2018 IL App (2d) 170325-U
No. 2-17-0325
Order filed September 4, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 14-CF-565
	)	
MODESTO ALARCON,	)	Honorable
	)	Clint Hull & Donald J. Tegeler, Jr.,
Defendant-Appellant.	)	Judges, Presiding.

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

ORDER

¶ 1 *Held*: The trial court did not err in imposing a 60-year sentence where it did not rely on an improper factor and its sentencing decision was not otherwise an abuse of discretion; trial court's suggestion that 25-year sentence was appropriate during pretrial conference did not prelude imposition of 60-year sentence following trial; the record adequately established that defendant consented to a search of his premises and the scope of the consent; pat-down search, assuming, *arguendo*, it occurred, did not taint subsequent consent; defendant's inculpatory statement prior to receiving *Miranda* warnings was not made in response to interrogation and was, in any event, harmless.

¶ 2 I. INTRODUCTION

¶ 3 Defendant, Modesto Alarcon, was convicted of Unlawful Possession of a Controlled Substance (over 900 grams of heroin) (720 ILCS 570/401(A)(1)(D) (West 2014)) and Money

Laundering (720 ILCS 5/29B-1 (West 2014)) following a bench trial in the circuit court of Kane County. He now appeals, alleging three primary errors. First, he contends the trial court erred in sentencing him to 60 years' imprisonment. Second, he argues that his motion to suppress physical evidence should have been granted. Third, he asserts that his motion to suppress a statement he made to the police should have been granted as well. We find none of these arguments persuasive; therefore, we affirm.

¶ 4 II. BACKGROUND

¶ 5 We set forth the following background material to facilitate an understanding of the discussion that follows. Additional facts as they pertain to the issues raised by defendant will be set forth as we analyze them.

¶ 6 On April 1, 2014, at about 4:25 p.m., law enforcement officers approached defendant in the front yard of his residence. They did not have a warrant, and they did not have reasonable suspicion sufficient to justify a temporary detention. There is conflicting testimony in the record (which will be discussed below) concerning whether the officers successfully obtained defendant's permission to search his residence. Defendant and the police officers went into the house. While seated at the dining room table, defendant was given a consent-to-search form. He signed it (defendant now disputes that the State proved he understood the form and that the State established the contents of the form, as only a Spanish-language version was introduced into evidence).

¶ 7 After the form was signed, the police executed a search of the premises. In a detached garage, they discovered approximately seven kilograms of heroin, currency, and a money counter. A handgun was discovered in the basement of the house, as was certain "packing materials," such as ziplock bags, a scale, and disposable respirator masks.

¶ 8 Defendant was then taken to the Aurora Police Department. After several hours, at about 8:10 p.m., defendant was placed in an interrogation room. Prior to waiving his *Miranda* rights, defendant was asked various personal questions, such as his name, his age, and the names of family members. He was also asked about his illegal immigration to this country. An officer then told defendant he wanted to speak with him about the heroin found at his home. Defendant stated that he had seven or eight kilograms of heroin in his garage. Defendant was then read his *Miranda* rights, and he agreed to speak with the police. He proceeded to make a number of inculpatory statements concerning his possession of the heroin. He also related that he recently picked up over $200,000 and delivered it to another individual. Defendant explained that he was storing the heroin for another individual and that he expected to receive $2,000 as payment.

¶ 9 Defendant filed motions to suppress based on the fourth and fifth amendments. They were denied following an evidentiary hearing. Defendant waived a jury trial, and a bench trial was held. Much of the evidence was presented via stipulation. A full sentencing hearing was held. Despite the fact that a 25-year sentence was suggested by the trial court at a conference held in accordance with Illinois Supreme Court Rule 402 (eff. July 1, 2012), the trial court imposed a maximum sentence of 60 years' imprisonment. This appeal followed.

¶ 10 III. ANALYSIS

¶ 11 On appeal, defendant raises three main issues (which encompass a number of related issues as well). First, defendant argues that the trial court erred in sentencing him to 60 years' imprisonment. Second, he contends that the trial court should have granted his motion to suppress physical evidence, which was brought on fourth-amendment grounds. Third, he asserts his motion to suppress his statement on fifth-amendment grounds should have been granted. We will address these arguments in turn. We may affirm on any basis appearing in the record,

regardless of the reasoning employed by the trial court. *People v. Rajagopal*, 381 Ill. App. 3d 326, 329 (2008).

