2011 IL App (1st) 092186-U
No. 1-09-2186

FIFTH DIVISION
July 22, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 02 CR 29874
	)	
CRAIG LOMAX,	)	Honorable
	)	Steven J. Goebel,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE JOSEPH GORDON delivered the judgment of the court. Presiding Justice Fitzgerald-Smith and Justice Howse concurred in the judgment.

O R D E R

HELD: Where a detective testified that defendant, who was in custody and had been read his *Miranda* rights, said he wanted to discuss the investigation, the trial court did not commit manifest error in determining that defendant initiated a general discussion of the case so as to render his subsequent statement admissible; the denial of the defendant's motion to suppress his statement was affirmed.

¶ 1 Following a jury trial, defendant Craig Lomax was convicted of the first degree murder of two victims, along with two counts of aggravated kidnaping, two counts of aggravated battery and three counts of armed robbery. Defendant was sentenced to natural life on each murder conviction. On appeal, defendant's sole contention is that the trial court erred in denying his motion to suppress his pre-trial statements to police. Defendant argues the court incorrectly ruled that he initiated contact with investigators after earlier invoking his *Miranda* rights. We affirm.

¶ 2 Before trial, defendant filed a motion to suppress inculpatory statements that he made to police while in custody. Defendant asserted he was arrested on October 24, 2002, and argued he was in custody for more than 72 hours, or three days, during which he exercised his right to remain silent. Defendant contended the length of his detention was excessive and coercive and that any statement he made during that time was taken in violation of his constitutional rights. According to defendant's motion, "The prosecution claims that the defendant reinitiated conversation with them at 5:00 p.m. Sunday, October 27, 2002."

¶ 3 At the hearing on the motion, Chicago police detective John Pellegrini testified he spoke to defendant at 10 a.m. on October 26 in a police station interview room. The detective advised defendant of his *Miranda* rights and after defendant

initially denied any involvement in the crimes, he made an inculpatory statement. At about noon that day, defendant's attorney arrived at the police station and met with defendant, after which the attorney told police defendant would make no further statement.

¶ 4 At about 2 p.m. on October 27, Olaudah Slaughter, a co-defendant also in custody, was placed in a lineup with defendant. After the lineup, Detective Pelligrini escorted defendant back to the interview room. According to Detective Pelligrini, defendant asked him about the result of the lineup, and he responded he could not discuss the lineup with defendant because defendant had an attorney.

¶ 5 Chicago police detective Thomas Flaherty testified that at about 5 p.m. October 27, defendant knocked on the door of the interview room in which he was being held, and Detective Flaherty opened the door. Detective Flaherty testified that defendant "basically related to me that he wanted to talk about this investigation." The detective reminded defendant that he was represented by counsel, and defendant responded he wanted to talk without his lawyer present. According to the detective, defendant was re-advised of his rights under *Miranda* and indicated he understood those rights.

¶ 6 Defendant spoke to Detective Flaherty for about an hour. At about 4:30 a.m. on October 28, defendant's statement

was memorialized. In the statement, defendant said that after he spoke to his attorney, he "asked the detectives what was going on with Slaughter." The parties stipulated that defendant's statement did not indicate he told police at 5 p.m. the previous night that he wanted to talk about the case.

¶ 7 In denying defendant's motion to suppress his statement, the trial court stated that although defendant's detention at the police station was lengthy, his statement was given voluntarily. The court explained:

> "I also believe the defendant did reinitiate contact with the police. Again, there's no contradictory testimony to Detective Flaherty. I do believe Detective Flaherty, therefore, the motion to suppress [the] statement is denied."

¶ 8 In defendant's statement, which was presented at trial, defendant said he, Slaughter and another co-defendant, Lazarek Austin, agreed to rob an auto shop on January 3, 2002. After the robbery, two men were bound, taken from the shop and dumped under a railroad trestle, where they were found dead. After the jury returned a guilty verdict as to defendant, the trial court sentenced defendant to two concurrent terms of natural life pursuant to section 5-8-1(c)(ii) of the Unified Code of Corrections (730 ILCS 5/5-8-1(c)(ii) (West 2008)) because he was

convicted of killing more than one person. Concurrent to that sentence, defendant also was sentenced to 20 years for one of the armed robbery counts and 5 years each for the two aggravated battery counts, to be served consecutively to the armed robbery sentence.

¶ 9 On appeal, defendant contends the trial court erred in finding he initiated a discussion about his case when he spoke to Detective Flaherty. He argues his convictions should be reversed and his case remanded for a new trial.

¶ 10 When an accused invokes his right to have counsel present during a custodial interrogation, he may not be subject to further interrogation without the presence of counsel unless "the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). This rule is designed to "prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Michigan v. Harvey*, 494 U.S. 344, 350 (1990).

¶ 11 To determine if the statements of an accused are admissible as substantive evidence, the first inquiry is whether the accused, and not the police, initiated further discussion after invoking the right to counsel. *Oregon v. Bradshaw*, 462 U.S. 1039, 1044-45 (1983). For the accused to initiate further conversation under this test, he or she must make a statement that evinces a "willingness and a desire for a generalized

discussion about the investigation." *Bradshaw*, 462 U.S. at 1045-46; *People v. Woolley*, 178 Ill. 2d 175, 198 (1997). Inquiries or statements that relate to the routine incidents of the custodial relationship will not "initiate" a discussion under the *Edwards* rule. *Bradshaw*, 462 U.S. at 1045 (request for water or to use a telephone does not indicate desire to "open up a more generalized discussion relating directly or indirectly to the investigation"). If the accused initiated a conversation with the police after previously requesting counsel, the second inquiry, which is not at issue in this case, is whether the accused's subsequent waiver of the right to counsel was knowing and intelligent. *Bradshaw*, 462 U.S. at 1044; *Woolley*, 178 Ill. 2d at 199.

