2014 IL App (4th) 130736-U

NOS. 4-13-0736, 4-13-1102 cons.

Order filed August 14, 2014

Modified upon denial of rehearing September 16, 2014

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Sangamon County
ROBERT E. FICKES,	)	No. 13CF52
Defendant-Appellee.	)	
	)	Honorable
	)	Leslie J. Graves,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Appleton and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: In No. 4-13-0736, the trial court erred when it concluded defendant's statement was involuntary and granted his motion to suppress.

In No. 4-13-1102, the notice of appeal is untimely and the appeal is dismissed.

¶ 2 In January 2013, the State charged defendant, Robert E. Fickes, with predatory criminal sexual assault (720 ILCS 5/11-1.40(a)(1) (West 2012)) and aggravated criminal sexual abuse (720 ILCS 5/11-1.60(c)(1)(i) (West 2012)). In May 2013, defendant filed a motion to suppress pursuant to section 114-11 of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/114-11 (West 2012)). Defendant asserted a statement made to a police detective and a Department of Children and Family Services (DCFS) investigator without a sign-language interpreter was involuntary. In July 2013, the trial court held a hearing on defendant's

motion to suppress and granted the motion.

¶ 3 The State appeals, arguing the trial court erred when it granted defendant's motion to suppress. It argues defendant's statement was voluntary, although he has a severe hearing impairment and the interview was conducted without the benefit of a sign-language interpreter. We reverse.

¶ 4 I. BACKGROUND

¶ 5 In January 2013, the State charged defendant with predatory criminal sexual assault (720 ILCS 5/11-1.40(a)(1) (West 2012)) and aggravated criminal sexual abuse (720 ILCS 5/11-1.60(c)(1)(i) (West 2012)).

¶ 6 In May 2013, defendant filed a motion to suppress pursuant to section 114-11 of the Procedure Code (725 ILCS 5/114-11 (West 2012)), requesting the trial court bar introduction of an October 22, 2012, interview with Anthony Mayfield, a Sangamon County sheriff's department detective, and Roger Washington, a DCFS investigator (a DCFS intern was also present), in which defendant made a statement implicating himself in the alleged crime. Defendant alleged it was apparent from his "speech pattern, diction, and volume, that he [was] audibly impaired" but the investigators did not utilize a sign-language interpreter to allow him to "communicate as effectively as a person without a disability." As a result, his statement was the product of his inability to understand the investigators. Defendant argued (1) the State violated his rights under the Americans with Disabilities Act of 1990 (ADA) when it failed to provide him with a sign-language interpreter, (2) he was unable to understand the investigators' questions because of his hearing impairment and his answers are unreliable, and (3) his statement was involuntary. Defendant included a typed transcript of the interview.

¶ 7 In June 2013, the State filed a written response to defendant's motion to suppress. The State argued the investigators did not violate the ADA because it did not obligate the investigators to provide services that were not needed or requested. The State argued it was normal for the investigators to use leading questions or occasionally repeat a question, and "[i]n almost every suspect interview there will be times when the trained interviewer will redirect the suspect and even verbally push the suspect to answer questions the suspect would prefer to evade." This was not coercive police activity that would render defendant's statement involuntary.

¶ 8 In June 2013, the trial court held a hearing on defendant's motion to suppress. Defendant introduced an audio recording of the interview. Mayfield testified it was "obvious" defendant had "some level" of hearing impairment, but at no time before, during, or after the interview did defendant mention he did not understand what Mayfield was saying. When defendant responded to a question "in a way that did not seem appropriate to the question," Mayfield interpreted defendant's response as an attempt to deflect the question. Anytime Mayfield discussed something defendant did not want to talk about, "all of a sudden he start[ed] answering my questions incorrectly" or "chang[ed] the subject." Mayfield did not know defendant was entirely deaf in his left ear and profoundly deaf in his right ear before he conducted the interview. Defendant did not inform Mayfield that he would benefit from the use of a sign-language interpreter. Mayfield would have provided a sign-language interpreter if defendant, or anyone else, had said that defendant needed a sign-language interpreter.