¶ 12 A. SENTENCING

¶ 13 Defendant makes two arguments concerning his sentence. First, he contends it was an abuse of discretion. Second, he asserts that the trial court considered as aggravation the dangerousness of the heroin he possessed, which, he states is a factor inherent in the underlying offense. We will first consider whether the trial court relied on an improper consideration; then, we will turn to its ultimate conclusion regarding sentencing.

¶ 14 1. Improper Factor

¶ 15 Defendant argues that the trial court erroneously considered the general dangerousness of heroin in determining an appropriate sentence. Defendant correctly points out that "a factor which is implicit in the offense of which [a] defendant was convicted should not be considered at sentencing as an aggravating factor." *People v. Latona*, 268 Ill. App. 3d 718, 729 (1994). This is because "the legislature obviously has already considered such a fact when setting the range of penalties and 'it would be improper to consider it once again as a justification for imposing a greater penalty.' " *People v. James*, 255 Ill. App. 3d 516, 532 (1993) (quoting *People v. Martin*, 119 Ill. 2d 453, 460 (1988)). The question of whether a sentencing court relied on a legally erroneous factor is a question of law subject to *de novo* review. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8.

¶ 16 It is not *per se* improper for a sentencing court to comment on the dangerousness of a defendant's conduct. See *People v. McCain*, 248 Ill. App. 3d 844, 852 (1993) (noting that "[i]t is important that defendants understand why they are subject to the penalties provided by law and why they have received their particular sentences. The harm that the crime causes society is an

inherent consideration which underlies the basic range of penalties specified by the legislature. Commenting on the problems caused by drug-related crime encourages rehabilitation by providing a context in which a defendant may develop feelings of remorse."). Moreover, though it is improper to consider the potential harm to society in general, it is not error to consider the degree of harm threatened by a defendant's specific conduct. *People v. Robinson*, 391 Ill. App. 3d 822, 844 (2009). Hence, it is not improper for a court to consider the quantity of drugs possessed by a defendant beyond the minimum amount necessary to invoke a certain sentencing range. *People v. Alcala*, 248 Ill. App. 3d 411, 425-26 (1993).

¶ 17 Defendant complains that the State presented the testimony of L. Robert Russell, the Kane County Coroner, regarding the general dangerousness of heroin. He then asserts that the trial court relied on this testimony in crafting his sentence. It is, of course, presumed that a trial court will disregard evidence before it that is not relevant. *People v. Stumpe*, 80 Ill. App. 3d 158, 164 (1979). Here, the court commented on the coroner's testimony:

> "Heroin has no medicinal purposes, absolutely none, in the form that I am currently looking at it. *I have 20 pounds of heroin right here that is probably capable of ruining many, many, lives in this locale.* Even if it doesn't kill the person, it can take away the person's soul. It can take away their family, their income, their house, everything they ever worked for. Everything we have ever heard about heroin is it can be addictive the first time you use it, and as we heard today, once you start using it, you need more and more and more, and that's what keeps these drug dealers in business is that people absolutely need it. I do not—*although it's been argued that [defendant] is not a street-level dealer, that I agree with. [Defendant] is anything but a street-level*

> *dealer*. I don't believe that [defendant] never knew the effects that this could cause, and quite frankly, I don't think he cares." (Emphasis added.)

As the italicized portions of the trial court's soliloquy make clear, it was addressing the particular harm threatened by defendant's conduct—particularly the enormous quantity of heroin in his possession. This is confirmed where the trial court later stated, "*This much heroin* can do so much damage and ruin so many people's lives that I don't think we could count the number of people it could ruin." (Emphasis added.)

¶ 18 Defendant also points to the trial court's statement that it wished to "send a message." However, in context, it is clear that the trial court was referring to sending a message that the sort of conduct engaged in by defendant would not be tolerated rather than a message about the dangers of heroin generally. Notably, the court stated, "I believe it is the obligation of this Court to send an absolute message that *what I see in front of me* will not be tolerated in this court or in any other court or on the streets of our community." (Emphasis added.) Further, a court may consider the need for deterrence in setting an appropriate sentence. *People v. Cameron*, 189 Ill. App. 3d 998, 1010 (1989).

