2017 IL App (2d) 141273-U
No. 2-14-1273
Order filed March 7, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOSE RUVALCABA-QUEZADA, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 08-CF-1149 Honorable George J. Bakalis, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court properly denied defendant's *pro se* claim of ineffective assistance of counsel, as its inquiry revealed that there was no colorable basis for his claim that counsel was ineffective for failing to move to suppress his confession: there was no indication of any evidence to support his claim that he was physically abused by the arresting officers, and in any event there was no indication that such abuse tainted his confession, the recording of which showed no sign of involuntariness; (2) we modified the mittimus to reflect defendant's entitlement to day-for-day good-conduct credit, pursuant to the law in effect at the time of the offense.

¶ 2 Defendant, Jose Ruvalcaba-Quezada, appeals from the judgment of the circuit court of Du Page County finding him guilty of first-degree murder and sentencing him to 40 years'

imprisonment. Defendant contends that (1) the trial court erred in refusing to appoint counsel to represent him on his posttrial claim that trial counsel was ineffective and that (2) the mittimus should be modified to make him eligible for day-for-day good-time credit. Because the court did not err in refusing to appoint new counsel, and because the version of the law under which he was sentenced made him eligible for good-time credit, we affirm the judgment and modify the mittimus.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on five counts of murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2012)). Defendant opted for a jury trial.

¶ 5 The following evidence was established at the trial. On December 27, 1997, as Jose Ortiz walked to the garage outside of his home, he was shot and killed. Ortiz was carrying his lunch box, as he was on his way to work. The empty shell casings and discharged bullets recovered from the scene came from a single nine-millimeter gun.

¶ 6 Ortiz was married to the ex-wife of Jesse Garcia. Garcia, who worked for his brother's landscaping business, had harassed the Ortiz family, including threatening to kill Jose Ortiz.

¶ 7 Angela Gifford, who was 16 when the murder took place, was dating a friend of defendant's nicknamed Chongo. Angela's sister, Christina Ramirez, was dating defendant.

¶ 8 In December 1997, the foursome drove from Joliet to the Downers Grove area. Once there, they drove around a particular block numerous times. As they did, Chongo and defendant, who spoke mostly in Spanish, would say in English "that one" as they pointed to the same house.

¶ 9 According to Angela, around Christmas 1997, she, Christina, Chongo, and defendant were at a friend's house. She heard defendant tell Christina that he had to shoot somebody in the morning. She thought defendant was joking.

¶ 10 Later, the four were at Chongo's sister's house. While there, Angela saw Chongo give defendant between $3000 and $5000. Angela did not know the purpose of the money.

¶ 11 According to Christina, in December 1997, while at a friend's house, defendant told her that he had to shoot somebody in the morning. Because defendant liked to joke, she did not take him seriously. Around that same time, Christina saw Chongo give defendant $3000. Also in December 1997, she saw defendant with a nine-millimeter gun.

¶ 12 In August 2000, Timothy Garlisch, a deputy with the Du Page County sheriff's office, was assigned to investigate the murder. In doing so he met with Angela in Joliet. He drove Angela to Downers Grove. They then drove around the block on which Ortiz's house was located. After driving through a nearby subdivision and speaking to Angela, Deputy Garlisch returned to the original subdivision, circling the block with Ortiz's house several more times. He then drove Angela home. According to Angela, during the trip, she identified the block that the four had circled in 1997.

¶ 13 According to Tiffany Wayda, a detective with the Du Page County sheriff's office, in 2000 the investigation focused on several individuals, including defendant. In April 2008, an arrest warrant for murder was issued for defendant. In January 2012, she was notified that on January 17, 2012, federal agents in South Carolina were going to arrest defendant for the murder. Accordingly, on January 16, 2012, Detective Wayda and Detective Harris, also of the Du Page County sheriff's office, went to South Carolina to interview defendant.

¶ 14 At approximately 7:30 a.m. on January 17, 2012, Detectives Wayda and Harris met with defendant at the sheriff's office in South Carolina. The interview was video recorded.

¶ 15 During the interrogation, Detective Wayda showed defendant a diary. Defendant identified it as one he had written while living in Utah. An entry in the diary stated that

defendant had been asked if he would kill someone for money. Defendant wrote that he killed him "with a 9mil outside of his house when he was on his way to go to work, because he had his lunchbox in his hand, but he didn't make it, he died."

