2019 IL App (1st) 161224-U
No. 1-16-1224

SECOND DIVISION
July 16, 2019

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 15 CR 9961
	)	
LAWRENCE CRAVENS,	)	
	)	The Honorable
Defendant-Appellant.	)	Thomas M. Davy,
	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Lavin and Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction for possession of methamphetamine affirmed where the State did not commit a discovery violation and where he received effective assistance of trial counsel. Defendant's court-appointed counsel reimbursement fee vacated where it was imposed absent compliance with statutory requirements.

¶ 2 Following a bench trial, defendant Lawrence Cravens was convicted of possession of methamphetamine and sentenced to 2 years' probation. On appeal, defendant seeks reversal of his conviction arguing that the State committed a discovery violation in contravention of Illinois Supreme Court Rule 412 (eff. March 1, 2001), depriving him of his right to a fair trial. He also

argues that his trial attorney was ineffective and that the trial court erred in imposing a court-appointed counsel reimbursement fee without holding a hearing to ascertain his financial circumstances in accordance with section 113-3.1 of the Code of Criminal Procedure of 1963 (Code or Code of Criminal Procedure) (725 ILCS 5/113-3.1 (West 2014)). For the reasons explained herein, we affirm defendant's conviction and vacate the court-appointed counsel fee.

¶ 3 BACKGROUND

¶ 4 On May 22, 2015, Chicago police officers effectuated a traffic stop on the vehicle containing three male occupants. During the course of the stop, defendant, the driver of the vehicle, was unable to produce a valid driver's license. As a result, defendant was placed in custody and the officers conducted a search of his person and the vehicle. During the search of the vehicle, the officers recovered a small tin box containing several baggies of methamphetamine from a backpack located in the backseat. Defendant was subsequently charged with possession of methamphetamine (720 ILCS 646/60(b)(1) (West 2014)).

¶ 5 Defendant ultimately elected to waive his right to a jury trial, and instead chose to proceed by way of a bench trial.

¶ 6 At trial, Officer Matthew Coffey testified that he encountered defendant at approximately 10:10 p.m. on May 22, 2015. He explained that he and his partner, Officer Stoyak, were on routine patrol when he observed a vehicle that was illegally parked in the vicinity of 8345 South Essex Avenue, blocking traffic and a crosswalk. After curbing the vehicle, Officer Coffey approached the driver's side of the vehicle and his partner approached the passenger side of the car. The vehicle contained three occupants. Defendant was the driver of the vehicle. The two other occupants were seated in the front passenger seat and the rear passenger-side seat, respectively. When asked to produce a driver's license and proof of insurance, defendant was

unable to do so and admitted that his license had been suspended. Officer Coffey conducted a Law Enforcement Agencies Data System (LEADS) inquiry and confirmed that defendant's license had been suspended. As a result, he placed defendant into custody for driving on a suspended license and performed a custodial search of his person.

¶ 7 During that search, Officer Coffey recovered a "burnt metal pipe" from defendant's front right pocket. Based on his experiences as a police officer, he believed the pipe was an item used to smoke narcotics. Thereafter, Officer Coffey began to perform an inventory search of the vehicle. During the search, he "had a conversation with [defendant] regarding a backpack" that was located in the backseat of the vehicle and defendant relayed that the backpack was "his property." Officer Coffey then removed the backpack from the vehicle and performed a search of its contents. Inside of the bag, he recovered "a green tin containing multiple baggies" of a "clear rock-like substance" that he suspected was methamphetamine. He also recovered a "clear bag containing 22 pills of suspect ecstasy." The backpack also contained several pieces of mail with "defendant's name on it." In addition to the drugs found in the backpack, two additional pills were "recovered from the vicinity of the front passenger seat." After recovering the aforementioned items, Officer Coffey transported defendant to the Fourth District police station.

¶ 8 At the station, at approximately 11:30 p.m., Officer Coffey advised defendant of his *Miranda* rights. Defendant acknowledged his understanding of those rights. Defendant then acknowledged that the rock-like substance found within the green tin located inside of his backpack was methamphetamine. The conversation took place in the station's processing room. Officer Pudowski was also present for this conversation.

¶ 9 On cross-examination, Officer Coffey clarified that the backpack was situated in the backseat of the vehicle directly behind the driver's seat. The passenger who had been sitting in

the rear of the vehicle had been situated in the rear passenger-side seat. Officer Coffey admitted that he considered defendant's statement that the backpack was "his" to be an admission of ownership of the bag. Although he completed both an arrest and incident report following defendant's arrest, Officer Coffey acknowledged that he did not include defendant's possessory statement about the backpack in either report. Officer Coffey also acknowledge that he did not inventory the backpack or any of the mail "belonging to" defendant that he discovered in the backpack. Indeed, he did not inventory anything in the backpack that bore defendant's name. In addition, he did not mention the mail in any of the reports he completed about the incident.