¶ 19 Finally, we note that in discussing the first factor set forth in section 5-5-3.2 of the Unified Code of Correction (730 ILCS 5/5-5.3.2 (West 2014)), whether the conduct "caused or threatened serious harm," the court stated:

> "The State wants me to find that [defendant's] conduct caused or threatened serious harm. I decline to do that in relation to the way Paragraph 1 is stated. I look at that as actual physical harm and/or severe mental trauma. *** I do note that the potential for harm that this heroin could cause that I'm looking at is great. I've heard evidence today that .2 grams I believe it was at the high end is what a normal user would use. They use

> it several times potentially, but that's 5 hits per gram, and I'm looking at between 8,000 and 9,000 grams of heroin in front of me. If I extrapolate that out, I'm somewhere between 40 to 45,000 hits of heroin, if my addition is correct. [Defendant] also testifies and states that on at least today at least 8 to 10 occasions he delivered substantial amounts of money. [T]here's a potential, yes, but I will not use number one in aggravation because I think it actually goes to actual bodily harm and/or as I said mental torture."

Again, it is clear that to the extent the court considered dangerousness, it was focused on defendant's particular conduct rather than heroin generally. Parenthetically, we note that the court declined to find that the first factor set forth in section 5-5-3.2 even applied.

¶ 20 In short, we find no error in the trial court's consideration of the dangers of defendant's particular conduct.

¶ 21 2. Abuse of Discretion

¶ 22 Having determined that the trial court did not rely on an improper factor in arriving at a sentence, we now turn to the question of whether the sentence imposed by the trial court was an abuse of discretion. Defendant was convicted of possessing in excess of 900 grams of heroin, which is a class X felony with a sentencing range of 15 to 60 years' imprisonment. See 720 ILCS 570/401(A)(1)(D) (West 2014). He received the maximum sentence. He now advances several reasons why he claims this sentence was an abuse of discretion.

¶ 23 Where a trial court imposes a sentence within the range set forth in the applicable statute, a reviewing court may disturb that decision only if the trial court has abused its discretion. *People v. Jones*, 168 Ill. 2d 367, 373 (1995). An abuse of discretion occurs only if no reasonable person could agree with the trial court. *People v. Ramos*, 353 Ill. App. 3d 133, 137 (2004). Our supreme court has emphasized that "the trial court is in a superior position to assess the

credibility of the witnesses and to weigh the evidence presented at the sentencing hearing." *Jones*, 168 Ill. 2d at 373. A court of review "must not substitute its judgment for that of the trial court merely because it would have weighed the factors differently." *People v. Fern*, 189 Ill. 2d 48, 53 (1999). The seriousness of the offense is the most important factor in imposing a proper sentence. *People v. Kelley*, 2015 IL App (1st), 132782, ¶ 94. Finally, a trial court need not "detail precisely for the record the exact process by which [it] determined the penalty nor is [it] required to articulate [its] consideration of mitigating factors nor is [it] required to make an express finding that [a] defendant lacked rehabilitative potential." *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002).

¶ 24 Defendant first contends that it was unjust for the trial court to impose a "de facto life sentence." Without further explanation, he claims that the trial court's decision was "purposeful and vindictive." How it is "purposeful and vindictive" is not immediately apparent to us. Indeed, though defendant may end up being incarcerated for the rest of his life, this is as much a function of his age as it is the length of the sentence. See *People v. Martin*, 2012 IL App (1st) 093506, ¶ 50 ("While defendant is arguably correct that his combined prison terms likely constitute a *de facto* life sentence, we nevertheless cannot say that the trial court abused its discretion in imposing such a sentence"). Defendant cites nothing to suggest that an older person is entitled to a more lenient sentence than a younger person simply by virtue of being older. As such, this point is forfeited. *People v. Taylor*, 2013 IL App (2d) 110577, ¶ 31.

¶ 25 Defendant further points to his alleged lack of criminal history, the State's recommendation of 40 years' imprisonment, the trial court's suggestion of a 25-year sentence at a Rule 402 conference, his alleged lesser role in the offense, and his "meaningful rehabilitative potential and substantial mitigation." Essentially, defendant is asking that we reweigh these

factors and impose a lesser sentence. Defendant also contends the trial court placed too much weight on the need to send a message to the community. It is simply not our role to reweigh such considerations and second guess the trial court. *Fern*, 189 Ill. 2d at 53. Rather, on appeal, it is defendant's burden to convince us that no reasonable person could agree that a 60-year sentence is appropriate. See *Jones*, 168 Ill. 2d at 373. Defendant has not met that burden here.