¶ 16 The State introduced portions of the video-recorded interrogation. In the video, defendant admitted the crime and provided numerous details, including that he had been paid $10,000 to kill Oritz. He explained that, although he did not know who actually paid him, the money was delivered by Chongo, who worked for the same landscaping company as did Jesse Garcia. Chongo also gave him the gun used to kill Ortiz. Defendant admitted that the words in his diary describing the murder were true. About 30 minutes into the interrogation, when asked by Detective Wayda how many times he had been to Ortiz's house before the shooting, defendant said that he could not recall, because it was a long time ago. Defendant added that, because it was so long ago, he was surprised by the arrest and the arresting officers hitting him in the chest. In the latter part of the recording, defendant spoke in Spanish on the telephone with his wife. In that conversation, which was translated to English, defendant told his wife that he was being taken back to Chicago for the crime he had told her about and that he was guilty.

¶ 17 The jury found defendant guilty. Defendant filed a *pro se* motion for a new trial, in which he asserted, among other things, that his trial counsel was ineffective for failing to seek suppression of his involuntary statement. In that regard, he claimed that he had been beaten by the arresting officers shortly before he was interrogated.

¶ 18 The trial court inquired of both defendant and his counsel regarding the allegation that counsel should have filed a motion to suppress defendant's statement. Defendant explained that he was arrested at a restaurant and that the arresting officers threw him against a chair. He had

told his counsel that "they would have to have the video [of] when [he] was beaten." Defendant added that he wanted counsel to "present the video [to show] how [he] was beaten."

¶ 19 Trial counsel acknowledged that defendant had told her that the arresting officers had beaten him. According to counsel, in reviewing the discovery, which consisted of over 3500 pages plus 6 DVDs, she found no basis for defendant's allegation that he had been beaten during the arrest. To the extent that defendant suggested that he was coerced into confessing as a result of the alleged beating, counsel asserted that there "was no evidence to [her] knowledge that that ever occurred." Thus, she felt that there was no basis for that allegation. When asked if she had read the motion to suppress filed by defendant's previous counsel, she answered that she had but explained that she withdrew the motion, because there was "nothing in the discovery in [her] opinion that would have supported proceeding to a hearing on that." Counsel added that there was no evidence that defendant provided any statement to the arresting officers or that he was "force fed" details of the crime before being interrogated.

¶ 20 The trial court denied defendant's request for appointment of new counsel. In doing so, the court found that there was no basis to appoint counsel, because the allegations either were contradicted by the record or involved matters of trial strategy and tactics.

¶ 21 Defendant elected to be sentenced under the law in effect when the offense was committed. He was sentenced to 40 years' imprisonment. The mittimus stated that he was to serve 100% of his sentence (see 730 ILCS 5/3-6-3(a)(2)(i) (West 2012)). Following the denial of his motion to reconsider, defendant filed a timely notice of appeal.

¶ 22 II. ANALYSIS

¶ 23 On appeal, defendant contends that: (1) the trial court erred in refusing to appoint new counsel on his claim of ineffective assistance of counsel, because he demonstrated that counsel

possibly neglected his case by not seeking to have his statement suppressed as involuntary; and (2) because the law in effect when the offense was committed provided that he was eligible for day-for-day good-time credit on his prison sentence, his mittimus should be modified accordingly.

¶ 24 The State responds that: (1) the trial court's decision not to appoint new counsel was not manifestly erroneous; (2) even if it was, the error was harmless; and (3) because the truth-in-sentencing provision requiring a defendant to serve 100% of his prison sentence did not become effective until June 19, 1998, the mittimus should be modified to recognize defendant's eligibility to receive day-for-day good-time credit.

¶ 25 We first address defendant's claim regarding the appointment of new counsel. A trial court is not automatically required to appoint new counsel anytime that a defendant claims that his trial counsel was ineffective. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 21 (citing *People v. Moore*, 207 Ill. 2d 68, 77 (2003)). Instead, the court must first conduct an inquiry to determine the factual basis underlying the defendant's claim. *Tolefree*, 2011 IL App (1st) 100689, ¶ 21.