¶ 12 It is the State's burden to prove a defendant initiated further conversations with the police after previously invoking his right to counsel. *People v. Wright*, 272 Ill. App. 3d 1033, 1042 (1995). Whether a defendant has in fact initiated a conversation with the police is determined by examining the totality of the circumstances, and the trial court's determination on that issue will not be disturbed unless it is manifestly erroneous. *Wright*, 272 Ill. App. 3d at 1042.

¶ 13 Acknowledging this deferential standard of review, defendant nevertheless contends in this appeal that he "is challenging the trial judge's determination that Detective

Flaherty testified credibly" about what defendant deems a "re-initiation" of a conversation with the police. Although Detective Flaherty testified defendant "basically related *** that he wanted to talk" about the investigation, defendant asserts a more credible account was offered by his written statement, in which defendant said he had asked the detectives how Slaughter had fared in the lineup. He argues his statement was a "far more credible source of evidence" than Detective Flaherty's testimony and that his question regarding Slaughter was not an initiation of a conversation with police.

¶ 14 Defendant therefore contends it is the task of this court to determine whether his handwritten statement was more reliable than Detective Flaherty's testimony. Such an analysis, however, would amount to *de novo* review, which by defendant's own admission is not the correct standard of review here. See *Wright*, 272 Ill. App. 3d at 1042 (trial court's determination on whether defendant initiated conversation with police will not be disturbed absent manifest error).

¶ 15 Detective Flaherty's testimony that defendant said he wanted to talk about the investigation supports the trial court's finding that defendant initiated further conversation with police. A suspect does not have to explicitly state that he wishes to resume interrogation. *Woolley*, 178 Ill. 2d at 200-01. The court was free to accept Detective Flaherty's account,

particularly in the absence of any contrary testimony (as the court expressly noted), and conclude that defendant initiated contact with the police so as to render his subsequent statements admissible. See, *e.g.*, *Bradshaw*, 462 U.S. at 1045-46 (suspect's inquiry of "Well, what is going to happen to me now?" was initiation of further generalized discussion); *Woolley*, 178 Ill. 2d at 201-02 (defendant's request for counsel followed by statement regarding guilt evinced willingness for general discussion); cf. *People v. Olivera*, 164 Ill. 2d 382, 390 (1995) (defendant's inquiry of "What happened?" to officer upon conclusion of lineup was limited inquiry that does not express willingness to engage in general conversation about investigation; denial of defendant's motion to suppress subsequent statement was reversed).

¶ 16 Defendant points out that here, as in *Olivera*, he asked a detective what occurred in a lineup. *Olivera* does not govern the result of the instant case for two reasons. First, in *Olivera*, the supreme court held the detective answered the defendant's inquiry in a manner by which the detective should have known would elicit an incriminating response. *Olivera*, 164 Ill. 2d at 392. Here, in contrast, Detective Pelligrini testified that he responded to the defendant's question about the lineup by reminding defendant that he was represented by counsel. See *Olivera*, 164 Ill. 2d at 392 (in situation of possible

initiation of conversation by defendant, proper response to a question is to advise accused of his rights and not to provide answer). Secondly, in the present case, the exchange between defendant and Detective Pelligrini as to the lineup was not the basis for the trial court's determination that defendant had initiated a general discussion about the case. Rather, that finding was based upon defendant's conversation with Detective Flaherty several hours later.

¶ 17 Defendant next asserts Detective Flaherty's account lacked credibility because, unlike some of the cases discussed above, Detective Flaherty did not testify as to defendant's exact words, which defendant contends are "crucial" in determining whether he initiated a general conversation. Defendant also points out the detective did not take notes or make any recording of his subsequent interview of defendant.

¶ 18 Defendant cites no authority for his contention that the inability of a witness to recall a remark verbatim, or the absence of notes or recordings, weakens the reliability of the witness's testimony as to the substance of a remark. Furthermore, the fleeting nature of such a remark by a defendant is not conducive to being recorded electronically.

¶ 19 Indeed, in *Wright*, 272 Ill. App. 3d at 1043-44, this court rejected the defendant's challenge to testimony that a felony review attorney who interviewed the defendant did not

write the defendant's specific remark on a folder but instead noted that the defendant had previously "initiated [a] conversation" with detectives. This court observed on appeal that the trial court heard and found to be credible the attorney's "live testimony that the defendant told her that he initiated the conversation with the detectives and apparently found that testimony credible." *Wright*, 272 Ill. App. 3d at 1044.

¶ 20 That conclusion is also supported by *People v. Allen*, 249 Ill. App. 3d 1001, 1008 (1993), in which the trial court accepted a detective's testimony that a defendant in custody told them that he wanted to talk and said he did not mean to hurt "those people." Under the manifestly erroneous standard, this court affirmed the trial court's classification of that exchange as a voluntary initiation of a discussion with police, absent testimony as to the defendant's exact words. *Allen*, 249 Ill. App. 3d at 1016. In summary, the trial court here did not commit manifest error in concluding, based on the testimony presented, that defendant initiated contact with police before he made a statement implicating himself in the instant crimes.

¶ 21 Accordingly, we affirm the trial court's denial of defendant's motion to suppress his statement and its judgment.

¶ 22 Affirmed.