¶ 10 On redirect examination, Officer Coffey explained that police reports contain summaries of the events that transpired. Although he did not include defendant's statement indicating ownership of the backpack in his reports, he did describe the bag as the "defendant's backpack."[1] Officer Coffey described the backpack as the "defendant's backpack" because defendant had relayed that the backpack belonged to him. He emphasized that he remembered the circumstances of defendant's arrest.

¶ 11 Following Officer Coffey's testimony, the State presented the stipulated testimony of Monica Kinslow, a forensic chemist employed by the Illinois State Police Crime Lab. Pursuant to the stipulation, Kinslow would testify that she received the 22 pink tablets that had been recovered from the backpack, conducted testing on one of those tablets, and found that it did not test positive for a scheduled substance. Kinslow would further testify that she also received five "bags of packages" and that she conducted testing accepted in the field of forensic chemistry for ascertaining the presence of a controlled substance on three of the five packages. Those three

[1] The reports actually contain the phrase "offender's backpack."

packages "were positive for 1.2 grams of methamphetamine." Kinslow did not conduct testing on the two remaining packages, which contained "residue having a gross weight of .2 grams."

¶ 12 After presenting the aforementioned stipulation, the State rested its case. Defense counsel moved for a directed finding, arguing that the State failed to present "enough evidence" to prove that defendant possessed the backpack in which the methamphetamine was recovered. After recounting the evidence that had been presented, the trial court ultimately denied the motion.

¶ 13 Thereafter, defense counsel recalled Officer Coffey to testify. Officer Coffey admitted that he never saw defendant handle the backpack at issue on the night of May 22, 2015. The backpack was already situated in the backseat of the vehicle when he effectuated the traffic stop. He also had no knowledge as to who placed the backpack in the vehicle. Although defendant was the driver of the vehicle at the time of the traffic stop, the registered owner of the car was Tamara Steele. Officer Coffey confirmed that defendant made a statement claiming ownership of the backpack following his arrest at the scene of the traffic stop; however, he was unable to recall the "specific words" that defendant used to claim ownership of the bag. Moreover, he did not include any specific words in the reports that he completed about the incident. Officer Coffey also admitted that defendant's post-*Miranda* statement at the police station was not memorialized in writing.

¶ 14 Following Officer Coffey's testimony, defendant elected not to testify and defense counsel rested without calling any additional witnesses. Thereafter, the parties delivered closing arguments. After considering the evidence presented and the arguments of the parties, the court found defendant guilty of possession of methamphetamine. Defendant's posttrial motion was denied, and at the sentencing hearing that followed, the circuit court sentenced defendant to 2

years' probation. The court also imposed a number of fines, fees, and costs, and entered an order requiring defendant to pay $200 as reimbursement to Cook County for the services provided by his court-appointed public defender. This appeal followed.

¶ 15 ANALYSIS

¶ 16 Discovery Violation

¶ 17 On appeal, defendant seeks reversal of his conviction, arguing that the State committed a discovery violation when it failed to disclose that Officer Coffey discovered several pieces of mail belonging to him in the backpack in which the methamphetamine was recovered. He argues that the State's failure to relay that information prior to trial violated the rules of discovery and prejudiced him, warranting a reversal of his conviction and remand for a new trial.[2]

¶ 18 The State denies that any discovery violation occurred, noting that Officer Coffey disclosed at a preliminary hearing that several items inside of the backpack at issue bore defendant's name and that the transcripts of the hearing were provided to defense counsel prior to trial. Alternatively, the State argues that if a discovery violation occurred, the violation was harmless because defendant suffered no prejudice.

¶ 19 As a threshold matter, we note that defendant never raised a discovery violation objection at trial. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (recognizing that to properly preserve an issue for appeal, a defendant must object to the purported error at trial and specify the error in a posttrial motion and that his failure to satisfy both requirements results in forfeiture of appellate review of his claim). In an effort to avoid forfeiture, however, defendant invokes the

[2] In his amended appellate brief, defendant also argued that the State committed another discovery violation when it failed to disclose that he had made a custodial statement to Officer Coffey in which he claimed ownership of the backpack that contained the methamphetamine that was the subject of his trial. In his reply brief, however, withdrew his argument with respect to that issue, recognizing that Officer Coffey had relayed defendant's custodial statement during the earlier preliminary hearing on the matter and that his attorney had been provided the transcripts of the hearing prior to trial.

