2017 IL App (2d) 150342-U
No. 2-15-0342
Order filed May 30, 2017

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
	)	
Plaintiff-Appellee,	)	
	)	No. 12-CF-3732
v.	)	
	)	Honorable
ANTHONY BRITO,	)	Victoria A. Rossetti and
	)	David P. Brodsky,
Defendant-Appellant.	)	Judges, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Jorgensen and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err by denying defendant's motion to suppress his custodial statements; we affirm defendant's conviction but amend the mittimus to reflect that defendant was taken into custody on December 13, 2012, for purposes of awarding pre-sentence credit for a total of 816 days.

¶ 2 Defendant, Anthony Brito, was charged with first-degree murder of Randy Hardy, who was shot and killed during the commission of an armed robbery. Following an unsuccessful pretrial motion to suppress statements, a jury found defendant guilty of first-degree murder. The trial court sentenced defendant to 50 years' imprisonment.

¶ 3 On appeal, defendant contends that (1) we must grant a new trial because the trial court erroneously admitted inculpatory statements that the police obtained in violation of his right to counsel under *Miranda v. Arizona*, 384 U.S. 436 (1986); and (2) even if we affirm the finding of guilt, the sentencing order should be corrected to give him the proper credit for time spent in pre-trial detention. The State disputes the first contention but confesses error on the sentencing issue. We affirm the conviction and amend the mittimus.

¶ 4 I. BACKGROUND

¶ 5 On December 13, 2012, Hardy was shot during an armed robbery at his apartment. Hardy died at the scene.

¶ 6 The police recovered some evidence located in a dumpster. They found a bandana, a black-hooded sweatshirt, and a latex glove in the dumpster. The DNA found on these items was consistent with defendant's DNA. Gunshot residue was found on the glove and sweatshirt. The police also recovered a handgun underneath the dumpster. A bullet taken from Hardy was fired from that handgun, as were all of the bullets and shells found at the scene of the crime.

¶ 7 Police Officer Craig Neal was dispatched to Hardy's apartment building in Waukegan, Illinois. He was told that there were three suspects headed west wearing dark clothing. Neal saw two men in dark clothing heading towards the Armory Terrace apartments. He and two other officers approached the two men, who identified themselves as Armando Sanders and defendant.[1] Neal spoke to defendant and noticed that he was breathing heavily and sweating, although it was 36 degrees out and defendant was not wearing a coat. While frisking defendant, Neal noted that his shirt was damp with sweat.

[1] A grand jury indicted defendant, Armando T. Sanders, and Steven Gee of the offense of first-degree murder of Hardy.

¶ 8 Defendant was taken into custody and later subjected to two interviews by Detectives Charles Schletz and Alejos Villalovos of the Waukegan Police Department. The interrogations were conducted on December 13 and 14, 2012, and the interviews were video recorded.

¶ 9 During the first interview, defendant was read his *Miranda* rights by Villalovos, and defendant stated, "I want my lawyer." Villalovos immediately exited the interview room and left defendant alone. About 45 minutes later, defendant started knocking on the door. Villalovos went to the door and asked defendant what he wanted, to which defendant replied, "We might as well get this over with." Villalovos asked if defendant wanted to speak to him without an attorney and defendant replied, "Fuck my attorney." Villalovos entered the room, read defendant his *Miranda* rights a second time, and began questioning him for about an hour and 40 minutes. Schletz joined Villalovos after some time. Defendant denied involvement in the shooting and the interview was terminated at 12:20 a.m. Defendant was placed in a cell for the night.

¶ 10 At 1:54 p.m. the next day, defendant was brought back to the interview room. At the start of the interview, Villalovos read defendant his *Miranda* rights a third time. Defendant agreed to speak to the police and, at 2:09 p.m., the following exchange took place between Schletz and defendant:

> "[Schletz]: We're gonna show you some pictures. Just a few pictures. OK?
>
> [Defendant]: At the same time, can I have my attorney with me?
>
> [Schletz]: What's that?
>
> [Defendant: Where's my attorney?
>
> [Schletz]: I don't understand what you're saying?
>
> [Defendant]: I said, my attorney.
>
> [Schletz]: What about your attorney?

[Defendant]: You know what I'm saying, can I have him with *** present?

[Schletz]: Well, that's your right."

¶ 11 Schletz continued the conversation with defendant and he acknowledged twice during the next two minutes that defendant had the right to an attorney, but defendant never mentioned an attorney again. The interview suspended around 3:24 p.m., when defendant expressed a desire to see Sanders. Defendant was taken to an area to be fingerprinted. While in that area, defendant spoke to Sanders, who was in a holding cell nearby. Sanders told defendant: "They know everything. Take your weight." Defendant was brought back into the interview room where defendant subsequently admitted that he shot Hardy. Defendant also admitted that the items found in and around the dumpster were his, including the handgun.

¶ 12 Before trial, defendant filed a motion to suppress his statements made during the interrogations. The motion alleged, *inter alia*, that the police continued to interrogate defendant without counsel present after he had invoked his right to counsel, and that his statements were not voluntary.

