2012 IL App (2d) 110817-U
No. 2-11-0817
Order filed December 26, 2012

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ELVER HERNANDEZ, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 09-CF-1875 Honorable Daniel B. Shanes, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Zenoff and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly found that the confession was voluntary and that defendant was an "organizer" of the attack. The matter is reversed and remanded for a hearing on defendant's ability to pay the public defender reimbursement.

¶ 2 Following a stipulated bench trial, defendant, Elver Hernandez, was convicted of first-degree murder (720 ILCS 5/9-1 (West 2010)) and sentenced to 84 years in prison. He appeals, contending that: (1) the trial court improperly admitted defendant's confession where, despite defendant's expressed desire not to have his statement recorded, the police surreptitiously videotaped it; (2) the trial court improperly found that defendant was eligible for an extended-term sentence on the basis

that the crime was committed in furtherance of the criminal activities of an organized gang and defendant was an "organizer, supervisor, financier, or [held] any other position of management or leadership;" and (3) after the trial court assessed defendant a public defender fee without considering his ability to pay, the matter may not be remanded for a further hearing on that issue. We affirm in part and reverse in part and remand for further proceedings.

¶ 3 On May 9, 2009, someone set fire to a house at 272 North Prospect Avenue in Mundelein, resulting in the death of 12-year-old Jorge Juarez. Investigators with the Lake County Major Crimes Task Force learned that Rafael Juarez, another resident of the Prospect Avenue house who was not home at the time of the fire, had recently had a falling out with the Mundelein Latin Kings gang. Rafael Juarez gave the investigators the names of several Latin Kings, including those of Manny Flores, defendant, and defendant's brother, Edwin Hernandez.

¶ 4 The detectives initially interviewed defendant, who gave an exculpatory statement. Investigators also interviewed Wilmer Garcia, another Latin King whose name Rafael gave them. Garcia said that there had been a gang meeting on May 8. At that time, Flores had assigned "smash on sight" (SOS) orders to various members of the gang. An SOS order meant that the member was expected to beat up a particular person or destroy that person's property. Further Latin King members interviewed by detectives confirmed defendant's attendance at the May 8 meeting and that it was defendant who was given the SOS order for Rafael Juarez.

¶ 5 The investigators brought defendant to the Waukegan police station, where he was met by Detectives Charles Schletz and Dominic Cappelluti. Defendant told the detectives he was willing to talk to them, but not in a room with a camera. He told them that he did not want to speak in front of the camera because, if it became known that he gave a recorded statement to the police, he and his family would be in danger of harm by Latin Kings. The detectives understood this to mean that

defendant did not want a statement recorded in any fashion. The detectives testified that it was common for gang members to refuse to give recorded statements, fearing retaliation. They further testified that they stopped short of expressly telling defendant that his statement would not be recorded.

¶ 6 Nevertheless, the detectives set up a camera behind a plastic plant in the interrogation room and proceeded to interview defendant. During the interview, defendant said that Rafael Juarez was a former Latin King who had been posting disrespectful comments about the gang on his Myspace page. The gang issued an SOS order against Rafael. Defendant attended the May 8 gang meeting, where the SOS order against Rafael was assigned to him.

¶ 7 Later that night, after drinking heavily at a gang party, defendant and Edwin decided to carry out the SOS order against Rafael Juarez. Defendant armed himself with a pipe while Edwin made a Molotov cocktail out of a beer bottle. They then walked the three blocks to Rafael Juarez's house. Defendant used the pipe to smash out the windows of a van parked in the driveway while Edwin threw the Molotov cocktail onto the porch.

¶ 8 Defendant was initially represented by the Lake County public defender. Later, private counsel appeared and the public defender was discharged. At that time the court ordered defendant to pay $300 as compensation for the services of the public defender.

¶ 9 The trial court denied defendant's motion to suppress his statement, finding that the totality of the circumstances showed that it was voluntary. Defendant elected to proceed to a stipulated bench trial to preserve his appellate rights regarding his motion to suppress. After considering the evidence, the court found defendant guilty of first-degree murder.

¶ 10 At a sentencing hearing, both parties and the trial court seemed to agree that defendant was eligible to receive an extended-term sentence on the basis that the crime was committed in

furtherance of the criminal activities of an organized gang and that defendant was an "organizer, supervisor, financier, or [held] any other position of management or leadership." The court sentenced defendant to 84 years' imprisonment. Defendant timely appeals.

¶ 11 Defendant first contends that the trial court erred by denying his motion to suppress his confession. He argues that the detectives deceived him by *implyin*g that they would honor his request not to record the interview and that this deception rendered the statement involuntary. We disagree.

