No. 3-09-0439

Order filed April 21, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit Will County, Illinois
Plaintiff-Appellee,	)	
	)	No. 07-CF-107
v.	)	
	)	
JOHN R. PITTS, JR.,	)	The Honorable
	)	Amy Bertani-Tomczak,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justice O'Brien concurred in the judgment.
Justice Schmidt specially concurred.

ORDER

Held: The trial court did not err in partially denying defendant's motion to suppress because the form of coercion identified by the trial judge -- a police officer's behavior -- was no longer present at the time the statements were given, and, moreover, the taint from the earlier coercive circumstances was attenuated. Because the 2002 amendment to section 12-14(d)(1) of the Criminal Code of 1961 did not become effective until January 1, 2003, the *ex post facto* doctrine bars the amendment from being applied to defendant.

Defendant, John R. Pitts, Jr., appeals from the partial denial of his motion to suppress. Alternatively, defendant argues that the matter must be remanded for a new sentencing hearing. We affirm the partial denial of defendant's motion to suppress, but vacate defendant's sentence and remand the matter for a new sentencing hearing.

FACTS

Defendant was indicted on three counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(1) (West 2002)). The indictments alleged that on December 5, 2002, defendant engaged in acts of digital penetration, oral sex, and vaginal intercourse with A.S.while armed with a dangerous weapon. Prior to trial, defendant moved to suppress certain statements which he had given to police. A summary of the evidence adduced at the hearing and trial follows.

On December 5, 2002, A.S. was walking to work when a man grabbed her from behind. The man held a knife to her throat, threatened to kill her, and dragged her onto the floor of the backseat of his car. The man drove for five to ten minutes and stopped in a wooded area. The man came into the backseat with his pants down and told her to take her clothes off. He forced her to perform oral sex on him, inserted his fingers in her vagina and inserted his penis in her vagina. She looked at his face for several minutes during this time, as their faces were only a few inches apart. A.S. identified defendant in court as the man who assaulted her.

After the incident, A.S. flagged down a passing bus and told the driver what happened. The police were called to the scene and subsequently took her to the hospital where a physician performed a cervical exam on her. Semen was found and preserved for future DNA comparison.

Approximately four years later, Moises Avila, a detective in the Joliet police department, spoke to C.M. She also alleged that she was the victim of a sexual assault. A friend of C.M..

gave the police a license plate number of the woman's assailant. The license plate number was registered to defendant and his wife. C.M. and her friend were shown photo lineups that included defendant. C.M.'s friend identified defendant as her assailant.

Another detective, Scott Cammack, subsequently showed a photo lineup, which included a picture of defendant, to another alleged sexual assault victim, J.R.. She identified defendant as the man who had assaulted her in 2002. Detective Avila applied for a warrant for defendant's arrest in connection with the assault on J.R., as well as an order allowing the police to obtain a sample of defendant's DNA. The arrest and search warrants were issued and defendant was taken into custody on December 5, 2006.

Later that day, at approximately 5:45 p.m., defendant signed a form that advised him of his *Miranda* rights. Detectives Avila and Cammack then began discussing several cases with defendant, but did not speak with him regarding A.S.'s case. During those discussions, defendant maintained that any sexual contact he had with C.M. and J.R. was consensual. At 6:00 p.m., defendant agreed to provide a videotaped statement and a DNA sample.

The videotaped interview of defendant began at 7:00 p.m. At approximately 8:20 p.m., Lieutenant Stein entered the interview room. Stein immediately addressed defendant in a loud voice and called him a "fucking predator" and a "monster." Stein also told defendant that his family would learn about what he had done. Stein never made physical contact with defendant. Stein's contact with defendant lasted for three to five minutes.

Defendant felt threatened by Stein and worried about the damage that his family could suffer. After Stein left the room, defendant for the first time said that he had taken sex from women who were not willing participants. The detectives responded that defendant needed an

opportunity to explain himself and to get treatment. Defendant felt that the detectives would get him counseling for his drug problem and do what they could to help him if he cooperated with them. Defendant then made further incriminating statements.

After a break, the detectives began a second videotaped interview, which lasted about five minutes before defendant complained of chest pain and was taken to Silver Cross hospital. Defendant was given aspirin and nitroglycerin on the way to the hospital. Officers Tizoc, Landeros and Powers accompanied defendant to the hospital. Defendant arrived at the hospital at 9:35 p.m.

