2019 IL App (2d) 170408-U
No. 2-17-0408
Order filed September 12, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MARQUETT E. PENELTON, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Stephenson County. No. 15-CF-118 Honorable Michael P. Bald, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Birkett and Justice Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court committed reversible error in failing to suppress as fruit of the poisonous tree evidence obtained at the police station following improper questioning in the police car. Regarding the unlawful possession with intent to deliver, we vacate the conviction and enter a conviction for possession of cannabis and remand for further proceedings.

¶ 2 Following a jury trial, defendant, Marquette E. Penelton, was found guilty of possession with intent to deliver more than 30 grams but not less than 500 grams of cannabis (720 ILCS 550/5(d) (West 2015)) and sentenced to 30 months' imprisonment. Defendant was also convicted of simple possession of the same amount of cannabis. Defendant seeks reversal and a

new trial, arguing that the trial court should have suppressed incriminatory statements he made at the police station after the police obtained involuntary statements during a custodial police car interrogation. We hold that the evidence should have been suppressed under the fruit of the poisonous tree doctrine. We vacate defendant's conviction and sentence for delivery and enter a conviction for possession of cannabis, more than 30 but less than 500 grams (730 ILCS 550/4(d) (West 2015)), pursuant to our authority under Illinois Supreme Court Rule 615(b)(3)(eff. Aug. 27, 1999).

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged by information with possession and possession with intent to deliver not less than 30 and not more than 500 grams of cannabis (720 ILCS 550/4(d) and 5(d) (West 2015)). After a jury returned a guilty verdict on both charges, the judge merged the possession conviction into possession with intent to deliver, and defendant was sentenced to 30 months' imprisonment.

¶ 5 Before the trial, the trial court heard and ruled on defendant's three pre-trial motions to suppress. The first motion was brought under the fourth amendment and claimed that the police illegally stopped and searched his vehicle, discovering cannabis and other evidence that defendant argued should be suppressed. The trial court denied the motion.

¶ 6 The second and third motions were brought under the fifth amendment. In the second motion, which sought to suppress statements defendant made in a police car at the scene of the traffic stop, defendant asserted that after stopping defendant's vehicle, the police ordered him out, handcuffed him, and put him in the backseat of a police car, where they interrogated and threatened him without warning him of his *Miranda* rights. The trial court granted this motion. The third motion sought to suppress defendant's subsequent statements at the police station. The

trial court denied the motion and allowed the State to introduce the incriminating statements defendant made at the station into evidence at his trial.

¶ 7 The following pertinent evidence was adduced at the suppression hearings and at trial. On May 12, 2015, the Freeport Police Department acted on a Crime Stoppers tip that defendant would be transporting two pounds of cannabis in a van, traveling from Milwaukee and arriving in Freeport before 5:00 p.m. that day. Officer Mathew Anderson, the K-9 handler for the Freeport Police Department, stopped defendant's van in Freeport at 4:30 p.m. There were at least four other officers there, two from the Freeport department and two from the Stephenson County Sheriff's Department. Anderson drove a police marked SUV, had a gun and a badge, and was dressed in a police uniform.

¶ 8 After identifying defendant as the driver, Anderson asked him if the vehicle contained any narcotics. Defendant replied that he had just smoked a blunt, which was lying on the floor. Anderson then conducted a free-air sniff around the van, using his police canine. The dog signaled the presence of narcotics around the passenger-side rear tire. Anderson directed defendant to step out of the vehicle, telling him he was going to be detained based on the positive alert.

¶ 9 Officer Tony Bradbury handcuffed defendant and put him in the backseat of Corporal Zalaznik's squad car. The doors could not be opened from the inside. Bradbury asked defendant if "there was any more [cannabis] in the car?"

¶ 10 There were two other male occupants of the van and a young child. Zalaznik detained and handcuffed the two other men, removing them from the van and seating one on the ground and placing the other in another squad car. According to Anderson, defendant was not arrested until the conclusion of the on-scene investigation, at which time the other men were released.

¶ 11 After defendant was detained, Anderson and Zalaznik searched the van. Between the front seats, Anderson found some loose cannabis and a small piece of a burnt blunt; behind a panel in the rear cargo area on the passenger side, he located a gallon Ziploc baggie containing what appeared to be cannabis.

¶ 12 Anderson then went to the police car in which defendant was seated and asked him through an open window "if there was any more cannabis in the van." Anderson explained that he "didn't want to have to tear every panel off in there and tear the van apart if there wasn't anything else." Anderson repeatedly threatened that he would rip apart the panels of the car because "based on the information [they] had, there was supposed to be more cannabis than what [they] had found in the van at that point, so [they] would be continuing to look for the rest of it."

