NOTICE
Decision filed 05/27/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-10-0192

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellant, | ) | Madison County. |
| | ) | |
| v. | ) | No. 09-CF-982 |
| | ) | |
| HUBERT HILL, | ) | Honorable |
| | ) | Richard L. Tognarelli, |
| Defendant-Appellee. | ) | Judge, presiding. |

JUSTICE DONOVAN delivered the judgment of the court.
Justices Goldenhersh and Wexstten concurred in the judgment.

**R U L E 2 3 O R D E R**

*Held*: The trial court properly granted the defendant's amended motion *in limine* and barred the use of statements made by the defendant during a video-recorded interview with a police detective, where the statements were plea-related in that the defendant exhibited a subjective expectation that he was negotiating a plea deal and the defendant's expectation was reasonable under the totality of the objective circumstances.

The defendant, Hubert Hill, was indicted by a grand jury in the circuit court of Madison County and charged with one count of first-degree murder in the stabbing death of John Byrd. Hill filed an amended motion *in limine* to bar the use of statements he made during a series of video-recorded interviews with detectives from the Collinsville police department on August 15, 2008, August 19, 2008, and August 25, 2008. Hill argued that his statements were made during the course of plea discussions and that they were inadmissible under Supreme Court Rule 402(f) (eff. July 1, 1997). Following an evidentiary hearing, the trial court found that Hill's statements were plea-related, and the court granted the amended motion *in limine*. The State's motion to reconsider was denied. The State then filed a

certificate of impairment and a notice of appeal pursuant to Supreme Court Rule 604(a)(1) (eff. July 1, 2006). We affirm.

In August 2008, Hill was being held at the Madison County jail on two separate cases. He was facing a felony charge of aggravated battery in one case and a felony charge of illegal possession of a prescription drug form in the other. An assistant public defender from the Madison County Public Defender's Office had been assigned to represent Hill on the illegal-possession-of-a-prescription-form charge, and he was actively engaged in plea negotiations with an assistant State's Attorney.

On August 15, 2008, Rick Wittenauer, a detective sergeant in the Collinsville police department, went to the Madison County jail to interview Hill in regard to the murder of John Byrd. Byrd was murdered in June 2007, and the case had gone cold. Unbeknownst to Detective Wittenauer, Hill had written to the public defender and requested him to notify the State's Attorney that Hill had knowledge about John Byrd's murder and that Hill would disclose that information in exchange for concessions from the State on his pending cases.

Detective Wittenauer met with Hill in an interview room at the county jail. The interview, which was approximately 20 minutes in duration, was recorded on video. In an attempt to illustrate the spirit of the discussion and Hill's frame of reference, we have provided an extensive recitation of the exchange between Hill and Detective Wittenauer, and we note that, as often occurs in ordinary discourse, each party repeats himself or restates his point from time to time.

Detective Wittenauer initiated the interview. He introduced himself as a police detective from Collinsville, but he did not immediately state the reason for his visit. Detective Wittenauer then presented Hill with a photograph of a man and asked if Hill knew him. Hill identified the man, noted that he had passed away, and then, completely unsolicited, said that he was not the one who "did it." Detective Wittenauer voiced surprise

as he asked, "Did what?" Hill seemed equally surprised by that question and asked, "Okay, what are you here for?" Hill did not wait for a response. He immediately explained that he had written a letter to his attorney and asked his attorney to make a deal because he knew the two people who killed Byrd. Hill stated that he thought the detective had come to see him because of the letter.

Detective Wittenauer advised Hill that he had not been contacted by Hill's attorney. Detective Wittenauer asked Hill if he wanted his attorney. Hill replied, "No." Hill told the detective that he would not divulge the names of the individuals who killed Byrd until he had a deal. Hill told Detective Wittenauer that he had a pending aggravated battery charge that was bogus and a prescription-drug-form case. Hill stated that he knew the people who killed Byrd. He stated that he was a witness to part of the incident. He repeated that he would not provide the identities of the people without a deal. The above exchange began not two minutes into the interview.

At that point, Detective Wittenauer asked whether Hill would sign a *Miranda* waiver (*Miranda v. Arizona*, 384 U.S. 436 (1966)) so that everything was legal. Hill stated that he had nothing to do with the murder, and he agreed to sign the waiver. Hill again said that he had written the public defender three days previously to advise that he wanted to talk about a deal. Detective Wittenauer noted the coincidence, remarking that he had not been contacted by the public defender and that he was interviewing people who knew Byrd and who had not been previously interviewed during the major case investigation.