plain error doctrine, which provides a limited exception to the forfeiture rule and allows for review of forfeited issues on appeal if the evidence is closely balanced or the error is of such a serious magnitude that it affected the integrity of the judicial process and deprived the defendant of his right to a fair trial. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *People v. Belknap*, 2014 IL 117094, ¶ 48; *People v. Sargent*, 239 Ill. 2d 166, 189 (2010); *People v. Piatkowski*, 225 Ill. 2d 551, 564-65 (2007). The first step in any plain error analysis is to determine whether any error actually occurred. *Piatkowski*, 225 Ill. 2d at 565; *People v. Rinehart*, 2012 IL 111719, ¶ 15. If an error is discovered, the defendant then bears the burden of persuasion to show that the error prejudiced him. *Sargent*, 239 Ill. 2d at 189-90. Keeping this standard in mind, we turn now to evaluate the merit of defendant's claim.

¶ 20 Rule 412 governs the State's discovery disclosure obligations to criminal defendants, and provides, in pertinent part, as follows:

> "Rule 412: Disclosure to Accused
>
> (a) Except as is otherwise provided in these rules as to matters not subject to disclosure and protective orders, the State shall, upon written motion of defense counsel, disclose to defense counsel the following material and information within its possession or control:
>
> ***
>
> (v) any books, papers, documents, photographs or tangible objects which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the accused." Ill. S. Ct. R. 412(a) (eff. March 1, 2001).

¶ 21 The purpose of the disclosure obligations outlined in Rule 412 is to " 'protect the accused against surprise, unfairness, and inadequate preparation' " (*People v. Hood*, 213 Ill. 2d 244, 258 (2004) (quoting *People v. Heard*, 187 Ill. 2d 36, 63 (1999)) and to provide the defendant with an

opportunity to investigate the circumstances from which the evidence arose (*People v. Cunningham*, 332 Ill. App. 3d 233, 249 (2002)). "The duty of the State to disclose under Rule 412 is a continuing one, requiring prompt notification to the defendant of the discovery of any additional material or information, up to and during trial." *People v. Hendricks*, 325 Ill. App. 3d 1097, 1103 (2001) (citing Ill. S. Ct. R. 415(b) (eff. Oct. 1, 1971)). Although compliance with the discovery rules is mandatory (*Cunningham*, 332 Ill. App. 3d at 249), noncompliance does not require reversal absent a showing of prejudice (*Hendricks*, 325 Ill. App. 3d at 1103; *People v. Woods*, 2011 IL App (1st) 091959, ¶ 26). Ultimately, it is the burden of the defendant to establish that he was prejudiced by a discovery violation. *Hood*, 213 Ill. 2d at 258.

¶ 22 In this case, Officer Coffey testified at trial that he discovered several pieces of mail belonging to defendant in the backpack in which the methamphetamine was recovered. In response to defendant's pretrial discovery request to identify the witnesses the State intended to call and "any books, papers, documents, photographs and tangible objects which the prosecution intend[ed] to use," the State referred defendant to the "police reports, transcripts, medical reports, and other documents attached to and incorporated as part of this answer." Among the documents tendered defense counsel in response to defendant's discovery request, was the transcript of defendant's preliminary hearing. During the preliminary hearing to ascertain whether there was probable cause to support the charge against defendant, Officer Coffey testified he found "*multiple items* with [defendant's] name in the backpack." (Emphasis added.) When defense counsel cross-examined Officer Coffey about the backpack and its contents, he acknowledged that he inventoried neither the backpack nor "the items with [defendant's] name on them." Officer Coffey was never asked to provide further detail about those items at the preliminary hearing.

¶ 23 Although the attorney appointed to represent defendant at trial was different from the public defender who initially represented defendant at the preliminary hearing, defendant's trial attorney, acknowledged in open court, her "receipt of a discovery packet as well as the Preliminary Hearing transcript that was tendered to [her]." Counsel further acknowledged that she had "had an opportunity to go over [those documents] with [defendant]." Defense counsel thus knew prior to trial that Officer Coffey discovered, but failed to inventory, physical items bearing defendant's name that he found in the backpack.