¶ 26 On a related note, defendant contends that it was *per se* improper for the trial court to impose a 60-year sentence after it suggested a 25-year sentence at a Rule 402 conference. In support, defendant cites *People v. Dennis*, 28 Ill. App. 3d 74, 78 (1975). In that case, the defendant had been offered a sentence of two to six years. *Id*. During plea negotiations, the trial court had been made aware of what the State could prove as well as the defendant's criminal record. *Id*. The defendant rejected the plea, and, following a jury trial, the trial court imposed a sentence of 40 to 80 years. *Id*. The reviewing court, finding the harsher sentence had been imposed due to the defendant's decision to choose a jury trial, reduced the sentence to 6 to 18 years' imprisonment. *Id*. at 79. Hence, the *Dennis* court corrected the unduly harsh sentence by imposing a sentence that was three times longer than had been contemplated during plea negotiations. Moreover, it expressly limited its holding:

> "Finally, we wish to make it clear that our holding that petitioner suffered a constitutional deprivation which must be remedied is limited to the facts of the instant case, namely, a sentence imposed following a jury trial approximately 20 times greater than that offered during plea negotiations. We do not intend it to erode the well established principle that a mere disparity between the sentence offered during plea bargaining and that ultimately imposed, of itself, does not warrant the use of our power to reduce a term of imprisonment imposed by the trial court." *Id.* at 78.

Here, the sentence imposed is slightly more than double that discussed at the Rule 402 conference. Thus, *Dennis* provides little support for defendant's argument.

¶ 27 We also note that the Rule 402 conference was, as is typical, held off the record. Hence, we do not know the precise details of what transpired during that conference. In *People v. Gornick*, 107 Ill. App. 3d 505, 513 (1982), the court noted, "The fact that a heavier sentence was imposed after trial than the one offered prior to trial does not necessarily justify the inference that the higher sentence was imposed as a punishment." Without knowledge of what exactly transpired in the conference, we cannot draw such an inference here.

¶ 28 Defendant compares the instant case to *People v. Nolan*, 291 Ill. App. 3d 879, 887 (1997). In *Nolan*, the reviewing court found an abuse of discretion where the trial court imposed a 30-year sentence for second-degree murder. The defendant had argued that the "factual matrix surrounding the" offense indicated the sentence was an abuse of discretion. *Id*. This case, of course, has a different "factual matrix." This is why such case-to-case comparison of sentences is unpersuasive, and, more importantly, not permitted in this state (*Fern*, 189 Ill. 2d at 55).

¶ 29 To conclude, the trial court's imposition of a 60-year sentence was not an abuse of discretion.

¶ 30 B. FOURTH AMENDMENT

¶ 31 Defendant further contends that the trial court erred in denying his motion to suppress physical evidence based on the fourth amendment. Typically, motions to suppress present mixed questions of law and fact. *People v. Pitman*, 211 Ill. 2d 502, 512 (2004). We review a trial court's findings of historical fact using the manifest-weight standard. *Id*. Under this standard, we will reverse only if an opposite conclusion is clearly apparent. *People v. Love*, 404 Ill. App. 3d 784, 787 (2010). The ultimate question of whether suppression is warranted is reviewed *de*

novo, meaning we are "free to undertake [our] own assessment of the facts in relation to the issues presented and may draw [our] own conclusions when deciding what relief should be granted." *Pittman*, 211 Ill. 2d at 512. A reviewing court may consider evidence presented both at the suppression hearing and at the subsequent trial in reviewing the propriety of a trial court's decision regarding a motion to suppress. *People v. Turner*, 259 Ill. App. 3d 979, 989 (1994).

¶ 32 Defendant makes two main arguments here. First, he contends that the State failed to establish the scope of the consent he purportedly granted to search his premises. Second, he argues that his consent was not valid due to the taint of a preceding illegal pat-down search. We will address these issues separately.

¶ 33 1. Consent

¶ 34 Defendant asserts that the evidence of record does not establish that he consented to the search of his house and garage (the heroin was discovered in a detached garage). It is axiomatic that the State bears the burden of proving consent by a preponderance of the evidence. *People v. Casazza*, 144 Ill. 2d 414, 417 (1991). This includes the scope of the consent given. See *People v. Baltazar*, 295 Ill. App. 3d 146, 149-50 (1998).