At the hospital, defendant asked the officers if any of the incidents for which he had been arrested were going to make the papers. The officers told him that they could not control what the papers published. Defendant seemed concerned about what his family would find out. Defendant then told Landeros that he was willing to speak with Avila and Cammack upon his return to the police station. Defendant was then examined by a physician, who diagnosed him with atypical chest pain, meaning that it was not a heart attack or angina. Further testing later revealed that defendant had cocaine in his system.

Defendant returned to the police station from the hospital at approximately 2:00 a.m. on December 6, 2006. Detectives asked defendant how he was feeling to which defendant responded he was hungry. Landeros gave defendant a corn dog, chicken sandwich, a bag of chips and a soda. Defendant was also allowed to use the restroom.

Detectives again admonished defendant of his *Miranda* rights and defendant again indicated that he understood them. Defendant was tired but thought that the detectives would get him counseling and he might not have to serve any time if he told them something. Thus, in an

effort to "get this over with," defendant agreed to be videotaped for the third time. During this interview, defendant discussed the instant case. Specifically, defendant admitted that he grabbed A.S., took her to a wooded area and forced her to have sex with him. Defendant denied, however, that he wielded a knife.

Defendant filed an amended motion seeking to suppress incriminating statements he gave to the police. Defendant argued that the statements were the result of coercion and police misconduct. Upon hearing argument, the trial court found that no "court would condone what [Stein] did." The court noted that defendant made "some admissions" and was then transported to the hospital after he complained of chest pain. While the court acknowledged that one cause of defendant's chest pain might have been Stein's actions, she found that the panic attack was "probably cocaine related." Ultimately, the court suppressed the statements defendant made prior to his transportation to the hospital.

In considering the admissibility of the statements defendant made upon his return from the hospital, the trial court found that defendant was away from the police station for five hours and that defendant never complained to the doctors or nurses that he had been mistreated by the police. The court further noted that, at the hospital, defendant told Landeros that he wanted to talk to Avila and Cammack. The court also found that defendant agreed to talk to the detectives after they showed him the *Miranda* rights form that he had previously signed. Based on these findings, the court concluded that the statements defendant made after the hospital were made without "any unlawful inducements." Thus, the court found these statements admissible.

At trial, the results of DNA testing were presented to the jury and the jury was advised that the DNA profile provided by defendant matched the profile identified in the vaginal swabs

taken from A.S. Specifically, defendant's DNA profile would be expected to occur in 1 in 46 quadrillion black unrelated individuals. Ultimately, the jury found defendant guilty on all three counts of aggravated criminal sexual assault.

At defendant's sentencing hearing, the trial court and the State engaged in the following colloquy:

> "MR. FITZGERALD: Having been convicted of three counts of aggravated criminal sexual assault, *** a violation of subsection (a)(1) is a Class X felony for which ten years shall be added to the term of imprisonment imposed by the Court. And all these convictions, Judge, must run consecutively, according to the statute.
>
> So, it's our position that he's eligible for a minimum term of 48 years and a maximum of 120 years to be served at 85 percent.
>
> THE COURT: How do you get the minimum of 48?
>
> MR. FITZGERALD: Well, if you take the minimum, each X is six to 30. If you add the ten years, Judge, you'll have 48 years, 16, 16, 16. And then you would have 40, 40 and 40 as a maximum. So, it's our position, Judge, that his minimum would be 48 and his maximum would be 120 under the statute at 85 percent."

After defendant's statement in allocution, the trial court noted that it considered all factors in aggravation and mitigation, as well as the fact that defendant was linked to other

offenses by DNA. The court stated that: "the law mandates that I have to sentence you to at least 16 years on each count." The court proceeded to sentence defendant to 30 years on each count.

ANALYSIS

Defendant raises two issues on appeal. First, defendant argues that the trial court erred in partially denying his motion to suppress. Specifically, defendant alleges that the court erred in finding that defendant's statements, after he returned to the police station from the hospital, were not involuntary. Instead, defendant argues that these statements should have been suppressed because "there was insufficient attenuation to insure that *** [the] statements were not the result of the police coercion found by the trial court during defendant's first statement." Alternatively, defendant alleges that the matter must be remanded for a new sentencing hearing because the court "erroneously sentenced defendant to enhanced sentences that included ten-year add-ons that were not authorized at the time of the commission of the offense."