¶ 24 Based on these facts, we find no discovery violation. Although the State's discovery response did not specifically reveal its intent to introduce evidence that the backpack contained mail belonging to defendant, he and his attorney were nonetheless apprised that Officer Coffey recovered physical "items" bearing defendant's name from the bag. Based on Officer Coffey's preliminary hearing testimony, defendant and his attorney were also aware that neither the backpack nor the physical items with defendant's name were inventoried. It is evident from the trial transcript that Officer Coffey's failure to inventory those items formed the basis of defense counsel's trial strategy, as counsel repeatedly questioned Officer Coffey about his inventory omissions and emphasized them in her closing argument. Moreover, we note that defense counsel never sought to have the "items" mentioned in preliminary hearing particularized and the State was under no obligation to explain the significance of those items. *People v. Anthony*, 38 Ill. App. 3d 190, 197 (1976) (noting that the committee comments accompanying Rule 412 "delimit[] the extent of [the State's] responsibility to notifying defense counsel, only in general terms, as to the existence and availability of the material and information. The State *** need not point out the significance of various items"). Under these circumstances, we find that the underlying purpose of the discovery rule was satisfied. See, *e.g.*, *People v. Britt*, 22 Ill. App. 3d

695, 700-701 (1974) (State did not commit a discovery violation even though it did not specifically reveal that it was intending to introduce checks at the defendant's trial where its answer to the defendant's discovery request included "miscellaneous papers" and where "the defense made no effort to have the items particularized" because the underlying purpose of the discovery rule was satisfied); *People v. Houck*, 13 Ill. App. 3d 684, 687 (1974) (there was no error in admitting defendant's jacket into evidence at trial even though the State did not specifically list it in its answer to defendant's discovery request because the State's answer did evidence its intent to introduce "materials" into evidence and the purpose of the discovery rule was thus honored). As such, we reject defendant's argument that he was prejudiced by the State's discovery response; rather, we conclude that the State's disclosure met its discovery obligation in this case. Having found no error, there can be no plain error. *People v. Sims*, 192 Ill. 2d 592, 628 (2000).

¶ 25 Ineffective Assistance of Counsel

¶ 26 Defendant next argues that he was deprived of his right to effective assistance of counsel when his trial attorney failed to file motions to preclude the State from introducing into evidence Officer Coffey's testimony about the mail as well as his pretrial statements.

¶ 27 The State responds that defendant's ineffective of assistance of counsel claim lacks merit because any motions challenging Officer Coffey's disputed testimony would not have been granted.

¶ 28 It is well-established that every criminal defendant has a constitutional right to receive effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I § 8; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674, 691-92 (1984). The right to effective assistance of counsel entails "reasonable, not perfect,

representation." *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 79. To prevail on a claim of ineffective assistance of trial counsel, the defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984) and establish that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced defendant. *People v. Albanese*, 104 Ill. 2d 504, 525 (1984); *People v. Baines*, 399 Ill. App. 3d 881, 887 (2010). With respect to the first prong, the defendant must overcome the "strong presumption" that counsel's action or inaction was the result of sound trial strategy. *People v. Jackson*, 205 Ill. 2d 257, 259 (2001); *People v. Shelton*, 401 Ill. App. 3d 564, 584 (2010). " 'In recognition of the variety of factors that go into any determination of trial strategy, * * * claims of ineffective assistance of counsel must be judged on a circumstance-specific basis, viewed not in hindsight, but from the time of counsel's conduct, and with great deference accorded counsel's decisions on review.' " *Wilborn*, 2011 IL App (1st) 092802, ¶ 79 (quoting *People v. Fuller*, 205 Ill. 2d 308, 330-31 (2002)); see also *People v. Mitchell*, 105 Ill. 2d 1, 15 (1984) ("The issue of incompetency of counsel is always to be determined by the totality of counsel's conduct.") To satisfy the second prong, the defendant must establish that but for counsel's unprofessional errors, there is a reasonable probability that the trial court proceeding would have been different. *People v. Peeples*, 205 Ill. 2d 480, 513 (2002). A defendant must satisfy both the performance and prejudice prongs of the *Strickland* test to prevail on an ineffective assistance of counsel claim. *People v. Evans*, 209 Ill. 2d 194, 220 (2004); *People v. McCarter*, 385 Ill. App. 3d 919, 935 (2008).

¶ 29 Defendant first suggests that his attorney was ineffective for failing to file a motion *in limine* to bar Officer Coffey from testifying about the mail he found in the backpack as a sanction for the State's discovery violation. Given our conclusion that the State did not violate

its discovery obligations, we necessarily reject defendant's contention that his attorney was ineffective for failing to file a motion on those grounds. Defendant nonetheless suggests that his attorney was also ineffective for failing to challenge Officer Coffey's testimony about the mail on best evidence grounds. Although defendant invokes the best evidence rule, he simply provides boilerplate citations to two cases[3] reciting the rule and engages in no analysis concerning the application of the rule to the case at bar. We note that " '[a] reviewing court is entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented [citation], and it is not a repository into which an appellant may foist the burden of argument and research [citation]; it is neither the function nor the obligation of this court to act as an advocate or search the record for error.' " *People v. Williams*, 385 Ill. App. 3d 359, 368 (1008) (quoting *Obert v. Saville*, 253 Ill. App. 3d 677, 682 (1993)). Notwithstanding defendant's shortcomings in developing his argument, we do not find that his attorney was ineffective for failing to object to Officer Coffey's testimony on best evidence grounds because the motion would not have been granted. See *People v. Wilson*, 164 Ill. 2d 436, 454 (1994) ("As a general rule, trial counsel's failure to file a motion does not establish incompetent representation, especially when that motion would be futile").