¶ 9 Washington testified defendant never stated he required a sign-language interpreter. Based on his observations before the interview, Washington did not find a sign-

language interpreter was necessary or appropriate. Nothing during the course of the interview led him to believe defendant needed assistance in communicating or understanding what was being communicated to him.

¶ 10 Defendant testified he had been deaf since birth. Hearing aids do not improve his hearing "a hundred percent" and, with a hearing aid, he can hear "intonations," "noises," and "voices," but not "words." He prefers to communicate by "signing and talking at the same time." A sign-language interpreter would have "improved" the quality of the interview and his answers.

¶ 11 In July 2013, the trial court held additional proceedings on the motion to suppress. Defense counsel argued, in relevant part, the interview was involuntary because it was unreliable and coerced. Counsel argued the investigators used a strategy of "tight leading questions," which allowed the investigators to "guide [defendant] to the place they wanted him to go" and obtain a confession. The investigators asked leading questions and defendant followed "along like a bobble head." Counsel asserted defendant never confessed and the alleged confession actually came from Mayfield's "mouth," "tactics," and "his inability to procure aid for [defendant] to understand what he [was] saying."

¶ 12 The trial court found defendant was "severely hearing impaired" and the investigators failed to take "appropriate steps to ensure their communication[] with [defendant] was as effective as their communication with anybody without a hearing impairment." The court found defendant's statement was "involuntary." The court did not enter a written judgment reflecting this ruling and the docket entry only states defendant's motion was granted

¶ 13 In July 2013, the State filed a motion to reconsider. In August 2013, the trial court, after a hearing, denied the motion to reconsider. On August 28, 2013, the State filed a

notice of appeal, which was docketed in this court as No. 4-13-0736.

¶ 14 In November 2013, the trial court entered the following docket entry: "A written order on the Court's ruling on Motion to Suppress is not required because the Court rules the oral finding is sufficient." On December 10, 2013, the State filed a second notice of appeal, which was docketed in this court as No. 4-13-1102. On the State's motion, this court consolidated the appeals.

¶ 15 II. ANALYSIS

¶ 16 The State argues the trial court erred when it granted defendant's motion to suppress. It argues defendant's statement was voluntary, although he has a severe hearing impairment and the interview was conducted without the benefit of a sign-language interpreter.

¶ 17 A. Jurisdiction

¶ 18 Illinois Supreme Court Rule 606(b) (eff. Feb. 6, 2013) requires a notice of appeal to be filed within 30 days after entry of the final judgment, or after the order disposing of a motion to reconsider. The State argues the August 28, 2013, notice of appeal was timely because the trial court, in announcing its ruling, essentially informed the parties a written order was not needed. We agree. In *People v. Harper*, 2012 IL App (4th) 110880, ¶ 20, 969 N.E.2d 573, this court considered a similar argument where "the trial court stated its oral pronouncement would 'stand as the ruling of the Court.' " The *Harper* court found the defendant did not need to present a written order to the trial court before the State could file its notice of appeal. *Id.* Here, the trial court did not direct the parties to prepare a written order and announced its oral ruling was the "sum and substance" of its ruling. Consistent with *Harper*, the court informed the parties a written order was not required and the August 28, 2013, notice of appeal is timely.

¶ 19 We agree with the State that this result requires the conclusion that the December 10, 2013, notice of appeal in No. 4-13-1102 is untimely under Rule 606(b).

¶ 20 B. Standard of Review

¶ 21 A two-part standard of review applies to reviewing a trial court's ruling concerning whether a confession is voluntary. The trial court's factual findings will only be reversed if those findings are against the manifest weight of the evidence. *People v. Murdock*, 2012 IL 112362, ¶ 29, 979 N.E.2d 74 (quoting *People v. Morgan*, 197 Ill. 2d 404, 437, 758 N.E.2d 813, 832 (2001)). The trial court's conclusion the confession was voluntary is reviewed *de novo*. *Id.*

¶ 22 C. Voluntariness of Defendant's Statement

¶ 23 The parties' arguments address whether defendant's statement was involuntary under both the federal and Illinois standards. We address these standards in turn.