We find the trial court did not err in partially denying defendant's motion to suppress because the form of coercion identified by the trial judge -- Stein's behavior -- was no longer present at the time the statements were given, and, moreover, the taint from the earlier coercive circumstances was attenuated. We vacate defendant's sentence, however, and remand the matter for a new sentencing hearing as the State concedes that the trial court erroneously believed that defendant's sentencing range was subject to a mandatory additional ten years per charge.

Motion to Suppress

In reviewing a trial court's ruling on a motion to suppress evidence, we apply the two-part standard of review adopted by the Supreme Court in *Ornelas v. United States*, 517 U.S. 690, 699, (1996). *People v. Cosby*, 231 Ill. 2d 262, 271 (2008). Under this standard, we give deference to

the factual findings of the trial court, and we will reject those findings only if they are against the manifest weight of the evidence. *Cosby*, 231 Ill. 2d at 271. However, a reviewing court " 'remains free to undertake its 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. *Cosby*, 231 Ill. 2d at 271, quoting *People v. Luedemann*, 222 Ill. 2d 530, 542-43 (2006).

A defendant's confession must be voluntary to be admitted into evidence or it violates the Fifth Amendment right against self-incrimination and the due process clause of the Fourteenth Amendment. *Dickerson v. United States*, 530 U.S. 428, 433 (2000). A confession is involuntary if the defendant's will was overborne by the circumstances surrounding the giving of the confession. *Dickerson*, 530 U.S. at 434.

Here, the trial court ruled that defendant's statements, prior to being taken to the hospital, were coerced and therefore inadmissable. The State does not challenge this finding. Thus, the question before us is whether the principal circumstance giving rise to the finding of coercion -- Stein's behavior -- was absent when defendant returned from the hospital and admitted that he grabbed A.S., took her to a wooded area and forced her to have sex with him.

"When a prior statement is actually coerced, the time that passes between confessions, the change and place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession." *People v. Strickland*, 129 Ill. 2d 550, 557 (1989), quoting *Oregon v. Elstad*, 470 U.S. 298, 310 (1985). " 'An intervening circumstance is one that dissipates the taint of unconstitutional police conduct by breaking the causal connection between the illegal conduct and the confession.' " *People v. Wilberton*, 348 Ill. App. 3d 82, 86 (2004); quoting *People v. Austin*, 293 Ill. App. 3d 784, 788 (2000). "Intervening

circumstances support attenuation when they are capable of inducing a voluntary desire to confess." *Wilberton*, 348 Ill. App. 3d at 86. A lapse of time may dissipate the taint of police misconduct by allowing the accused to reflect on his situation. *Wilberton*, 348 Ill. App. 3d at 86.

The record in this case reveals that Stein entered the interview room and engaged defendant at 8:20 p.m. Stein's contact with defendant lasted for three to five minutes and consisted of calling defendant a "fucking predator" and a "monster." Stein also told defendant that his family would learn about what he had done. Defendant subsequently complained of chest pains and was taken to the hospital. Defendant arrived at the hospital at 9:35 p.m. Officers, other than those who had been conducting the interview, were present with defendant at the hospital. Defendant initiated a conversation with one of them, Landeros. Upon doing so, defendant told Landeros that he was willing to speak with Avila and Cammack. Defendant never complained to the doctors or nurses that he had been mistreated by the police. Defendant was diagnosed with atypical chest pain, treated and discharged from the hospital. Defendant returned to the police station at 2:00 a.m. Upon stating that he was hungry, defendant was given food and drink and allowed to use the restroom. Avila and Cammack subsequently reviewed defendant's *Miranda* rights with him for the second time. Defendant indicated he understood his rights. Defendant then stated that he sexually assaulted A.S.