¶ 30 "The best evidence rule states a preference for the production of the original or documentary evidence when the contents of the documentary evidence are sought to be proved." *People v. Tharpe-Williams*, 286 Ill. App. 3d 605, 610 (1997); see also Ill. R. Evid. 1002 (eff. Jan. 1, 2011) ("To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute").

[3] We note that *People v. Vassar*, 331 Ill. App. 3d 675 (2002), one of the two cases defendant cites to in his amended appellate brief to support his best evidence argument is cited incorrectly. Although defendant does correctly identify the page of the case in which the best evidence rule is discussed in the case (pinpoint cite), he incorrectly identifies the first page of the case in both the body of his brief as well as in the points and authorities section of his brief. Specifically, he misidentifies the first page of the case as 375 instead of 675.

" 'The best evidence rule applies only when the contents or terms of a writing are in issue and must be established.' " *People v. Davis*, 2014 IL App (4th) 121040, ¶ 20 (quoting *People v. Pelc*, 177 Ill. App. 3d 737, 742 (1988)). The rule, however, "does not apply where a party seeks to prove a fact that has an existence independent of the documentary evidence, even though the fact might have been reduced to, or is evidenced by, the documentary evidence." *Tharpe-Williams*, 286 Ill. App. 3d at 610.

¶ 31 In this case, the *contents* of the mail were not at issue. Rather, defendant's possession of the backpack and the methamphetamine contained therein was at issue. Officer Coffey's testimony about the *existence* of the mail rather than its contents, in turn, served to provide circumstantial evidence of defendant's ownership of bag and the methamphetamine. Although it would have been better practice for Officer Coffey to inventory the backpack and all of its contents, including the mail, we nonetheless find that the best evidence rule did not apply to his testimony about the existence of the mail. Because the best evidence rule did not apply, counsel failure to challenge Officer Coffey's testimony on best evidence grounds was not unreasonable. See, *e.g.*, *People v. Davis*, 2014 IL App (4th) 121040, ¶ 20 (defense counsel was not ineffective for failing to object to the testimony provided by a State's witness about one of the defendant's text messages on best evidence grounds because the State was not seeking to prove the content or terms of the text message but was simply using the existence of the message and the time that the message was sent as evidence of the defendant's intent to sell drugs, and as such, the best evidence rule did not apply).

¶ 32 Defendant next suggests that his attorney was ineffective for failing to file motions to suppress his statements. He argues that the first statement that he made at the scene of the traffic stop in which he admitted to ownership of the backpack occurred while he was in custody absent

Miranda admonishments, and as such, should have been suppressed. Although his second statement, in which he admitted that the tin recovered from the backpack contained methamphetamine, was made after he received his *Miranda* admonishments at the police station, defendant argues that the second statement was not sufficiently attenuated from the first unlawfully obtained statement, and as such, should have been suppressed pursuant to the Supreme Court's ruling in *Missouri v. Siebert*, 542 U.S. 600 (2004).

¶ 33 Generally, the decision whether or not to file a motion to suppress is regarded as a matter of trial strategy, and is thus generally immune from ineffective assistance of counsel claims. *People v. Martinez*, 348 Ill. App. 3d 521, 537 (2004). That is because the issue of "[w]hether or not a motion to suppress should be filed in a criminal case is a matter of trial tactics and has little bearing on competency of counsel." *People v. Peterson*, 248 Ill. App. 3d 28, 38 (1993). To prevail on such a claim, a defendant must establish that there was a reasonable probability that a motion to suppress would have been granted and that the outcome of the trial would have been different had the evidence been suppressed. *People v. Givens*, 237 Ill. 2d 311, 331 (2010); *People v. Ayala*, 386 Ill. App. 3d 912, 917 (2008). If, however, filing such a motion would have been futile, then counsel's failure to file the motion, or decision to withdraw the motion, does not amount to ineffective assistance. *Givens*, 237 Ill. 2d at 331.

¶ 34 The fifth amendment of our federal constitution protects against involuntary self-incrimination (*People v. Lopez*, 229 Ill. 2d 322, 355 (2008)) and in its seminal ruling *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court, in an effort to reduce the risk of coerced confessions and preserve the right against involuntary self-incrimination, held:

> "[W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against

> self-incrimination is jeopardized. * * * He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney[,] one will be appointed for him prior to any questioning if he so desires." *Id.* at 478-79.