¶ 13 After reviewing the videos and the interrogations, the court denied defendant's motion to suppress. The court found that defendant unequivocally invoked his right to counsel during the initial December 13 interview and that the statements defendant made regarding an attorney on December 14 were not unequivocal or unambiguous in light of his previous invocation of his right to counsel on December 13, and that defendant made a knowing and voluntary waiver based on the totality of the circumstances; "that there was a free and uncoerced choice and an awareness of his rights and the consequences of abandoning those rights." As a result of the trial court's ruling, portions of the videos of defendant's December 13 and 14 interviews were played to the jury during the trial and admitted into evidence, including his statements of confession.

¶ 14 Following the trial, the jury found defendant guilty of murder. The trial court subsequently denied defendant's motion for a new trial and the case proceeded to sentencing. Thereafter, the trial court sentenced defendant to 50 years in prison. Defendant now appeals.

¶ 15 II. ANALYSIS

¶ 16 A. Invocation of Right to Counsel

¶ 17 In reviewing a trial court's ruling on a motion to suppress evidence, we apply a two-part standard of review. *People v. Timmsen*, 2016 IL 118181, ¶ 11. First, we give great deference to the trial court's factual findings when ruling on a motion to suppress evidence and will reverse the court's ruling only if the findings are against the manifest weight of the evidence. *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006). Second, we review *de novo* the trial court's ultimate legal conclusion as to whether suppression is warranted. *Timmsen*, 2016 IL 118181, ¶ 11.

¶ 18 In this case, the specific police interrogation at issue was recorded and there is no factual dispute regarding the words defendant used and the manner in which he spoke them during the interrogation. The sole issue here is whether defendant's words constituted an unequivocal request for counsel. Therefore, our analysis focuses on the correctness of the trial court's legal conclusion that defendant's incriminating statements were not taken in violation of his fifth amendment right to counsel. See, *e.g.*, *People v. Gaytan*, 2015 IL 116223, ¶ 19.

¶ 19 Defendant argues that he is entitled to a new trial because the trial court erroneously admitted inculpatory statements he made to the police after invoking his right to counsel. Specifically, defendant argues the trial court erred in ruling that he had invoked his right to counsel on December 13 but did not unambiguously invoke that right again on December 14. Defendant maintains that, contrary to the trial court's conclusion, any reasonable officer would have understood defendant's statements made at the December 14 interview to be a request for

counsel, precisely because defendant had invoked his right to counsel just one day earlier in connection with the same case. Because the interview did not cease on December 14, after defendant asked for counsel, defendant maintains that any statements subsequently made by him should have been suppressed.

¶ 20 Under *Miranda*, and as a means to protect the fifth amendment right against self-incrimination, an individual subjected to custodial interrogation or under the imminent threat of interrogation is entitled to have retained or appointed counsel present during the questioning. *People v. Harris*, 2012 IL App 100678, ¶ 69 (citing *Miranda*, 384 U.S. at 444-45; *People v. Schuning*, 399 Ill. App. 3d 1073, 1081-82 (2010)). If the accused requests counsel at any time during the interview, she or he cannot be subject to further questioning until a lawyer has been made available or the individual reinitiates conversation. *Id* (citing *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981); *In re Christopher K.*, 217 Ill. 2d 348, 376 (2005)). The purpose of this bright-line rule is to prevent police from either deliberately or unintentionally persuading the accused to incriminate himself notwithstanding his earlier request for counsel's assistance. *Smith v. Illinois*, 469 U.S. 91, 98 (1984); see also *Davis v. United States*, 512 U.S. 452, 458 (1994) (the right to counsel is designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights).

¶ 21 "In applying this rigid prophylactic rule developed in *Edwards*, courts must determine whether the accused actually invoked her right to counsel." *Harris*, 2012 IL App 100678 ¶ 69 (citing *Davis*, 512 U.S. 452 at 458; *In re Christopher K.*, 217 Ill. 2d at 376.) This is an objective inquiry, which at a minimum requires some statement that reasonably can be construed as an expression of a desire for counsel. *Id* (citing *Davis*, 512 U.S. at 459; *In re Christopher K.*, 217 Ill. 2d at 378). A trial court may consider the proximity between the *Miranda* warnings and the

purported invocation of the right to counsel in determining how a reasonable officer in the circumstances would have understood the suspect's statement. *In re Christopher K.*, 217 Ill. 2d at 381. The primary focus of the inquiry, however, should remain on the nature of the actual statement at issue. *Id.* A reference to an attorney that is ambiguous or equivocal, according to a reasonable officer in the circumstances, does not require cessation of questioning. *Davis*, 512 U.S. at 459 (finding "maybe I should talk to a lawyer" to be an ambiguous invocation); see also *In re Christopher K.*, 217 Ill. 2d at 378-81. However, "the defendant need not articulate his desire in the manner of a Harvard linguist, but he must articulate his desire in a clear enough manner that a reasonable officer in the circumstances would understand the statement to be a request for an attorney." *Schuning*, 399 Ill. App. 3d at 1082. See also *People v. Sommerville*, 193 Ill. App. 3d 161, 169 (1990) ("simply referring to an attorney *** does not automatically constitute an invocation of the right to counsel").