In view of those circumstances, we conclude that there was a break in the stream of events sufficient to insulate the defendant's post-hospital statements from the effect or taint of Stein's prior behavior. See *Strickland*, 129 Ill. 2d at 558. We stress the following facts: (1) defendant had time to reflect upon his situation as the statements at issue were made five hours after Stein's behavior, (2) Stein's contact with defendant was, at most, five minutes, (3)

defendant was taken to the hospital by different officers -- Tizoc, Landeros and Powers -- than the detectives who were conducting the interview -- Avila and Cammack, (4) at the hospital defendant requested, on his own accord, to speak with Avila and Cammack upon his return to the police station, (5) defendant was diagnosed with atypical chest pain, treated and discharged from the hospital, (6) defendant's *Miranda* rights were reviewed with him for the second time upon his return to the police station, (7) defendant indicated for the second time that he understood his rights, and (8) Stein was not present at the time the statements at issue were given. Accordingly, we find that the trial court did not err in partially denying defendant's motion to suppress.

Even assuming *arguendo* that it was error for the trial court to admit defendant's post-hospital statements, we find any error harmless since, excluding the statements, there was sufficient competent evidence to prove defendant guilty of aggravated criminal sexual assault. Specifically, A.S. testified that defendant held a knife to her throat, threatened to kill her, and took her to a wooded area where he forced her to perform oral sex on him, inserted his fingers in her vagina and inserted his penis in her vagina. The DNA evidence also established defendant's identity as the assailant beyond a reasonable doubt.

Sentencing

Alternatively, defendant alleges that the matter must be remanded for a new sentencing hearing because the court "erroneously sentenced defendant to enhanced sentences that included ten-year add-ons that were not authorized at the time of the commission of the offense." The State concedes this issue.

Section 12-14(d)(1) of the Criminal Code of 1961 was amended in 2002 to include the ten-year add-on provision, however, it did not become effective until January 1, 2003. Public

Act 92-721, eff. January 1, 2003. The *ex post facto* doctrine bars application of the statutory ten-year add-on provision to defendant. See *People v. Timmons*, 114 Ill. App. 3d 861, 871 (1983). Accordingly, we vacate defendant's sentence and remand the matter for a new sentencing hearing.

For the foregoing reasons, we affirm the trial court's order partially denying defendant's motion to suppress. We vacate defendant's sentence and remand the matter for a new sentencing hearing.

Affirmed in part and vacated in part; cause remanded.

JUSTICE SCHMIDT, specially concurring:

I concur with the majority but write separately to point out that I cannot see how any reasonable person could believe that the brief encounter with Lt. Stein in which Stein addressed defendant in a loud voice, called him a "fucking predator" and a "monster," and told defendant that his family would learn of what he had done, could be deemed to have coerced a confession from defendant. The officer's "predator" and "monster" comments were simply police jargon for "I know you are a serial rapist," and "I think you are a bad, bad person." The comment by Stein that defendant's family would find out what he did was simply a statement of fact. Therefore, while I concur in the majority opinion that any coercive effect of Lt. Stein's conduct was attenuated, I submit alternatively, there was simply no coercive behavior to be attenuated.

The conduct of which the defendant complains simply cannot reasonably be construed to have rendered any statements by defendant involuntary. Defendant does not even allege a threat of force or a threat of anything else during his brief encounter with Stein. Stein came into the interview room more than one hour after defendant's interview began. Prior to Stein's appearance, other detectives, for the most part, politely listened to defendant explain that each of the alleged victims actually wanted to have sex with him and that there was no force involved. Stein came in the room and explained to defendant that he had been watching the interview and was not buying defendant's version of events. He then told the defendant that defendant had ruined the lives of each of his victims and that the only way for the healing to begin was for defendant to "cut the bullshit" and tell the truth. He pointed out that the victims had husbands, mothers and fathers and that he was incredulous that defendant would make a mockery of the victims in court by testifying that they were "coke whores" who wanted to have sex with him. It

was in this context that Stein called defendant a "fucking monster" and "fucking predator." A loud tone of voice and dropping the "F-bomb" could not have rendered the defendant's confession involuntary.

Viewing the video of the encounter, it is clear that Lt. Stein used a loud voice and some adjectives which are generally unacceptable in polite society. However, it is equally clear that he made no threats of violence. Likewise, the video shows that defendant was not cowering or showing any other signs of fear during the Lt. Stein soliloquy. In fact, at one point, defendant actually reaches out toward the end of the desk where Stein is sitting, pats the desk with his fingers and suggests that maybe Stein should be quiet. No reasonable person could watch this video and conclude that Lt. Stein's actions rendered defendant's statements involuntary. Stein will probably not be invited to join Mothers Against Bad Words. However, in the context of the environment in which he was operating, he did nothing wrong.