¶ 35 At issue here is the contents of a document written mostly in Spanish that the State represents to be a consent form signed by defendant. No translation of the form appears in the record. Defendant contends, "Without an opportunity to review the precise verbiage of the written consent[,] there was simply no possible way for the trial court to properly assess the objective reasonableness of the officers' conclusion that the defendant had consented to the warrantless search of his garage." Defendant characterizes testimony regarding the content of the form as "limited."

¶ 36 Defendant also claims that a portion of the form that was written in English was confusing. Specifically, he points to a section of the form that "contained a blank space with a handwritten notation listing the defendant's address and two vehicles that were found parked on the premises, followed by a mixed language clause that read '. . .and detached garaje of 1032 Grove St.' " Defendant contends that the word "detached" could be misunderstood by a Spanish speaker as a term of exclusion which would specifically exempt the garage from the other locations that are authorized for search." At this point, we note the State's observation that it would be odd indeed for such a consent form to identify places not included within its scope.

¶ 37 In any event, the evidence presented in the proceedings below provided ample evidence of the content of the form. It also provided a basis for the trial court to determine that defendant understood sufficient English and the police understood sufficient Spanish such that defendant was meaningfully informed about what he was consenting to.

¶ 38 Officer Krystal Williams testified that she approached defendant in front of his house at about 4:25 p.m. on April 1, 2014. She addressed defendant in both English and Spanish. She testified that she understands Spanish. She stated that she initially addressed defendant in English and he "seemed to understand some of it," and she repeated her questions in Spanish. She asked defendant if they could search his house, and he responded affirmatively. She then gave him a form to sign, which she testified was a "consent to search form." Defendant signed the form, as did Williams and another officer as witnesses. Williams further testified that after she and two other officers encountered defendant in his front yard, they asked if they could go inside. Defendant agreed, and the group went inside and sat at the dining room table. Defendant's wife and two or three children were present. She presented defendant with the consent-to-search form. He read it. Williams explained the form to him and gave him an

opportunity to review it. She "explain[ed] to him what [she] wanted to do." Defendant never asked any questions about the form or stated that he did not understand it.

¶ 39 Similarly, Officer Thomas La Pak testified that he was with Williams when she encountered defendant on April 1, 2014. When they initially encountered defendant, they addressed him in English and he responded in English. La Pak identified the consent form signed by defendant as "our standard consent to search in Spanish." This form was given to defendant while the group sat at his dining room table. La Pak saw defendant sign it, and he signed it too. He did not recall defendant having any questions about the form. Agent Robert Taylor testified that he was also present. He identified the form that defendant signed as a "consent to search in Spanish." The form was explained to defendant.

¶ 40 Keeping in mind that the State need only carry its burden here by a preponderance of the evidence (*Casazza*, 144 Ill. 2d at 417), the officer's testimony provides an ample basis to infer that the form signed by defendant was a consent-to-search form and that defendant understood the form. Initially we note that the trial court found the three officers whose testimony is set forth above to be credible. Further, the trial court found that Williams "presented the defendant with a consent form in Spanish." This is a finding of historical fact, to which we owe deference. *Pitman*, 211 Ill. 2d at 512. Three officers testified that the form was a consent-to-search form. There was evidence in the record that at least one of those officers (Williams) understood Spanish, so she would be able to understand the form. Further, La Pak testified that it was a "standard" form, so it was the sort of document that the officers would recognize. Under such circumstances, we cannot say that the trial court's finding that Williams presented defendant with a consent-to-search form in Spanish is contrary to the manifest weight of the evidence.

¶ 41 As for the scope of the consent, defendant contends that the word "detached" could have caused him to believe that the garage was not within the scope of the search. However, the evidence indicated that the officers explained the form to him and he had no questions about it. Moreover, there is some evidence the defendant understood English to a degree (despite his testimony to the contrary). There was testimony that defendant appeared to understand and responded appropriately when he was initially approached and addressed in English. That he misconstrued "detached" in the manner he now suggests is rank speculation, and even if he did, the officers testified that they explained the form to defendant and he asked no questions about it.

¶ 42 Finally, defendant also argues that there was no evidence as to whether any verbal consent was made in English or Spanish. He adds, "Without some evidence tending to establish whether or not the defendant could understand the language that was used to request his consent to enter the home, the trial court had no basis to conclude that the State had met its burden to show that it was objectively reasonable to believe that the alleged consent was knowing and voluntary." However, this argument lacks support in the record. Williams testified that she understands Spanish and that she addressed defendant in both English and Spanish. She first addressed defendant in English and he "seemed to understand some of it." She then repeated her questions in Spanish. She asked defendant if they could search his house, and he responded affirmatively. Accordingly, the evidence in the record indicates that the officers and defendant were able to communicate effectively.