¶ 13 Anderson also asked defendant how much he paid for the bag of cannabis and where he had gone out of town. He had information defendant was coming from Milwaukee and was trying to see if defendant was being truthful with him. Defendant at first denied knowing about cannabis in the car other than the blunt he was smoking. He later admitted that he had paid $225 for the bag, which included $75 for his share. He also told Anderson that there was no more cannabis in the car.

¶ 14 Both Anderson and Bradbury testified that defendant was restricted in movement and never free to leave at any time during the questioning in the police car. They further stated that they did not read defendant his *Miranda* rights in relation to the questioning in the police car. Their stated reason was the belief that defendant was "detained" in the squad car, not under arrest. After the questioning was over, defendant was arrested for not having a valid driver's license.

¶ 15 At the police station, defendant was taken to the booking room, where Bradbury questioned him. Before Bradbury transported defendant to the station, Anderson had told him that defendant "indicated the cannabis belonged to him." When Bradbury asked defendant where he got the cannabis, he said, "you understand I already know this, and you know that you already know this." Defendant's subsequent confession was recorded.

¶ 16 At trial, the State argued that defendant's statement at the police station proved he was guilty of possession of cannabis with intent to distribute, and defendant's taped confession was played numerous times for the jury.

¶ 17 II. ANALYSIS

¶ 18 In reviewing a trial court's ruling on a motion to suppress evidence, we undertake our "own assessment of the facts in relation to the issues, and we review *de novo* the trial court's ultimate legal ruling as to whether suppression is warranted." (Internal quotation marks omitted.) *People v. Johnson*, 237 Ill. 2d 81, 88-89 (2010); *People v. Dawn*, 2013 IL App (2d) 120025, ¶ 20. We may consider the entire record, including trial testimony. *People v. Alfaro*, 386 Ill. App. 3d 271, 290 (2008), citing *People v. Gilliam*, 172 Ill. 2d 484, 501 (1996). Additionally, we may affirm the trial court on any basis found in the record. *Johnson*, at 89.

¶ 19 Defendant asserts that the statements he made in the police car were involuntary and, therefore, obtained in violation of the fifth amendment. We agree. Preliminarily, however, we address the State's forfeiture argument.

¶ 20 The State contends that defendant forfeited his argument on appeal that the fruit of the poisonous tree doctrine applies because in his motion to suppress his confession in the police car, "he never argued that his statements were involuntarily made," and in moving to suppress his confession at the police station, he never claimed that the second confession was insufficiently

attenuated to remove the taint from the first confession. The record shows that defendant identified the issue of involuntariness in the first suppression motion, stating that "any statements or confessions *** elicited from him was [sic] the direct result of mental coercion, promises, or threats, and was [sic], therefore, involuntary." In his second motion, defendant addressed the legal issue of attenuation. Although the State does not assert this point, we note that both of defendant's pleadings are deficient for failing to supply supporting factual allegations. See 725 ILCS 5/114-11(b) (West 2015) ("The motion shall *** state facts showing wherein the confession is involuntary").

¶ 21 The State, however, did not challenge the defective pleadings in the trial court and acquiesced to the raising of the issues by failing to object. Had the State objected to the defect in the pleadings the trial court could have addressed the issue and the defendant could have attempted to remedy the defect. Therefore, the trial court properly allowed evidence to be elicited on those issues. See, e.g., *People v. Daniels*, 164 Ill. App. 3d 1055, 1078 (1987) ("A [party] may [forfeit] the issue of the improper admission of evidence on appeal by failing to object to it during trial (citation), or by *** acquiescing in the admission of the evidence, even though it is improper"). The issues of voluntariness and attenuation were fully vetted by the parties and addressed at length in the trial court's written ruling on the motion to suppress the confession at the station. Noting that forfeiture is a limitation on the parties, not the court (*People v. Williams*, 188 Ill. 2d 293, 301 (1999)), we choose to consider the issues of voluntariness and attenuation.