¶ 24 1. *Voluntariness of Defendant's Statement Under Federal Law*

¶ 25 The due process clause of the fourteenth amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV. The United States Supreme Court has interpreted the due process clause to prohibit police activity that "wrings a confession out of an accused against his will." *Blackburn v. Alabama*, 361 U.S. 199, 206-07 (1960); see also *Brown v. Mississippi*, 297 U.S. 278, 285-86 (1936) (state cannot use "torture to extort a confession"); *Miller v. Fenton*, 474 U.S. 104, 109 (1985) (noting "certain interrogation techniques *** are so offensive to a civilized system of justice that they must be condemned"). In *Colorado v. Connelly*, 479 U.S. 157, 167 (1986), the Supreme Court held "coercive police activity is a necessary predicate to the finding that a

confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment."

¶ 26 The parties agree no evidence shows the investigators physically coerced defendant into making the statement. Defendant argues he was a "vulnerable suspect" because of his age and hearing impairment, the investigators should have exercised "special care" when questioning him, and their failure to accommodate his hearing impairment rendered his statement involuntary. Defendant's argument is unpersuasive.

¶ 27 Defendant contends *United States v. Sablotny*, 21 F.3d 747 (7th Cir. 1994), supports his contention he is entitled to "special care" because his "older age" is combined with an "obvious impairment"—his hearing impairment. In *Sablotny*, the Seventh Circuit Court of Appeals rejected the defendant's argument that her "advanced age rendered her unusually susceptible to coercive treatment." *Id.* at 749. The court noted it had used " 'special care' " when considering a juvenile's confession but had never invoked any special standard for "elderly" defendants. *Id.* at 751. The court concluded it would not give "special consideration to the alleged vulnerability of a 62-year-old, on account of age alone." *Id.* It noted the defendant's claim "she was unable to resist purported coercion is essentially a claim of mental impairment." *Id.* at 752. The court went on to indicate application of a balancing test is appropriate in analyzing claims of an impaired mental state. *Id.* According to *Sablotny*, the proper inquiry was whether a mental impairment of whatever kind should have reasonably been apparent to the interrogators. However, the defendant did not testify she was impaired during the interview and "absent some incapacity that the interrogators could reasonably perceive," the defendant's age, "without more," did not render her confession involuntary. *Id.*

¶ 28 Defendant suggests *Sablonty* provides for an age-plus-impairment test, but the Seventh Circuit treated the defendant's age argument as being a claim of mental impairment. *Id* at 752. He interprets the *Sablonty* court's use of "impairment" and "incapacity" to encompass any type of impairment. However, the *Sablonty* court used these terms to refer to mental impairment and mental incapacity. *Id.* As discussed below, it is well established that a different "quantum of coercion" applies to persons with intellectual disabilities. Defendant does not contend he has an intellectual disability or suffered from a mental impairment at the time of the interview, making *Sablonty* inapplicable to defendant's claims.

¶ 29 Both parties cite *State v. Hindsley*, 2000 WI App 130, 237 Wis. 2d 358, 614 N.W.2d 48, in support of their respective arguments. In *Hindsley*, the defendant who was deaf, used American Sign Language (ASL), and could not write English. *Id.* ¶ 8, 237 Wis. 2d 358, 614 N.W.2d 48. The defendant alleged he did not understand what the sign-language interrupter communicated to him because the interpreter did not use ASL. *Id.* The Wisconsin court noted the voluntariness standard "remains focused on police coercion, and considers a person's language and culture only insofar as they bear on whether coercion by more subtle means, rather than by overt acts, took place." *Id.* ¶ 41, 237 Wis. 2d 358, 614 N.W.2d 48. The court framed its inquiry as whether the defendant "understood that the police wanted to ask him questions about the death of his son," and concluded his understanding was "evident" from the fact he communicated information about his son's death to the police. *Id.* Defendant emphasizes the police in *Hindsley* attempted to accommodate Hindsley's hearing impairment, which, he asserts, is a "far different situation" than the one here, where "the police made *no effort whatsoever* to meet their obligations under the ADA." Defendant has provided no direct support for his