¶ 26 After inquiring of the defendant and his counsel, the trial court may base its decision on: (1) trial counsel's answers and explanations; (2) a brief discussion between the court and the defendant; or (3) the court's knowledge of counsel's performance at trial and the facial insufficiency of the allegations. *Tolefree*, 2011 IL App (1st) 100689, ¶ 22. If the court determines that the claim lacks merit, or pertains only to matters of trial strategy, the court need not appoint new counsel and may deny the *pro se* motion. *Tolefree*, 2011 IL App (1st) 100689, ¶ 22. A claim lacks merit if it is conclusory, misleading, or legally immaterial, or does not bring to the court's attention a colorable claim of ineffective assistance of counsel. *Tolefree*, 2011 IL

App (1st) 100689, ¶ 22. However, if a defendant's claim indicates that trial counsel possibly neglected his case, the court must appoint new counsel. *Moore*, 207 Ill. 2d at 78.

¶ 27 On appeal, if the trial court did not rule on the merits, the standard of review is *de novo*. *Moore*, 207 Ill. 2d at 75. If the court decided the motion on its merits, then we will reverse only if the decision was manifestly erroneous. *Tolefree*, 2011 IL App (1st) 100689, ¶ 25. Manifest error is that which is clearly plain, evident, and indisputable. *Tolefree*, 2011 IL App (1st) 100689, ¶ 25.

¶ 28 In this case, because the trial court conducted a proper inquiry and ruled on the merits of defendant's motion, we will reverse only if that ruling was manifestly erroneous. It was not.

¶ 29 Defendant's claim of ineffective assistance of trial counsel was based on his allegation that counsel should have filed a motion to suppress his statement, because he had been beaten by the arresting officers. A defendant arguing ineffective assistance of counsel must show that his counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defendant in that there is a reasonable probability that, but for counsel's deficiency, the result of the proceeding would have been different. *People v. Houston*, 226 Ill. 2d 135, 144 (2007). Decisions involving judgment, strategy, or trial tactics will not support a claim of ineffective assistance. *People v. Lindsey*, 324 Ill. App. 3d 193, 197 (2001).

¶ 30 The question of whether to move to suppress evidence is considered a matter of trial strategy. *People v. Little*, 322 Ill. App. 3d 607, 611 (2001). Courts presume that counsel had a legitimate strategy for filing or not filing a motion to suppress. *Little*, 322 Ill. App. 3d at 611. The decision to abandon a motion to suppress is also considered a matter of trial strategy. *People v. Carballido*, 2011 IL App (2d) 090340, ¶ 44. To overcome that presumption and prevail on a claim of ineffective assistance of counsel based on the failure to file a motion to

suppress, a defendant must show that the motion would have succeeded and that there is a reasonable probability that the outcome of the trial would have been different had the evidence been suppressed. *Little*, 322 Ill. App. 3d at 611. If filing a motion to suppress would have been futile, it is axiomatic that failing to file such a motion was not ineffective. *People v. Givens*, 237 Ill. 2d 311, 331 (2010).

¶ 31 We begin with defendant's assertion that trial counsel should have obtained a video of the alleged beating by the arresting officers. Defendant never alleged that such a video existed. Rather, when asked by the court, he said that he told his counsel that "they would have to have the video [of] when [he] was beaten." However, he never stated to the court, or explained to counsel, how he knew that there was a video of his arrest. Thus, he never identified any factual basis for his apparent assumption that there was such a video. Not only that, counsel explained that she was not aware of any evidence, beyond defendant's own assertion, that defendant was beaten by the arresting officers. She added that she had reviewed the discovery, none of which showed any basis for defendant's allegation of abuse by the arresting officers.

¶ 32 Not only did defendant fail to point to any evidence that he was beaten, apart from his own assumption regarding a video of his arrest, the video of his interrogation showed no signs of such abuse. In the video, defendant did not exhibit any physical injuries, did not express that he was in any pain, and did not request medical treatment. Although he stated that the arresting officers had hit him in the chest, he did not do so until well into the interrogation. Even then, he did so only in the context of being asked how many times he had been to the victim's house before the shooting. In answering that question, he explained that the incident happened so long ago that he was surprised by the arrest and by being struck during it. Thus, his reference to having been hit in the chest during the arrest was merely a passing comment. He did not

otherwise complain during the interrogation about any physical abuse that occurred during the arrest. Therefore, the interrogation video, which counsel had reviewed, failed to support defendant's claim that he had been beaten by the arresting officers.

¶ 33 Absent any reasonable basis for trial counsel to believe that there was any corroborating evidence that defendant was beaten by the arresting officers, defendant did not identify a colorable claim that his counsel was deficient for not filing a motion to suppress. See *Tolefree*, 2011 IL App (1st) 100689, ¶ 22. Thus, on that basis the trial court's refusal to appoint new counsel was not manifestly erroneous.