¶ 22 The fifth amendment to the United States Constitution (U.S. Const., amend. V) and article I, section 10, of the Illinois Constitution (Ill. Const.1970, art. I, § 10) guarantee that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself." The State

has the obligation to establish, by a preponderance of the evidence, that a statement is voluntary. 725 ILCS 5/114–11(d) (West 2015); *People v. Nicholas*, 218 Ill. 2d 104, 118 (2005). We set out the appropriate analysis in *People v. Dennis*, 373 Ill. App. 3d 30, 45 (2007):

> To determine whether a statement was voluntary, we consider the totality of the circumstances. *Nicholas*, 218 Ill. 2d at 118 ***. Factors to be considered in our determination include the defendant's age, intelligence, education, experience, and physical condition at the time of the interrogation; the duration of the interrogation; whether the defendant received *Miranda* warnings prior to giving the statement; whether physical or mental abuse was employed against the defendant; and the legality and duration of the detention. *Nicholas*, 218 Ill. 2d at 118 ***. Where it appears that the circumstances were such that the defendant's will to remain silent was inappropriately overborne, the statement will be deemed involuntary. See *People v. Stone*, 61 Ill. App. 3d 654, 663 *** (1978) (finding that an involuntary confession requires reversal regardless of other evidence sufficient to support conviction).

¶ 23 We agree with the trial court's finding that defendant was in custody during the interrogation. An interrogation is custodial if the person questioned is "not at liberty to terminate the interrogation and leave." *People v. Jordan*, 2011 IL App (4th) 100629, ¶ 17, quoting *People v. Braggs*, 209 Ill. 2d 492, 506 (2004). Here, defendant was handcuffed and locked in a police car before the questioning began; he was obviously not at liberty to terminate the interrogation and leave. This fact, with certain inapplicable exceptions, such as public safety, triggers the requirement of giving *Miranda* warnings. See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (statements stemming from custodial interrogation, or "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action

in any significant way" may not be used unless *Miranda* warnings or their equivalent are given). Accordingly, defendant's statements in the police car were illegally obtained.

¶ 24 Moreover, physical or mental abuse by police includes the "existence of threats or promises." *People v. Richardson*, 234 Ill. 2d 233, 254 (2009). Here, while defendant was handcuffed and locked in the backseat of the squad car, Anderson repeatedly threatened to rip his van apart to find more cannabis. He also related (at the hearing) that according to his information there should be more cannabis than was found, displaying knowledge for which he sought confirmation. We reject the State's suggestion that Anderson simply did not want to waste defendant's time or unnecessarily damage his vehicle. Based on the tip that was the basis for the stop, Anderson and the other officers had reason to believe there was more than 500 grams of cannabis in the van and were more probably than not looking for incrimination on that amount. To enlist defendant's cooperation in finding more cannabis, Anderson combined threats with promises: at one point he told defendant, "[d]on't lie to me. I already know where you're coming from"; after defendant conceded that he purchased the bag of cannabis, Anderson said, "I appreciate the honesty. Just don't lie. I'll help you out the best I can, okay. I'm not going to tear apart your vehicle if you're sitting here being honest with me."

¶ 25 Additionally, we note that defendant was pulled over specifically because he was suspected of committing this crime. See *Lopez*, 229 Ill. 2d at 364 (noting that an officer might mistakenly withhold *Miranda* warnings not realizing that a suspect is in custody and that warnings are required). The stop was based upon a reliable tip: Robyn Stoval of the Freeport Police Department testified that she had used this confidential informant at least 12 times over the last 6 years, including 4 times last year, and his information always resulted in misdemeanor or felony convictions. Discovering the presence of cannabis in the van was not an accident or a

fortuity, incidental to a routine stop. The incriminatory questions relating to the presence of cannabis in the van were plainly designed to elicit incriminating answers. There was no valid reason not to give *Miranda* warnings before questioning defendant. See *Elstad v. Oregon*, 470 U.S. 298, 318 (1985) ("the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements").

¶ 26 We conclude that the State failed to establish by a preponderance of the evidence that defendant's incriminating statements in the police car were voluntary.

¶ 27 Next, defendant contends that, because the statements in the police car were obtained illegally, the statements made at the police station must also be suppressed under the "fruit of the poisonous tree" doctrine. See *People v. White*, 117 Ill. 2d 194, 222 (1987). citing *Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963); *People v. Laliberte*, 246 Ill. App. 3d 159, 166 (1993). Again, we agree.

¶ 28 Under the exclusionary rule, evidence obtained as a direct result of an unlawful interrogation is inadmissible unless it was "attenuated," or obtained by "means sufficiently distinguishable from the unlawful conduct that it was purged of the taint of that illegality." *Dennis*, 373 Ill. App. 3d at 47, citing *People v. White*, 117 Ill. 2d 194, 222 (1987). "Factors to be considered in determining whether a confession was the product of an illegal arrest include: (1) the proximity in time between the arrest and the confession; (2) the presence of intervening circumstances; (3) the purpose and flagrancy of the police misconduct; and (4) whether *Miranda* warnings were given." *People v. Morris*, 209 Ill. 2d 137, 157 (2004). "The burden of showing the admissibility of the statement rests on the prosecution." *Id*.