proposition the ADA obligated the investigators to provide him with a sign-language interpreter. In *People v. Long*, 296 Ill. App. 3d 127, 693 N.E.2d 1260 (1998), this court considered a similar situation involving a hearing-impaired defendant and noted the ADA is focused on ensuring effective communication and only requires a public entity "to give 'primary consideration' to the choice of the individual with disabilities, not to provide that individual's choice in every circumstance." *Id.* at 130, 693 N.E.2d at 1263. There, the police officer denied the defendant's requests for a sign-language interpreter and communicated through written notes. *Id.* at 128, 693 N.E.2d at 1261. This court concluded the parties were able to effectively communicate without a sign-language interpreter. *Id.* at 131, 693 N.E.2d at 1264. Defendant does not explain how the ADA obligates a public entity to provide accommodation where the individual did not *request* accommodation. Here, defendant did not inform the investigators he preferred to communicate through sign language or request a sign-language interpreter. Rather, he verbally communicated with them. The *Hindsley* court was not concerned about whether the police accommodated the defendant's hearing impairment or used the most effective form of communication to communicate with him. Rather, it was concerned about whether the defendant "understood" the police wanted to ask questions about the alleged crime. *Hindsley*, 2000 WI App 130, ¶ 41, 237 Wis. 2d 358, 614 N.W.2d 48. Moreover, defendant has provided no support for his contention an alleged violation of the ADA should "weigh heavily" in considering whether a statement is voluntary under the federal voluntariness standard. We conclude *Hindsley* supports the State's argument the investigators' failure to communicate in defendant's preferred mode of communication does not render the questioning coercive.

¶ 30 Here, as the parties agree, no evidence shows the investigators physically coerced

defendant into making his statement. The audio recording demonstrates the investigators did not verbally threaten defendant or take advantage of defendant's hearing impairment to coerce him into making a statement he did not understand he was making. It shows, despite the absence of a sign-language interpreter, the parties were able to convey what was intended to be communicated; defendant understood the investigators wanted to ask questions about the alleged crime; he responded to those questions willingly; and he recounted events surrounding when the crime is alleged to have occurred. The absence of a sign-language interpreter did not render the investigators' questioning coercive under the federal voluntariness standard.

¶ 31 2. *Voluntariness of Defendant's Statement Under Illinois Law*

¶ 32 Defendant argues the State forfeited its argument the statement was voluntary under Illinois law because it did not make this argument in its opening brief. In his brief, defendant argues his statement is involuntary under Illinois law. Defendant, as the appellee, may argue any point in support of the trial court's judgment on appeal, so long as the factual basis for such point was before the trial court. See *People v. Lashmet*, 372 Ill. App. 3d 1037, 1043, 868 N.E.2d 368, 373 (2007). Here, the trial court ruled the statement was "involuntary" and did not specify whether its ruling was based on the federal standard or Illinois law. Thus, we will examine whether defendant's statement was involuntary for state-law purposes.