¶ 35 As a general rule, the failure to give the prescribed warnings and obtain a defendant's knowing waiver of those rights when the defendant is subjected to a custodial interrogation usually requires exclusion of any custodial statements; "however, the rule is not without exception." *People v. Lopez*, 229 Ill. 2d 322, 356 (2008). In *Oregon v. Elstad*, 470 U.S. 298 (1985), the Supreme Court recognized that suppression of all statements following a *Miranda* violation is not always necessary. In *Elstad*, police executed an arrest warrant for the defendant at his home. While one officer was explaining the arrest to the defendant's mother, another officer asked the defendant questions in another room of the house without admonishing him of his *Miranda* rights. The defendant made an incriminating statement in response to the questioning. After being transported to the police station, the defendant was admonished in accordance with *Miranda*, waived his rights, and provided another statement. At trial, the defendant's pre-warning statement was suppressed, but his post-warning statement was admitted. The Supreme Court found no error in admitting the post-warning statement. In doing so, the Court noted the difference between statements that are coerced and confessions that are freely given in response to unwarned, but noncoercive questioning and concluded:

> "[A]bsent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has

> given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights." *Elstad*, 470 U.S. at 314.

¶ 36 The Court revisited *Elstad* in *Siebert*. In *Siebert*, the defendant was arrested for murder and interrogated by police, who did not admonish her in accordance with *Miranda*. After making an incriminating statement, the police administered the admonishments, obtained a written waiver of the defendant's rights, confronted the defendant with her pre-warning statement, and obtained another confession. At the suppression hearing in the lower court, the investigating officer admitted that he had deliberately withheld *Miranda* warnings and employed an ask-first, admonish-later interrogation technique. A plurality of the Supreme Court condemned this approach and concluded that the defendant's post-warning statement should have been suppressed. In doing so, the court distinguished *Elstad* in which there had been a "good faith *Miranda* mistake" versus the questioning that the defendant had been subjected to, which had been "systemic, exhaustive, and managed with psychological skill." *Siebert*, 542 U.S. 615-16. The plurality then created a new test to determine whether the *Miranda* warnings administered after questioning commenced was effective enough to protect a defendant's rights against involuntary self-incrimination. The new test called for consideration of "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." *Id*. at 615. Applying that test, the plurality concluded that the defendant's post-warning statement was inadmissible since it was obtained

through a police strategy intentionally designed to undercut and circumvent *Miranda*. *Id.* at 616-17.

¶ 37 Justice Kennedy wrote a concurring opinion, advocating use of a "narrower test [to determine the admissibility of post-warning statements] applicable only in the infrequent case * * * in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning." *Siebert*, 542 U.S. at 622 (Kennedy, J., concurring). He explained:

> "The admissibility of postwarning statements should continue to governed by the principles of *Elstad* unless the deliberate two-step strategy was employed. If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made. Curative measures should be designed to ensure that a reasonable person in the suspects's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver." *Siebert*, 542 U.S. at 622 (Kennedy, J., concurring).

¶ 38 Given the lack of a majority opinion in *Siebert*, the Illinois Supreme Court, in *People v. Lopez*, 229 Ill. 2d 322 (2008), adopted the position set forth in Justice Kennedy's concurrence to determine the admissibility of a defendant's post-*Miranda* statement following an initial *Miranda* violation because it "resolve[d] the case on the narrowest grounds and [wa]s therefore controlling authority." *Id.* at 360. In applying Justice Kennedy's concurrence, the court instructed that a reviewing court

> "must first determine whether the detectives deliberately used a question first, warn later technique when interrogating defendant. If there is no evidence to support a finding of deliberateness on the part of the detectives, [the] *Siebert* analysis ends. If there is

> evidence to support a finding of deliberateness, then [the reviewing court] must consider whether curative measures were taken, such as a substantial break in time and circumstances between the statements, such that the defendant would be able 'to distinguish the two contexts and appreciate that the interrogation has taken a new turn.' " *Id*. at 360-61, quoting *Siebert*, 542 U.S. at 622, (Kennedy, J., concurring).

¶ 39 Recognizing that police officers often refuse to admit on the record that they employed an ask-first, warn-later interrogation technique, the court set forth objective factors to be considered in determining whether such a technique was utilized, including: the timing, setting and completeness of the pre-warning interrogation; the continuity of police personnel; and the overlapping content of the defendant's warned and unwarned statements. *Id*. at 362. Keeping these principles in mind, we turn to evaluate the two statements at issue.