¶ 34 Not only did defendant fail to show a colorable claim of deficient performance, he also failed to show a colorable claim that he was prejudiced by counsel's failure to file a motion to suppress. That is so because, even if there was evidence that the arresting officers hit defendant in the chest and shoved him into a chair, that evidence, when viewed in light of the totality of the circumstances, would not have rendered his statement to Detectives Wayda and Harris involuntary.

¶ 35 Confessions are measured against the requirements of due process and will be excluded if involuntary. *People v. Richardson*, 234 Ill. 2d 233, 252 (2009). The test of voluntariness is whether the defendant made the statement freely, voluntarily, and without compulsion or inducement, or whether his will was overcome when he confessed. *Richardson*, 234 Ill. 2d at 253. In determining whether a statement was voluntary, a court must consider the totality of the circumstances, with no single factor being dispositive. *Richardson*, 234 Ill. 2d at 253. Relevant factors include the defendant's age, intelligence, background, experience, mental capacity, education, and physical condition when questioned, the legality and duration of the detention, the

presence of *Miranda* warnings, the duration of the questioning, and any physical or mental abuse by the police, including any threats or promises. *Richardson*, 234 Ill. 2d at 253-54.

¶ 36 Where a defendant challenges the admissibility of a statement via a motion to suppress, the State bears the burden of proving, by a preponderance of the evidence, that the statement was voluntary. *Richardson*, 234 Ill. 2d at 254. Once the State makes its *prima facie* case that the statement was voluntary, the burden shifts to the defendant to produce some evidence that the confession was involuntary. *Richardson*, 234 Ill. 2d at 254. If he does, the burden reverts to the State. *Richardson*, 234 Ill. 2d at 254. However, when it is evident that the defendant has been injured while in police custody, the State must show by clear and convincing evidence that the injuries were not inflicted as a means of producing the confession. *Richardson*, 234 Ill. 2d at 254-55. Ultimately, the constitutional test for the admission of a confession remains whether it was voluntary. *Richardson*, 234 Ill. 2d at 256.

¶ 37 In this case, defendant's claim that his statement was involuntary was based solely on his assertion that he was hit in the chest and pushed into a chair by the arresting officers. Even if true, that would not have been sufficient to establish that his subsequent confession was involuntary. The video of his interrogation showed that he was given, and knowingly waived, his *Miranda* rights. See *Richardson*, 234 Ill. 2d at 259 (*Miranda* warnings after alleged physical abuse support finding of voluntariness). The duration of the interview was short, having lasted only about two hours. Defendant, who was in his mid-30s, appeared to understand the purpose of the interview and communicated freely with the detectives. He was given coffee, offered food and restroom breaks, and was allowed to call his wife. The detectives treated defendant professionally and did not threaten him or promise him anything. Defendant was interrogated at a location apart from where he was arrested and by officers different from the arresting officers.

See *Richardson*, 234 Ill. 2d at 259 (changed interrogators or location shows voluntariness of confession). Nor did defendant exhibit any outward effects, such as being uncomfortable or in pain, from his allegedly having been struck by the arresting officers. When we consider the relevant factors in their totality, it is clear that, even if the arresting officers hit defendant in the chest and pushed him into a chair, his confession was not involuntary. Therefore, defendant did not make a colorable claim that, had trial counsel filed a motion to suppress, it would have resulted in the suppression of his statement. Thus, for that reason as well, the trial court's decision not to appoint counsel was not manifestly erroneous.

¶ 38 We next address the sentencing issue. In doing so, we note that the State concedes that defendant is eligible for day-for-day good-time credit. We agree. It is undisputed that defendant opted to be sentenced under the law applicable on December 27, 1997, the date when the offense was committed. However, the provision requiring him to serve 100% of his sentence did not become effective until June 19, 1998. *People v. Bailey*, 307 Ill. App. 3d 226, 231 (1999) (citing *People v. Reedy*, 186 Ill. 2d 1, 17 (1999)). Therefore, it did not apply to defendant's sentence. See *Bailey*, 307 Ill. App. 3d at 231. Thus, we modify the mittimus to show that defendant is eligible to receive day-for-day good-time credit. See Ill. S. Ct. R. 615(b) (eff. Jan. 1. 1967); *People v. Bashaw*, 304 Ill. App. 3d 257, 259 (1999).

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we affirm the judgment of the circuit court of Du Page County and modify the mittimus to show that defendant is eligible for day-for-day good-time credit. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 41 Affirmed as modified.