Hill told Detective Wittenauer that he would not disclose the names of the individuals who killed Byrd because he wanted to strike a deal but that he would give some information. Hill then stated that he had been drinking whiskey with two individuals, a male and a female; that he and the two individuals went to Byrd's house to borrow some money to buy crack cocaine; that he stayed outside because he owed Byrd money; that a few minutes after the

two individuals went into the house, he heard some yelling and sounds of a scuffle inside; that he went inside the house; that once inside, he saw the male holding Byrd while the female used a buck knife to cut the side of Byrd's throat; that Byrd continued to struggle; and that the male took the knife from the female and stuck Byrd somewhere in the back of the head. Hill said that he saw Byrd drop to the ground near the icebox and that he "got out of there" and went home. Hill looked toward Detective Wittenauer and said, "Does that tell you I know something." Hill said that there was more to it and that he intended to use the information to get out of his troubles. Hill asked Detective Wittenauer to contact his attorney.

Detective Wittenauer did not respond to Hill's request at that time. Instead, he mentioned that some evidence had been left at the scene. He asked Hill if he would consent to a buccal swab to collect his DNA. Hill stated that his DNA was already on file, but he agreed to the swab. As Hill swabbed his cheek, Detective Wittenauer said that one thing he could "offer" Hill was a computer voice-stress-analyzer test. Once the swab was completed, Hill again asked Detective Wittenauer to talk with the prosecutor and his attorney. Detective Wittenauer replied, "I sure will." Hill stated that James Buckley was the prosecutor on the illegal-possession-of-a-prescription-form case and that he did not know who had the aggravated battery case. Detective Wittenauer asked Hill whether he had saved the information on Byrd "for a time when [he] needed it." Hill responded in the affirmative.

Detective Wittenauer asked Hill to go over how the murder had happened. Hill repeated his account of what had occurred. Hill then told Detective Wittenauer that the State wanted him to do three years on the illegal-possession-of-a-prescription-form case. He vehemently reiterated that the aggravated battery charge was bogus. Hill said that he wanted his attorney present at the next meeting. Detective Wittenauer then asked whether Hill wanted to do the computer voice-stress analysis. Hill replied that he wanted his attorney

involved in that matter. As the interview ended, Hill reiterated that he was using the information he had about Byrd's killing as a tool to help him get out of his pending charges and that he wanted an agreement before he disclosed the identity of the two persons who killed Byrd.

According to the record, Hill met with detectives from the Collinsville police department again on August 19, 2008, and August 25, 2008. Apparently, no deal resulted from the meetings. On April 23, 2009, Hill was charged by indictment with one count of first-degree murder in the stabbing death of John Byrd. Prior to the trial, Hill filed an amended motion *in limine* and sought an order directing the State and its witnesses not to mention any statements made by Hill to the Collinsville police officers during the interviews at the Madison County jail on August 15, 2008, August 19, 2008, and August 25, 2008.

During a hearing on Hill's amended motion *in limine*, the trial court viewed the videos of the interviews and heard testimony. Thereafter, the court found that Hill offered to provide information on another incident under investigation in exchange for probation rather than incarceration on the cases pending against him, that Hill had stated the general terms upon which he would be willing to bargain, and that Hill's unsolicited statements constituted an offer to enter plea negotiations. The court concluded that Hill's subjective expectation to negotiate a plea was reasonable under the circumstances and that the discussions were plea-related. The court entered an order directing the State and its witnesses to make no mention of Hill's statements made to Collinsville detectives at the Madison County jail on August 15, 2008, August 19, 2008, and August 25, 2008.

The State filed a motion to reconsider. During the hearing on the motion to reconsider, the State conceded that the discussions on August 19, 2008, and August 25, 2008, could be fairly characterized as plea-related. The State argued that the discussions on August 15, 2008, could not be characterized as plea-related where Hill never offered to plead guilty

to any offense and where the discussions did not contain the rudiments of a plea negotiation. The trial court denied the State's motion to reconsider. This interlocutory appeal followed.

The sole issue is whether the trial court erred in finding that Hill's discussions with Detective Wittenauer on August 15, 2008, were "plea-related" within the meaning of Supreme Court Rule 402(f).

Supreme Court Rule 402(f) provides in pertinent part that if a plea discussion does not result in a plea of guilty, then the plea discussion shall not be admissible against the defendant in any criminal proceeding. Ill. S. Ct. R. 402(f) (eff. July 1, 1997). The purpose of this rule is to encourage the negotiated disposition of criminal cases by eliminating the risk that the accused will enter plea discussions at his peril. *People v. Friedman*, 79 Ill. 2d 341, 351, 403 N.E.2d 229, 235 (1980).