¶ 22 Applying an objective standard, we conclude that defendant did not unambiguously invoke his right to counsel and that the detectives were free to elicit his inculpatory statements. The first interview began the night of December 13, 2012, when defendant was read his *Miranda* rights by Villalovos, and he stated unequivocally that he wanted his lawyer. Villalovos immediately ceased questioning defendant and left the interview room. Defendant knew from his experience that, if he said he wanted his lawyer present for questioning, his invocation of his right to counsel would be honored.

¶ 23 The next afternoon, defendant was brought back to the interview room and read his *Miranda* rights a third time. Defendant asked some questions about his attorney. Schletz did not understand what defendant was saying. The officer, at this point, is allowed to ask questions to clarify if defendant is invoking his right to counsel. See *Schuning,* 399 Ill. App. 3d at 1089-90

(noting that clarifying questions, though not required, is often good police practice and "will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel" (quoting *Davis*, 512 U.S. at 461). Ultimately, defendant stated: "Can I have him [his attorney] present?" Schletz appropriately replied, "That is your right." Schletz acknowledged defendant's right to have his attorney present two times after defendant's question. However, defendant never mentioned his attorney again.

¶ 24 We find this case similar to *People v. Quevedo*, 403 Ill. App. 3d 282 (2010), cited by the State. There, after having his *Miranda* rights explained, defendant said that he understood his right to counsel, and then stated "[u]hhhh—huh. Then we're still going to wait until the attorney arrives." *Id*. at 293. We agreed with the State that, regardless of the punctuation shown in the transcript, a reasonable police officer could have interpreted this statement as a question about the availability of an attorney rather than an unambiguous request for one. The defendant also asked "can the attorney come right now? Right this minute?" *Id*. The detective said that an attorney was not available that night but that the defendant could request counsel and end the conversation at any time. The defendant responded "[n]o, then let's do it like you say. I'll answer what—what you guys ask me." *Id*. Viewing the defendant's statements in context indicated that the unavailability of an attorney at the beginning of the first interview caused the defendant to not ask for one. The defendant executed the *Miranda* waiver, and he did not assert that he expressed a desire to speak with an attorney during any of the subsequent questioning. Accordingly, we concluded that the defendant did not make an unambiguous request for counsel and that the detectives were free to elicit his inculpatory statements. *Id*. at 293-94.

¶ 25 Like *Quevado*, defendant's questions concerned the availability of his attorney rather than a request for one. His statements contained some lack of decisiveness or clarity, and as pointed out by the trial court, given his previous interview in which defendant unmistakably stated his intentions, it is objectively clear that Schletz and Villalovos were not unreasonable in continuing their questioning. Furthermore, defendant never mentioned nor asked for an attorney during the remainder of the interview.

¶ 26 Contrary to defendant's assertion, this case is distinguishable from *Schuning* and *Harris*. In *Schuning*, the defendant asked the officer to use the telephone to call his attorney. The officer said yes, but the ICU nurse told the defendant that phones could not be used in the ICU. The defendant was never given use of a phone. *Schuning*, 399 Ill. App. 3d at 1075. Unlike in the present case, the defendant clearly asked to contact his attorney and never was given that opportunity before he made inculpatory statements.

¶ 27 In *Harris*, the defendant asked the officer if she could have a few days to acquire an attorney, to which the officer responded, "No." *Harris*, 2012 IL App (1st) 100678 ¶ 70. The defendant then said she had no way to obtain his phone number and the officer responded only to ask if the defendant no longer wanted to answer questions. In the present case, Schletz and Villalovos scrupulously honored defendant's invocation of his right to counsel at the interview on December 13, and they continued to indicate to defendant at the interview the next day that he had the right to have his attorney present. Defendant never unequivocally asserted that right before answering questions.

¶ 28 Accordingly, the trial court did not err in denying the suppression motion and, because there was no error, we need not consider whether the admission of the statements was harmless.

¶ 29 B. Credit

¶ 30 Additionally, defendant argues that he is entitled to credit against his prison sentence to properly reflect the time he served in presentence custody. In this case, the sentencing order entered on March 9, 2015, orders that defendant serve 50 years in the Illinois Department of Corrections and indicates that defendant should receive credit for 818 days for time he spent in custody from January 10, 2013, through March 9, 2015, which is incorrect. The period from January 10, 2013, through March 9, 2015, is only 788 days. Defendant was arrested on December 13, 2012, and remained in custody throughout the pendency of the case, which should be 816 days. The State confesses the error, and we agree. Accordingly, we amend the mittimus to reflect a custody date of December 13, 2012, for purposes of awarding pre-sentence credit for a total of 816 days.

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, the judgment of the circuit court of Lake County is affirmed as amended. 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 2012).; see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 33 Affirmed as amended.