¶ 29 Here, the interrogation at the police station followed quickly upon the interrogation in the police car. Defendant was pulled over at 4:30 p.m. The vehicle was searched before defendant was questioned. Bradbury testified that he was on the scene of the stop "for a while" before defendant was placed under arrest and transported to the police station; his police car video recorder indicates that this period of time was about 18 minutes. Questioning of defendant resumed in the booking room at the station, where his *Miranda* rights were read to him at 5:32 p.m., and he began giving a taped statement at 5:37 p.m., less than an hour after the conclusion of questioning and the arrest at the traffic stop. Moreover, Bradbury used the illegally obtained statements made in the police car "immediately upon defendant's arrival at the police station," which is an "indici[um] of coercion" that weighs in favor of finding no attenuation. *Dennis*, 373 Ill. App. 3d at 50.

¶ 30 There were no intervening circumstances in this case. Moreover, Bradbury knew at the police station that defendant had already confessed, and exploited this illegally obtained knowledge during the interrogation, confronting defendant with "you understand I already know this, and you know you already know this. I am just trying to talk to you about it. You understand that right." "As a general rule, confronting a suspect with illegally obtained evidence tends to induce a compelled statement by demonstrating the futility of remaining silent." *Dennis*, 373 Ill. App. 3d at 48.

¶ 31 As for the purpose and flagrancy of the police misconduct, the use of the illegally obtained confession in the police car to induce defendant to give up his right to remain silent and provide a recorded confession plainly militates against attenuation.

¶ 32 As to the fourth factor, it is not disputed that defendant was given *Miranda* warnings before making his statements at the police station. Although the fact that *Miranda* warnings

were given is not sufficient in itself to purge the taint of illegality (*Morris*, 209 Ill. 2d at 157), the giving of the warnings generally weighs in favor of a finding of attenuation. See *Dennis*, 373 Ill. App. 3d at 48. Under the circumstances of this case, however, where the evidence indicates that the police "deliberately employed a question first, warn later strategy" to obtain defendant's incriminating statements, any attenuating effect of giving *Miranda* warnings is insignificant. *People v. Lopez*, 229 Ill. 2d 322, 359 (2008), citing *Missouri v. Seibert*, 542 U.S. 600, 622 (2004) (Kennedy, J., concurring). See *People v. Alfaro*, 386 Ill. App. 3d 271, 302 (2008) (where an unwarned statement is suppressed, a later, warned statement will generally be admissible except where it can be determined that the police deliberately employed a "question first, warn later" interrogation strategy).

¶ 33 In *Lopez*, our supreme court set out the analysis for determining whether the interrogator deliberately withheld *Miranda* warnings: "courts should consider whether objective evidence and any available subjective evidence such as an officer's testimony, support an inference that the two-step interrogation procedure was used to undermine the *Miranda* warning.' " *Lopez*, 229 Ill. 2d at 361, quoting *United States v. Williams*, 435 F.3d 1148, 1158 (9th Cir. 2006). Courts should consider the following factors as guidelines for assessing evidence objectively: " 'the timing, setting and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre-and postwarning statements.' " *Lopez*, 229 Ill. 2d at 361-61, quoting *Williams*, 435 F.3d at 1159, citing *Missouri v. Seibert*, 542 U.S. 600, 615 (2004) (plurality op.).

¶ 34 Here, the police knew before they left the police station to make the stop that there was a substantial amount of cannabis in the vehicle. Any question eliciting a response regarding the presence of drugs could be and was ultimately incriminating. The interrogation of defendant in

the police car was complete in that defendant confessed to possession of the bag of cannabis found in his van and that he traveled to Milwaukee to buy the cannabis for $225. The setting was a coercive custodial environment from which defendant was not free to leave. It is unreasonable for the State to claim that the questioning was merely for background information. Since defendant was not told of his *Miranda* rights, he was not given the option of refusing to answer the officer's questions. Officer Bradbury was one of the two officers who interrogated defendant in the police car, and he was the officer who transported defendant to the police station, interrogated him there, and elicited incriminating statements. He also told defendant at the police station that "you understand I already know this, and you know that you already know this"; telling him, in other words, that defendant knew Bradbury knew that defendant already confessed.