¶ 40 As to the first statement, we note that the record contains little evidence pertaining to the circumstances that led to defendant's pre-*Miranda* admission that he was the owner of the backpack that Officer Coffey found in the backseat of the vehicle. When called as a witness in the State's case-in-chief, Officer Coffey testified that after his LEADS search confirmed that defendant had been driving on a suspended license, he handcuffed defendant, conducted a search of defendant's person, as well as an inventory search of the vehicle. During his search of the vehicle, he "had a conversation with [defendant, who was standing next to the car,] regarding a backpack that was sitting in the vehicle which [defendant] related to [him] was his property." When he was called as a defense witness, Officer Coffey simply stated that defendant "claimed ownership of the backpack on scene."[4] Officer Coffey never testified that he initiated the

[4] Officer Coffey's preliminary hearing testimony provides no further detail about the circumstances pursuant to which defendant's statement was made. He simply testified that he recovered a "tin containing multiple baggies containing a rock-like substance, suspect methamphetamine from [defendant's] backpack." When asked how he knew it was defendant's backpack, Officer Coffey explained that defendant "related to me that it was his."

"conversation" with defendant at the scene or that he questioned defendant at all about the backpack or any other matter after he placed defendant into custody. Indeed, although he used the word "conversation," Officer Coffey never identified any words he spoke to defendant before or after defendant's claim of ownership of the backpack. Given the sparse record it is possible that defendant volunteered a spontaneous statement of ownership when he saw Officer Coffey observe the backpack during the vehicle search, in which case the lack of *Miranda* warnings would not require suppression of the statement. See *People v. Pawlicke*, 62 Ill. App. 3d 791, 796 (1978) (recognizing that "[v]olunteered or spontaneous statements, as opposed to admissions elicited by custodial interrogation are 'expressly excepted' from the requirements of *Miranda*. [Citations]. Thus, a volunteered statement is admissible even if preceded by inadequate *Miranda* warning or even without *Miranda* warnings"). Ultimately, given the lack of evidence contained in the record before us that defendant's statement of ownership of the backpack was a procured during a custodial *interrogation* or its "functional equivalent" (*Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980)), such that the lack of *Miranda* warnings would have required suppression of the statement, we are unable to conclude that counsel's failure to file a motion to suppress the statement was unreasonable or that such a motion would have been granted.

¶ 41 Moreover, even if defendant's first statement was obtained in contravention of *Miranda*'s mandate, our review of the aforementioned precedent does not support his argument that suppression of his second statement was required. Notably, there is no evidence that the officers in this case deliberately employed an improper two-step interrogation technique and purposefully subjected defendant to a pre-warning custodial interrogation in an effort to circumvent the requirements of *Miranda.* As explained above, there is no evidence that Officer Coffey posed

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Thereafter, when asked when defendant made the statement, Officer Coffey simply testified that defendant made the statement "on scene."

any questions to defendant about the backpack at the scene of the traffic stop after defendant was in custody. Thus, we are unable to conclude that defendant was subjected to pre-warning questioning that was "systematic, exhaustive, and managed with psychological skill," that was designed to force him into making a statement that the law enforcement officials would use against him after administering *Miranda* warnings. *Siebert*, 542 U.S. at 616. In addition, we note that the second statement occurred at a different time and place from the first statement. Based on the record, defendant's pre-warning statement was made sometime shortly after 10:10 p.m. at the scene of the traffic stop whereas his post-warning statement occurred at approximately 11:30 p.m. at the Fourth District police station's processing room. Although Officer Coffey was one of the two officers who spoke to defendant at the police station after he was advised of his *Miranda* rights, there is nothing in the record to show that this was an intentional tactic used to induce a confession. Moreover, we note that defendant's second statement was not identical to his first statement. In his second statement, he did not make an express statement of ownership of the backpack; rather, in his second statement, he simply acknowledged that the rock-like substance contained in the green tin that Officer Coffey recovered from the backpack was methamphetamine. Thus, viewing the objective evidence in totality, we are unable to conclude that the officers deliberately employed an ask-first, warn-later interrogation technique.

¶ 42 As such, *Elstad*, not *Siebert*, governs the admissibility of defendant's post-warning statement, and the statement will be admissible so long as it was voluntarily made. *Lopez*, 229 Ill. 2d. at 360. Among the factors to consider when evaluating the voluntariness of a statement are the defendant's age, education, intelligence, experience with the criminal justice system, the length of detention and interrogations, whether the defendant was advised of his constitutional

rights, and whether he was mistreated or abused. *People v. Williams*, 230 Ill. App. 3d 761, 776 (1992). The record reveals that at the time of his arrest, defendant was 30-year-old male who had obtained his GED and was employed as a painter. The record further reveals that defendant had a previous criminal history of drug charges. There is no evidence that the second statement, which was made after receiving *Miranda* admonishments, was obtained following prolonged questioning or abusive police tactics. Indeed, the record does not contain any evidence that suggests that defendant's second statement was involuntary. Given that the statement was voluntarily made, defendant's claim that his attorney was ineffective for failing to file a motion to suppress his second statement is without merit.