¶ 33 Section 114-11 of the Procedure Code permits a criminal defendant to "move to suppress as evidence any confession given by him on the ground that it was not voluntary." 725 ILCS 5/114-11 (West 2012). Recently, in *Murdock*, the Illinois Supreme Court phrased the Illinois voluntariness standard as follows:

"To determine the voluntariness of a confession, courts

> consider the totality of the circumstances, including such factors as the defendant's age, intelligence, background, experience, education, mental capacity, and physical condition at the time of questioning. [Citation.] Other factors include the duration and legality of the detention and whether there was any physical or mental abuse by the police. [Citation.] Threats or promises made by the police may be considered physical or mental abuse. [Citation.] No single factor is dispositive, rather '[t]he test of voluntariness is whether the individual made his confession freely and voluntarily, without compulsion or inducement of any kind, or whether the individual's will was overborne at the time of the confession.' " *Murdock*, 2012 IL 112362, ¶ 30, 979 N.E.2d 74 (quoting *Morgan*, 197 Ill. 2d at 437, 758 N.E.2d at 832).

In *People v. Bernasco*, 138 Ill. 2d 349, 365, 562 N.E.2d 958, 965 (1990), our supreme court commented on the difference between the Illinois voluntariness standard and the federal standard announced in *Connelly*. It also discussed the important impact the prophylactic rule announced in *Miranda v. Arizona*, 384 U.S. 436 (1966), has on analyzing whether a confession is voluntary. The supreme court recognized "a *Miranda* waiver must be knowing and intelligent as well as voluntary." *Bernasco*, 138 Ill. 2d at 364, 562 N.E.2d at 964. Under Illinois state law, "Illinois courts in effect have treated intelligent knowledge as one component of a confession's overall voluntariness, rather than as an admissibility criterion separate from voluntariness as in *Miranda* waiver law." *Id.* at 365, 562 N.E.2d at 965. Thus, under Illinois law "voluntariness and

intelligent knowledge" are "interrelated" questions. *Id.*

¶ 34 Defendant argues his statement is involuntary under Illinois law because the totality of the circumstances—namely his age, health, and hearing impairment—shows he was "vulnerable" and unable to "effectively communicate" during the interview. Defendant spends a considerable amount of his argument discussing "deaf culture" and "myths about methods of effective communication between hearing and deaf people." As the State points out, defendant did not present any evidence regarding these matters at the motion-to-suppress hearing. Further, defendant presented no evidence about his health history or "deteriorating physical condition" at the motion hearing. "[G]enerally, a party may not rely on matters outside the appellate record to support his or her position on appeal." *Kildeer-Countryside School District No. 96 v. Board of Trustees of the Teachers' Retirement System*, 2012 IL App (4th) 110843, ¶ 21, 972 N.E.2d 1286. We decline to consider matters not presented to the trial court.

¶ 35 Illinois courts have recognized special caution is required in reviewing the voluntariness of confessions made by juveniles and persons with intellectual disabilities. See *People v. Braggs*, 209 Ill. 2d 492, 519, 810 N.E.2d 472, 488 (2003) ("Custodial interrogation trades on the weakness of individuals ***; the young and mentally infirm are most vulnerable."); *Murdock*, 2012 IL 112362, ¶ 32, 979 N.E.2d 74 (explaining "a juvenile's confession is a sensitive concern"). All of the cases cited by defendant in support of his argument he is "vulnerable" fall into these two categories. See *People v. Slater*, 228 Ill. 2d 137, 161, 886 N.E.2d 986, 1001 (2008) (concluding the defendant's "intellectual limitations" did not render her statement involuntary); *Daniels*, 391 Ill. App. 3d at 783, 908 N.E.2d at 1130 (the defendant's Intelligence Quotient (IQ) placed her in the lower one-tenth of 1% of adults her age); *People v. Braggs*, 335