¶ 35 The content of the pre- and post-warning statements overlapped in that both contained defendant's confession that the bag of cannabis belonged to him and that he bought it in Milwaukee for $225. Compare *People v. Brannon*, 2013 IL App (2d) 111084, ¶ 46, as modified on denial of reh'g (June 7, 2013) (determining there was insufficient evidence to show that the officers deliberately engaged in the question first, warn later technique where, *inter alia*, "only the postwarning statements specifically pertained to the possession of the heroin").

¶ 36 Turning to the subjective factors outlined in *Lopez*, Bradbury and Anderson both testified that they did not inform defendant of his *Miranda* rights during the first interrogation because he was detained but not under arrest. As noted above, the officers were wrong: defendant was in custody and not at liberty to leave the encounter, and the officers knew he was a suspect; accordingly, he was entitled to *Miranda* warnings before the officers questioned him, regardless

of whether he was under arrest. Either the officers were unaware of the rudimentary requirements of *Miranda* or they were reckless about their motives for not giving the warnings.

¶ 37 Where, as here, there is evidence to support a finding of deliberateness on the part of the interrogators, "we must consider whether curative measures were taken, such as a substantial break in time and within circumstances between the [prewarning and postwarning] statements, such that the defendant would be able to distinguish the two contexts and appreciate that the interrogation has taken a new turn." (Internal quotation marks omitted.) *Lopez*, 229 Ill.2d at 361-62, citing *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring). "Alternatively, an additional warning that explains the likely inadmissibility of the prewarning custodial statement may be sufficient." *Lopez*, 229 Ill.2d at 365, quoting *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring).

¶ 38 In this case, there was practically no break in time and circumstances between the statements. Custodial interrogation resumed in the booking room at the station less than an hour after the questioning in the car—possibly within half an hour. The questioning was conducted by the same officer, Bradbury, who handcuffed defendant, seated him in the squad car and drove him to the station. Bradbury was also the first to asked defendant if there was more cannabis in the van. Bradbury's statement near the beginning of the interrogation, when he asked defendant where he got the cannabis—"you understand I already know this, and you know that you already know this"—did not signal a new turn in the interrogation. If anything, it echoed Anderson's earlier comment in the squad car when telling defendant not to lie to him: "I already know where you're coming from." Bradbury's statement also relied directly upon his knowledge of the illegally obtained statements made in the police car, which Anderson had shared with him. Additionally, Bradbury did not advise defendant that his confession from the police car could not be used against him.

¶ 39 The record establishes that the interrogators did not take curative measures in this case.

¶ 40 Finally, we consider the prejudicial impact of the trial court's erroneous rulings in order to determine whether the admission of illegally obtained evidence at trial necessitates a retrial. *Dennis*, 373 Ill. App. 3d at 51. "If the trial court's error was harmless, the jury's verdict will stand." *Id.*, citing *People v. St. Pierre*, 122 Ill. 2d 95, 114 (1988). The State "bears the burden of persuasion with respect to prejudice *** [; i]n other words, the State must prove beyond a reasonable doubt that the jury verdict would have been the same absent the error." (Internal quotation marks omitted.). *People v. Thurow*, 203 Ill. 2d 352, 363 (2003).

¶ 41 The State argued at trial that defendant's statement at the police station proved he was guilty of possession of cannabis with intent to distribute. The prosecutor stated at least three times in closing argument that defendant's own words were sufficient to find him guilty. The audio recording of defendant's statement at the police station was published to the jury, and parts of the statement were played in open court at least 6 times. Bradbury's testimony regarding defendant's police station confession also contributed to the jury's reaching a guilty verdict. We are unable to find beyond a reasonable doubt that defendant's illegally obtained statements did not contribute to his conviction for delivery. Not so for the possession charge.

¶ 42 At the same time, the evidence introduced at trial was sufficient to support a finding of defendant's guilt beyond on a reasonable doubt. Accordingly, defendant will not be subjected to double jeopardy on remand. *Dennis*, 373 Ill. App. 3d at 51. We also note that the evidence was sufficient to prove defendant guilty of possessing the blunt, as well as the additional cannabis found in the van. He immediately volunteered he had been smoking and he was in constructive possession as the driver of the vehicle.

¶ 43 III. CONCLUSION

¶ 44 For the reasons stated, we vacate defendant's conviction for possession with intent to deliver and enter a conviction for simple possession (more than 30 but not less than 500 grams) and remand for further proceedings. .

¶ 45 Vacated in part, affirmed in part, and remanded.