¶ 43 In sum, we find defendant's arguments on this point unpersuasive.

¶ 44 2. Illegal Pat Down

¶ 45 Defendant next contends that he was subjected to a suspicionless search prior to granting consent to search his premises. In turn, he argues, that this alleged illegality tainted the

subsequent consent. Defendant testified that the officers searched him in the front yard before they entered the house. Williams testified that she did not search defendant, but did not recall if anyone else did. La Pak could not recall whether defendant was patted down, but added that it would not have been standard practice to do so during a consensual encounter. Taylor also could not recall, but acknowledged that it was his practice to "do just a quick check for weapons."

¶ 46 The trial court found that "if the defendant was searched[,] it was a quick cursory search for weapons." Nowhere does the trial court expressly state whether the pat down occurred. A more definitive finding by the trial court would have been helpful to us in resolving this appeal. If the point were dispositive, we would have to remand to allow the trial court to address it. However, we hold that, assuming *arguendo* a pat down occurred, such a minor intrusion would not vitiate defendant's consent. For the remainder of this discussion, we will assume, consistent with the trial court's findings, that a "quick cursory search for weapons" occurred.

¶ 47 Before proceeding further, we note defendant's contention that it would be inappropriate for us to address the question of attenuation on appeal without findings from the trial court. As noted above, a mixed standard of review applies, and we conduct *de novo* review of ultimate constitutional questions regarding suppression. *Pittman*, 211 Ill. 2d at 512. Attenuation presents such an issue. *People v. Ferris*, 2014 IL App (4th) 130657, ¶ 67; *People v. Wilberton*, 348 Ill. App. 3d 82, 85 (2004). Hence, so long as we accept the findings of the trial court (unless they are against the manifest weight of the evidence), we may address, *de novo*, the question of whether defendant's consent was sufficiently attenuated from the posited pat-down search such that it was valid.

¶ 48 Defendant correctly points out that a pat-down search is necessarily (absent consent) a seizure. See *In re Mario T.*, 376 Ill. App. 3d 468, 471 (2007) ("Once Officer Hickey began the

protective pat-down, it changed the fundamental nature of the encounter from a consensual one into a full-blown *Terry* stop."). Nothing in the record provides an adequate justification for such an intrusion. The State suggests that defendant's suspected involvement in a large drug conspiracy provided a justification. However, this argument has previously been rejected by Illinois courts. *People v. Boswell*, 2014 IL App (1st) 122275, ¶ 23 ("However, *Terry* requires more than a general belief that drug dealers may carry weapons before a pat-down may be conducted."); *People v. Marcella*, 2013 IL App (2d) 120585, ¶ 32 ("However, it is well established that, even when an officer has a reasonable suspicion that an individual is a drug dealer, a *Terry* search for weapons is not supported merely by the officer's belief that drug dealers carry weapons.").

¶ 49 Where "the State can establish attenuation between the illegal seizure and the subsequent consent to search, the consent will be considered purged of the primary taint and, therefore, valid." *Marcella*, 2013 IL App (2d) 120585, ¶ 35. Attenuation is judged with respect to the totality of the circumstances. *People v. Salgado*, 396 Ill. App. 3d 856, 865 (2009). Relevant factors in analyzing whether consent is sufficiently attenuated from an illegal search include " (1) the temporal proximity between the seizure and the consent; and (2) the presence of intervening circumstances." *Id*. The flagrancy of the alleged police misconduct is also relevant. *Id.* at 865-66.

¶ 50 Initially, we note that the flagrancy of any alleged police misconduct was minimal. The trial court found that defendant was subject to, at most, "a quick cursory search for weapons." This finding is not against the manifest weight of the evidence. It has been explained that "[p]olice action is flagrant where the investigation was carried out in such a manner to cause surprise, fear, and confusion, or where it otherwise has a 'quality of purposefulness,' *i.e.*, where

the police embark upon a course of illegal conduct in the hope that some incriminating evidence * * * might be found." *People v. Jennings*, 296 Ill. App. 3d 761, 765 (1998). A brief and limited search for weapons clearly does not fall within this definition. As such, this consideration weighs in favor of finding defendant's subsequent consent valid.