¶ 12 A confession is voluntary if it is the product of free will, rather than the "inherently coercive" atmosphere of the police station. *People v. Willis*, 215 Ill. 2d 517, 535 (2005). In deciding whether a confession was voluntary, we consider the totality of the circumstances surrounding it, including the defendant's age, intelligence, education, experience, and physical condition at the time of the detention and interrogation; the duration of the interrogation; the presence of *Miranda* warnings; the presence of any physical or mental abuse; and the legality and duration of the detention. *People v. Nicholas*, 218 Ill. 2d 104, 118 (2005). No one factor is dispositive. *People v. Gilliam*, 172 Ill. 2d 484, 500 (1996).

¶ 13 A confession is involuntary where a defendant's will was overborne at the time of his confession such that it cannot be deemed the product of a rational intellect and a free will. *People v. Bowman*, 335 Ill. App. 3d 1142, 1153 (2002). " '[P]olice are allowed to play on a suspect's ignorance, fears[,] and anxieties so long as they do not magnify these emotionally charged matters to the point where a rational decision becomes impossible.' " *Bowman*, 335 Ill. App. 3d at 1153 (quoting *United States v. Rutledge*, 900 F.2d 1127, 1130 (7th Cir.1990)). In reviewing whether the defendant's confession was voluntary, we accord great deference to the trial court's factual findings, and we will reverse those findings only if they are against the manifest weight of the evidence.

Nicholas, 218 Ill. 2d at 116. However, we review *de novo* the ultimate question whether the confession was voluntary. *Nicholas*, 218 Ill. 2d at 116.

¶ 14 Here, a consideration of the totality of the circumstances convinces us that the trial court correctly found that defendant's confession was voluntary. Defendant was given *Miranda* warnings as soon as the interview began, and he said that he understood them. See *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966). Defendant was 22 years old and had been arrested previously. As the trial court found, the overall tenor of the interview was relaxed, and at an approximate length of fourty minutes, it was not excessively long. There is no indication that the detectives threatened or coerced defendant in any way.

¶ 15 Against this, the single fact that the police deceived defendant about whether the interview would be recorded did not render the confession involuntary. As the trial court observed, it is difficult to see how the decision to surreptitiously record the interview could have influenced defendant's decision to confess, as he was not even aware of it. The voluntariness of a confession is determined at the time of the statement not in retrospect.

¶ 16 Police deception does not invalidate a confession as a matter of law, but is only one factor to consider when deciding whether a confession was voluntary. *People v. Martin*, 102 Ill. 2d 412, 427 (1984). In *People v. Minniti*, 373 Ill. App. 3d 55 (2007), the police falsely told the 17-year-old defendant that his DNA had been found inside the victim and that satellite imagery showed him entering the victim's home. Further, they misled the defendant's father by telling him that they were doing a routine followup interview. Nevertheless, we found the defendant's confession voluntary. The police deception here was far less extensive than that in *Minniti*. Moreover, defendant here was 22 years old and, unlike the *Minniti* defendant, had prior experience with the criminal justice system.

¶ 17 Defendant cites *People v. Moore*, 368 Ill. App. 3d 549 (2006). There, the defendant signed a rights-waiver form that explicitly promised that the interview would be recorded to protect the defendant's rights. However, unbeknown to anyone, the audio portion of the recording equipment malfunctioned. The prosecutor revealed this during the trial and attempted to introduce a three-paragraph summary of the interview prepared by one of the detectives. The trial court found the defendant's confession was involuntary and declared a mistrial. The appellate court affirmed, holding with minimal analysis that the false promise that the interview would be recorded rendered the defendant's subsequent statement involuntary.

¶ 18 Defendant argues that the converse should be true here: that the officers' implicit representation that the interview would not be recorded renders his statement involuntary. We disagree. Although not mentioned by the appellate court in *Moore*, the prosecution's midtrial revelation and attempt to introduce a police-prepared summary arguably influenced the decision to affirm the exclusion of the defendant's statement. Here, the issue was litigated well before trial. Moreover, of great importance to the *Moore* court was the explicit promise that the interview would be recorded. There was no explicit promise here. Thus, the trial court did not err in finding defendant's confession voluntary.

¶ 19 The State contends that the officers were motivated by a desire to comply with section 103-2.1 of the Code of Criminal Procedure, which provides that a custodial interrogation in a murder case is presumed to be inadmissible unless the interrogation is recorded. 725 ILCS 5/103-2.1 (West 2008). Defendant disputes whether that section is applicable at all and points out that the police could comply with the section by simply recording that defendant did not want his statement recorded. 725 ILCS 5/103-2.1(e)(iv) (West 2008). However, given our conclusion that defendant's

statement was voluntary, the officers' motivation is irrelevant and we need not further consider this question .

