Detective Cato's hour-long interrogation, the defendant remained in the interrogation room. ASA Bogdan arrived and questioned the defendant approximately two-and-a-half hours after Detective Cato's interrogation ended. ASA Bogdan began his questioning by advising the defendant of his *Miranda* rights and ensuring that he understood them. Although arguably satisfying the second and third considerations, the State nevertheless is unable to overcome the fact that Detective Cato failed to acknowledge the defendant's invocation of his right to remain silent and that both interrogations discussed the March 12, 2012 shooting. In short, the defendant's invocation of his right to remain silent was not scrupulously honored. Accordingly, the defendant's statement to ASA Bogdan was also inadmissible.

¶ 39 Despite the fact that available evidence demonstrates that the defendant's confession occurred after officers ignored his invocation of the right to remain silent, his trial counsel failed to introduce this evidence during the suppression hearing. There cannot be any valid trial strategy for defense counsel's failure to introduce this evidence. We therefore conclude that counsel's representation fell below an objective standard of reasonableness.

¶ 40 However, in order to successfully state a claim of ineffective assistance of counsel, the defendant must also show that there is a reasonable probability that the outcome of his trial would have been different had his statements been suppressed. To satisfy this requirement, the defendant need not show that he would have been acquitted, only that a different outcome would be reasonable. See *People v. Goods*, 2016 IL App (1st) 140511, ¶ 46. In other words, the defendant must show that "a verdict of not guilty would be reasonable." *People v. McCarter*, 385 Ill. App. 3d 919, 935 (2008). We conclude that the defendant has met that burden.

¶ 41 Our supreme court has noted, in a different context, that "[c]onfessions carry extreme probative weight, and therefore the admission of an unlawfully obtained confession rarely is harmless error." (Internal quotations omitted.) *People v. St. Pierre*, 122 Ill. 2d 95, 114 (1988). Indeed, the prosecutor stated in rebuttal that "[t]he most damning evidence in this case comes from the mouth of [the defendant]." That said, even without the defendant's confession, there is evidence sufficient to support the defendant's convictions, namely: Aguilar identified the defendant as the shooter; the defendant's fingerprints were on the passenger side of the pickup truck, which Gallardo and Reynaldo identified was the one used by the perpetrators; Officer Gonzalez testified that, as the suspect wearing a white t-shirt and blue shorts fled, he threw a gun, which was later recovered and connected to the shooting; and Officer Salcedo testified that

the defendant was wearing a white shirt and blue shorts when he was arrested. However, the evidence also established that Gallardo, who was standing next to Aguilar on the porch, could not identify the defendant shortly after the shooting took place; the defendant tested negative for gunshot residue; the pickup truck tested negative for gunshot residue; and no forensic evidence connected the defendant to either the gun or the recovered clothing that tested positive for gunshot residue. After reviewing the totality of the evidence, we conclude that “a verdict of not guilty would be reasonable.” *McCarter*, 385 Ill. App. 3d at 935.

¶ 42 As mentioned, the State presented sufficient evidence during the defendant’s trial to support his convictions; as such, there is no issue with regard to double jeopardy. *People v. McKown*, 236 Ill. 2d 278, 311 (2010) (“If the evidence presented at the first trial, including the improperly admitted evidence, would have been sufficient for any rational trier of fact to find the essential elements of the crime proven beyond a reasonable doubt, retrial is the proper remedy.”). Accordingly, we reverse the defendant’s convictions and remand for a new trial.

¶ 43 Having determined that the defendant received ineffective assistance of counsel, we need not address the defendant’s remaining contentions that his sentence is unconstitutional and his sentencing order should be modified. We note, however, that our supreme court has recently determined that a prison term of greater than 40 years for a juvenile, such as the one at issue here, is a *de facto* life sentence and that a circuit court must consider the defendant’s youth and attendant characteristics before imposing such a sentence. *People v. Buffer*, 2019 IL 122327, ¶ 42.

¶ 44 For the following reasons, we reverse the defendant’s convictions and remand to the circuit court for a new trial.

No. 1-15-3627

¶ 45 Reversed and remanded for a new trial.