¶ 43 Court-Appointed Counsel Fee

¶ 44 Next, defendant argues that the circuit court erred when it imposed a $200 court-appointed public defender reimbursement fee in accordance with section 113-3.1 of the Code of Criminal Procedure (725 ILCS 5/113-3.1(a) (West 2014)) without first conducting a hearing on his ability to pay as required by the statute. The State concedes that the fee was imposed absent a hearing and does "not object to defendant's request" to vacate the order requiring him to pay the $200 fee.

¶ 45 Section 113-3.1 of the Code of Criminal Procedure sets forth the circumstances pursuant to which a defendant who benefits from the legal services of a court-appointed attorney may be ordered to pay a reasonable sum to reimburse the county or the State for those services. 725 ILCS 5/113-3.1 (West 2014). That provision provides, in pertinent part, as follows:

"§ 113-3.1. Payment for Court-Appointed Counsel.

(a) Whenever under either Section 113-3 of this Code or Rule 607 of the Illinois Supreme Court the court appoints counsel to represent a defendant, the court may

> order the defendant to pay to the Clerk of the Circuit Court a reasonable sum to reimburse either the county or the State for such representation. In a hearing to determine the amount of the payment, the court shall consider the affidavit prepared by the defendant under Section 113-3 of this Code and any other information pertaining to the defendant's financial circumstances which may be submitted by the parties. Such hearing shall be conducted on the court's own motion or on motion of the State's Attorney at any time after the appointment of counsel but no later than 90 days after the entry of a final order disposing of the case at the trial level." 725 ILCS 5/113-3.1(a) (West 2014)).

¶ 46 The procedural safeguards set forth in the statute before a court-appointed counsel fee may be imposed—notice and a hearing on the defendant's ability to pay—are necessary to protect a defendant's due process rights. See *People v. Cook*, 81 Ill. 2d 176, 186 (1980) ("A summary decision which orders reimbursement without affording a hearing with opportunity to present evidence and be heard acts to violate an indigent defendant's right to procedural due process"). Compliance with the statute's procedural safeguards is "a prerequisite to impos[e] a public defender fee." *People v. Gutierrez*, 2012 IL 111590, ¶ 18.

¶ 47 Here, toward the end of defendant's sentencing hearing, the following exchange took place:

> "[State]: Judge, there is a bond posted.
>
> [THE COURT]: Right. I'll allow the State's motion for reimbursement of bond in the amount of $200."

¶ 48 Thereafter, the court signed a prewritten form order captioned "Order for Payment of Court-Appointed Counsel," in which it filled in the blank to indicate defendant was required to

pay $200 "as reimbursement to Cook County for the services of the Public Defender as court-appointed counsel." Although the form order contains language indicating that defendant had "received notice of the motion" and that the court had conducted a "hearing *** in accordance with section 113-3.1 of the Code," the record shows that the court conducted no inquiry into defendant's ability to pay a court-appointed counsel fee before entering the order.

¶ 49 With respect to the hearing requirement of the statute, our supreme court has held:

> "To comply with the statute, the court may not simply impose the fee in a perfunctory manner. [Citation.] Rather, the court must give the defendant notice that it is considering imposing the fee, and the defendant must be given the opportunity to present evidence regarding his or her ability to pay and any other relevant circumstances." [Citation.] The hearing must focus on the costs of representation, the defendant's financial circumstances, and the foreseeable ability of the defendant to pay." *People v. Somers*, 2013 IL 114054, ¶ 14.

The record in this case shows that no such hearing was held prior to the court's entry of the court-appointed fee order. Instead, the record simply shows there was a short exchange at the end of defendant's sentencing hearing in which the court referenced the sum of $200 as "reimbursement." Section 113-3.1 of the Code was never referenced and the court did not specify what the $200 reimbursement was for in open court. It is only evident from the form order included in the common law record that the judge was referring to the court-appointed counsel fee. Because the court-appointed counsel fee order was entered absent proper notice and a hearing as required by section 113-3.1, we vacate the order. See, *e.g.*, *People v. Daniels*, 2015 IL App (2d) 130517, ¶ 30 (vacatur of a court-appointed counsel fee rather than remand for a

hearing is the proper remedy when it is evident that the court failed to conduct any hearing on the matter prior to entering the order).

¶ 50 CONCLUSION

¶ 51 The judgment of the circuit court is affirmed in part; vacated in part.

¶ 52 Affirmed in part; vacated in part.