¶ 20 Defendant next contends that the trial court improperly imposed an extended-term sentence. The indictment alleged that defendant was subject to an extended term because the crime was committed in furtherance of the criminal activities of an organized gang, namely, the Latin Kings. As noted, the prosecutor, defense counsel, and the trial court all believed that defendant was subject to a mandatory extended-term sentence. The court ultimately imposed an extended term of 84 years.

¶ 21 The sentencing range for first-degree murder is 20-60 years. 730 ILCS 5/5-8-1(a))(1)(a) (West 2008). The maximum sentence can be extended to 100 years if one of the aggravating factors has been pleaded in the indictment and proved beyond a reasonable doubt. 730 ILCS 5/5-5-3.2(b) (West 2008). One such factor was found in section 5-5-3.2(b)(8),[1] which at the relevant time provided that the court could impose an extended term:

¶ 22 "When a defendant is convicted of a felony other than conspiracy and the court finds that the felony was committed under an agreement with 2 or more other persons to commit that offense and the defendant, with respect to the other individual, occupied a position of organizer, supervisor, financier, or any other position of management or leadership, and the court further finds that the felony committed was related to or in furtherance of the criminal activities of an organized gang or was motivated by the defendant's leadership in an organized gang." 730 ILCS 5/5-5-3.2(b)(8) (West 2008).

[1]The State concedes that the indictment miscited the relevant provision as section 5-5-3.2(b)(13), but defendant does not claim prejudice from the improper citation.

¶ 23 Defendant concedes that the crime was committed in furtherance of the criminal activities of an organized gang, but denies that he was an organizer or supervisor of the activity. He contends that he was merely carrying out an order that Flores gave him. The State responds that Flores gave defendant the order but left it to his discretion how and with whom to carry it out, and that defendant held a position of leader or organizer with respect to his brother.

¶ 24 *Particularly in light of defendant's acknowledgment that he was eligible for an extended-term sentence,* based on the evidence submitted, the trial court could reasonably find that defendant was in an organizing or leadership role at the time the offense was committed. Flores had given defendant the SOS order earlier in the evening, but did not instruct him further. Rather, it appears that the order meant only that defendant was to beat up the subject or to destroy his property in some fashion. Thus, it appears that defendant came up with the plan to smash the windows on the van and set fire to the house. In that regard, the court could reasonably conclude that defendant, who was actually given the SOS order, occupied a leadership position with respect to his 17-year-old brother. Defendant was with his brother when he procured the pipe used to smash the windows of the van, and when his brother prepared the Molotov cocktail. Further they walked together to the Juarez home and perpetrated the damage and fire. Since the order was given to defendant, the recruiting of his 17 year old brother made defendant an "organizer, supervisor, ...or other position of management or leadership..." . Further, we note that, had defendant objected, the State might have been able to produce additional evidence on this question.

¶ 25 Defendant's final contention is that the cause should not be remanded for a hearing on his ability to pay a public defender reimbursement fee. Defendant argues, and the State agrees, that the court erred by imposing the fee without considering defendant's ability to pay. See 725 ILCS 5/113-3.1(a) (West 2008); *People v. Love*, 177 Ill. 2d 550, 553 (1997). However, the parties disagree about

the remedy. The State contends that we may simply remand for a hearing on defendant's ability to pay. Defendant contends that no hearing is possible more than 90 days after the judgment became final.

¶ 26 Defendant acknowledges a long line of precedent holding that remand for a hearing is the appropriate remedy. See, *e.g.*, *Love*, 177 Ill. 2d at 564; *People v. Elcock*, 396 Ill. App. 3d 524, 532 (2009). He contends, however, that this precedent has been called into question by the supreme court's recent decision in *People v. Gutierrez*, 2012 IL 111590. There, the court acknowledged its holding in *Love* but noted that in *Gutierrez* neither party had raised the propriety of a remand as an issue and cautioned that *Love* "should not be read as deciding the issue either way." *Id.* at ¶ 18. The court declined to decide the issue there because the trial judge had never imposed the fee at all; rather it had simply been added by the circuit clerk. Defendant contends that, in light of *Gutierrez*, we should reconsider the cases providing for a remand. We decline to do so.

¶ 27 In our view, *Gutierrez* did not expressly overrule *Love*. Rather, the court distinguished *Love*, noting that there the trial court imposed the fee without a hearing, while in *Gutierrez* the trial court never imposed the fee at all. The only reported case to consider this issue since *Gutierrez* distinguished it on the same basis and remanded the cause for a new hearing on the defendant's ability to pay. *People v. Somers*, 2012 IL App (4th) 110180. We agree with *Somers* and will continue to follow *Love* until the supreme court overrules it. We note that our supreme court may consider the issue again, having granted leave to appeal in *People v. Fitzpatrick*, 2011 IL App (2d) 100463.

¶ 28 The judgment of the circuit court of Lake County is affirmed.