¶ 51 Further, "A lapse of time may dissipate the taint of an illegal arrest by allowing the accused to reflect on his situation." *Wilberton*, 348 Ill. App. 3d at 85. In this case, little time elapsed between the time the pat down is assumed to have occurred and the time at which defendant gave consent to search the premises. On the other hand, it has been stated that the lapse of time can serve to exacerbate the taint of an initial illegality where there are additional indicia of coercion during the intervening period. *People v. Ollie*, 333 Ill. App. 3d 971, 985 (2002) see also *People v. Lekas*, 155 Ill. App. 3d 391, 414 (1987) ("A lapse of time is a factor which cuts both ways in analyzing attenuation. It may serve to amplify the coercion latent in the custodial setting, particularly when there are other indicia of coercion[citation]; equally, it may help to purge the taint of a prior illegality by allowing an accused to reflect on his situation, particularly when attended by other factors ameliorating coercion, such as *Miranda* warnings."). Here, there was no indication that anything coercive happened between the alleged pat down and the consent. Nevertheless, we hold that this factor favors defendant's position to a degree.

¶ 52 Finally, we consider the presence of intervening circumstances. The trial court found the testimony of Williams, La Pak, and Taylor to be credible and defendant's testimony to be incredible. The officers' testimony indicated that, prior to giving consent, defendant was presented with a consent form, in Spanish, and allowed to review it. The form was explained to him. These findings are not contrary to the manifest weight of the evidence. In *People v. Jardon*, 393 Ill. App. 3d 725 (2009), the court considered whether a confession was sufficiently

attenuated from an initial illegality. The court found the fact that the defendant had been given *Miranda* warnings was a factor weighing in favor of attenuation. *Id.* at 734. In this case, presenting defendant with the consent form served a similar function. As the *Miranda* warnings serve to inform a defendant that he or she has certain rights, the consent form made clear to defendant that he could have withheld consent by not executing it. As such this factor indicates that defendant's consent was not tainted by the pat down search, assuming, *arguendo*, it occurred.

¶ 53 We also find *People v. Taggart*, 233 Ill. App. 3d 530, 553-54 (1992), instructive:

> "We interpret the essence of *Kelly*[, 76 Ill. App. 3d 80 (1979),] and *Freeman*[, 121 Ill. App. 3d 1023 (1984),] to be that a consent obtained pursuant to an unauthorized assertion of police power in such a fashion as to convey to a defendant an apparent authority to so act renders a consent involuntary. Such is not the case here, however. [The police officer's] mere display of the photograph, albeit seized illegally from defendant's van, without more, did not convey an apparent authority such that defendant would have believed his consent to be a passive submission to that authority rather than a voluntary relinquishment of a right. There is nothing in the record to indicate that the defendant would have felt obliged to consent to a search of his van merely because [the officer] showed him the two photographs previously taken from the van.").

In this case, it is difficult to see how a brief pat-down search occurring prior to defendant being presented with the consent form would have conveyed apparent authority for the police to search such that defendant would not have felt free to decline consent.

¶ 54 Accordingly, given the near nonexistent level of flagrancy of the police conduct along with the fact that defendant's consent was secured only after a consent form was explained to

and executed by him, we hold that his consent was sufficiently attenuated from any illegal pat down that may have occurred. We therefore reject defendant's argument on this point.

¶ 55 Before moving on, we note that defendant argues that the trial court erred in refusing to "rehear or reconsider" his argument regarding the occurrence of the pat-down search. Our resolution of this point renders this argument moot.

¶ 56 C. FIFTH AMENDMENT

¶ 57 Defendant's final contention is that the trial court erred in failing to suppress his statement made to the police shortly after 8 p.m. on the same day that the search discussed above occurred. The trial court made the following findings. On April 1, 2014, defendant was arrested and transported to the Aurora police station at approximately 4:25 p.m. He was moved to an interview room at about 8:10 p.m., where he was interrogated by three police officers. Defendant was told the State would be informed of his cooperation. The officers asked some preliminary questions and then, at about 8:17 p.m., stated that "they wanted to speak with him about the heroin that was found inside his house." Defendant responded to this statement by stating that "he had 7 or 8 kilograms in the house." At this point, defendant was read his *Miranda* rights and executed a written waiver of them. After waiving these rights, defendant went on to admit he possessed the heroin.