The decision whether a defendant's statement is plea-related necessarily turns on the facts of each case and must be made on a case-by-case basis. *Friedman*, 79 Ill. 2d at 351-52, 403 N.E.2d at 235. Although this is a fact-specific inquiry, where neither the facts nor the credibility of witnesses is disputed, the trial court's decision is reviewed *de novo*. *People v. Taylor*, 289 Ill. App. 3d 399, 402, 682 N.E.2d 310, 312 (1997).

In determining whether a statement is plea-related, a court considers whether the accused exhibited a subjective expectation to negotiate a plea and whether his expectation was reasonable under the totality of the objective circumstances presented. *Friedman*, 79 Ill. 2d at 351-52, 403 N.E.2d at 235. Where the accused's subjective expectations are not explicit, the surrounding objective circumstances are critical to a determination of whether the statement is plea-related. *Friedman*, 79 Ill. 2d at 353, 403 N.E.2d at 236. A statement does not come within the coverage of Rule 402(f) unless the discussion contains the rudiments of a negotiation process, that is, a willingness by a defendant to enter a plea of guilty in return for concessions by the State. *Friedman*, 79 Ill. 2d at 353, 403 N.E.2d at 236.

Statements made as an offer to enter negotiations and statements made at an advanced stage of the negotiation process are indistinguishable insofar as they are equally devastating in a trial of the accused. *Friedman*, 79 Ill. 2d at 352, 403 N.E.2d at 235. In determining whether a statement is plea-related, the court does not require a prologue explicitly marking the opening of plea discussions. *Friedman*, 79 Ill. 2d at 351-52, 403 N.E.2d at 235. If a prologue is delivered, such as a defendant's inquiry into "making a deal," it is a clear indication of a defendant's intent to pursue plea negotiations. *Friedman*, 79 Ill. 2d at 352, 403 N.E.2d at 235. If, however, the discussion is interpreted as an attempt to elicit an officer's opinion on a defendant's fate, such as whether the death penalty is applicable to the charges, rather than the initiation of plea discussions, the statements do not fall within the ambit of Rule 402(f). See, *e.g.*, *People v. Victory*, 94 Ill. App. 3d 719, 721, 419 N.E.2d 73, 75 (1981).

In addition, the fact that the party to whom the statement was made did not have actual authority to enter negotiations, standing by itself, is not sufficient to render a statement admissible. *Friedman*, 79 Ill. 2d at 352, 403 N.E.2d at 235; *People v. Hill*, 78 Ill. 2d 465, 401 N.E.2d 517 (1980). Relevant factors include a defendant's perception of a government official's negotiating authority and whether a defendant thought that the official was an appropriate party to whom he could convey his offer to bargain. *Friedman*, 79 Ill. 2d at 352, 403 N.E.2d at 235.

In the instant case, the video recording from August 15, 2008, clearly shows Hill's explicit, subjective expectations that he was entering the beginning phase of plea negotiations and that Detective Wittenauer was an appropriate party to whom he could convey his offer to bargain. During the 20-minute interview, Hill repeatedly conveyed his offer to provide the identities of the killers in exchange for some concessions by the State on his two pending cases, and he provided some information regarding the matter to show that he "knew

something." Hill expressed his view that the aggravated battery charge he faced was bogus, but he intimated a willingness to acknowledge the illegal-prescription-form charge. Hill was reasonably clear that he was not offering his cooperation in exchange for some future considerations. He was reasonably clear that he wanted to avoid a term of imprisonment on the pending charges. During the interview, Hill twice asked Detective Wittenauer to contact his public defender and the prosecutor to advise them of his willingness to strike a deal. We recognize that Detective Wittenauer stated early on that he had not been contacted by Hill's attorney and that he had come to interview Hill as part of his followup investigation. But during the interview, Detective Wittenauer agreed to contact both the prosecutor and Hill's attorney about Hill's willingness to strike a deal, and he did nothing to dispel the impression that he was an appropriate party to carry Hill's offer to bargain. Hill's subjective intent to initiate plea negotiations is clear. His expectation was reasonable under the totality of the objective circumstances. The trial court did not err in finding that the statements made by Hill during the interview on August 15, 2008, constituted the rudiments of a plea negotiation and that Hill's statements were therefore inadmissible under Rule 402(f). The trial court did not err in granting Hill's amended motion *in limine* and in directing the State and its witnesses to make no mention of Hill's statements to a Collinsville police detective on August 15, 2008, at the Madison County jail.

Affirmed.