Ill. App. 3d 52, 69, 779 N.E.2d 475, 489 (2002) (defendant had "mental retardation"); *People v. Higgins*, 239 Ill. App. 3d 260, 270, 607 N.E.2d 337, 344 (1993) (17-year-old juvenile with IQ of 67); *People v. Johnson*, 221 Ill. App. 3d 588, 591, 584 N.E.2d 165, 168 (1991) (17-year-old juvenile with "developmental and learning problems"); *Murdock*, 2012 IL 112362, ¶ 3, 979 N.E.2d 74 (16-year-old juvenile); *In re Marvin M.*, 383 Ill. App. 3d 693, 694, 890 N.E.2d 984, 986 (2008) (14-year-old juvenile); *People v. Westmorland*, 372 Ill. App. 3d 868, 879, 866 N.E.2d 608, 616 (2007) (" 'immature' " 17-year-old juvenile); *People v. McDaniel*, 326 Ill. App. 3d 771, 782, 762 N.E.2d 1086, 1095 (2001) (14-year-old juvenile). Obviously, defendant is not a juvenile and, as discussed above, he has provided no support for the contention he was entitled to special care because he was 62 years old at the time of the interview. Defendant has not alleged he has an intellectual disability or suffered from a mental impairment at the time of the interview. This leaves defendant's hearing impairment.

¶ 36 Defendant asserts he "struggled to understand" the investigators' questions because a sign-language interpreter was not provided. At the motion hearing, he testified a sign-language interpreter would have "improved" the interview. He did not testify he was unable to understand the investigators were conducting an interview, the interview's subject, or any particular question asked during the course of the interview—evidence relevant to the intelligent-knowledge component of the Illinois voluntariness standard. Defendant, as he did in the trial court, parses through the interview and points to "false positives" as evidence the statement is the product of "misunderstandings" and "miscommunication." The truthfulness of particular answers or the statement as a whole is not relevant to whether defendant gave a voluntary statement. See *People v. Kincaid*, 87 Ill. 2d 107, 117, 429 N.E.2d 508, 511 (1981) ("The

truthfulness or reliability of a confession is irrelevant in determining whether it was voluntarily made."). The question is whether, under the totality of the circumstances, defendant's statement was "freely self-determined" and not the product of an overborne will. *Melock*, 149 Ill. 2d at 452, 599 N.E.2d at 953-54; *Murdock*, 2012 IL 112362, ¶ 30, 979 N.E.2d 74.

¶ 37 In considering the totality of the circumstances, including the intelligent-knowledge component, defendant's statement was voluntary. At the time of the interview, defendant was 62 years old and, as the State concedes, suffered from a "severe hearing impairment." The interview took place in defendant's home, was conducted by a detective and a DCFS investigator, and lasted for approximately 45 minutes. The audio recording, which we have listened to, reflects the investigators made no physical or verbal threats, nor any attempt to deceive defendant into confessing. See *Melock*, 149 Ill. 2d at 450, 599 N.E.2d at 953 (noting "deception weighs against a finding of voluntariness"). The recording reflects Mayfield asked leading questions, expressed disbelief at defendant's explanations, and repeatedly attempted to redirect him back to discussing the allegations. As Mayfield testified at the hearing, these interviewing techniques are commonly used in questioning criminal suspects. The record before us affords no basis to conclude these interviewing questions were inherently coercive. See *Id.* at 452, 599 N.E.2d at 954 ("Although the questioning was, most likely, at times rigorous and, admittedly, accusatorial, we do not equate this conduct with the coerciveness which gives rise to due process concerns."); *People v. Gilliam*, 172 Ill. 2d 484, 500, 670 N.E.2d 606, 613 (1996) ("Suspects typically do not confess to the police purely of their own accord, without any questioning."). Defendant did not testify he felt coerced, threatened, intimidated, or uncomfortable by the investigators' questioning. At no time during the interview did defendant

request a sign-language interpreter. At no juncture did he request that the investigators use any different method of communication. Rather, he actively engaged in a verbal conversation with the investigators and responded to their questions. As captured by the audio recording, the flow of the interview and timing of defendant's responses undermine his argument he did not understand the nature of the interview and the investigators' questions. The evidence does not indicate defendant's statement was the product of an overborne will or police overreach. We conclude the trial court erred when it concluded defendant's statement was involuntary.

¶ 38 III. CONCLUSION

¶ 39 We reverse the trial court's judgment and remand for further proceedings.

¶ 40 No. 4-13-0736, Reversed and remanded.

¶ 41 No. 4-13-1102, Dismissed.