¶ 58 The trial court construed the relevant issue as whether an interrogation within the meaning of the *Miranda* rule occurred. Of course, *Miranda* warnings must be given only before an accused is subject to a custodial interrogation. See *People v. Fasse*, 174 Ill. App. 3d 457, 460 (1988). Defendant was indisputably in custody at the time he made the statement at issue. An interrogation takes place through "express police questions or 'any words or actions on the part of the police * * * that the police should know are reasonably likely to elicit an incriminating

response.' " *People v. Barnett*, 393 Ill. App. 3d 556, 558 (2009) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)). Here, the trial court determined that the statement that provoked defendant's admission—"I want to speak with you about the heroin found inside your house"—did not constitute interrogation. We agree with the trial court.

¶ 59 In *People v. Jones*, 337 Ill. App. 3d 546 (2003), the court considered whether an interrogation had occurred. The defendant had been arrested, and his car was impounded. *Id.* at 549. During an inventory search, a loaded handgun was found in the locked glove compartment. *Id*. An officer told the defendant that they had "located a handgun in the car." *Id*. Defendant responded by asking why they "went into a locked glove box without a search warrant." *Id*. Defendant had not been apprised of his *Miranda* rights. *Id*.

¶ 60 The *Jones* court determined the officer's statement did not constitute interrogation. *Id.* at 553. It found that the statement was not "reasonably likely to elicit an incriminating response, as the statement did not seek or require a response at all." It observed that the statement was "purely informational." *Id*. It distinguished the case of *People v. Burson*, 90 Ill. App. 3d 206, 208 (1980), where an officer, confronting a defendant who he knew to be driving while his license was revoked, stated, "Now, Jerry, you know better than to drive that car." The *Burson* court found this to constitute interrogation because the officer's statement "posited the guilt of the defendant as fact while attempting to elicit comments directed toward why the defendant committed the act." *Id.* at 210. Unlike *Burson* and like *Jones*, the statement at issue in this case did not posit defendant's guilt. Moreover, like the officer's statement in *Jones*, the statement here did not seek, much less require a response. We hold that this statement simply was not " 'reasonably likely to elicit an incriminating response.' " *Barnett*, 393 Ill. App. 3d 556, 558 (2009) (quoting *Innis*, 446 U.S. at 301). Defendant asserts that the fact that he was told his

cooperation would be related to the State somehow alters the nature of the officer's statement; however, it is not clear to us how this changes the fundamental nature of the statement such that it would be *reasonably likely* to induce defendant to incriminate himself.

¶ 61 An additional basis exists to affirm the trial court on this point. Agent Jose Gonzalez testified that, after waving his *Miranda* rights, defendant went on to admit his possession of the heroin at issue. Specifically, Gonzalez testified that defendant stated that defendant "had picked up the kilos of heroin about a few days ago from a subject that lived in Aurora." When defendant went to pick up the drugs, he did not know whether it would be heroin or cocaine. When he got home, "he knew it was heroin." He also admitted picking up a sum of money. These admissions are far more detailed than defendant's simple, unwarned statement that "he had 7 or 8 kilograms in the house."

¶ 62 The fruit-of-the-poisonous-tree doctrine does not apply to a *Miranda* violation. *People v. Gonzalez*, 313 Ill. App. 3d 607, 615 (2000). However, *Miranda* violations may be deemed harmless, if they are found to be so beyond a reasonable doubt. *People v. Fort*, 2014 IL App (1st) 120037, ¶ 19. The erroneous admission of evidence that is merely cumulative of other properly admitted evidence is harmless. See *People v. Patterson*, 217 Ill. 2d 407, 428 (2005) ("[T]his court listed three different approaches for measuring error under this harmless-constitutional-error test: (1) focusing on the error to determine whether it might have contributed to the conviction, (2) examining the other evidence in the case to see if overwhelming evidence supports the conviction, and (3) *determining whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence*." (Emphasis added.)). Here, defendant's statement made prior to waving his *Miranda* rights was clearly cumulative of statements he made

after doing so. As such, assuming error occurred here, it was harmless beyond a reasonable doubt.

¶ 63 We therefore find none of defendant's contentions on this point persuasive.

¶ 64 IV. CONCLUSION

¶ 65 In light of the foregoing, the judgment of the circuit court of Kane County is affirmed.

¶ 66 Affirmed.