IN THE COURT OF APPEALS OF IOWA

No. 1-245 / 00-233
Filed May 23, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL ROBERT PENA,
Defendant-Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire, Judge.

Michael Pena appeals from his convictions and sentences of possession of marijuana and delivery of cocaine. **AFFIRMED.**

Gary K. Koos, Bettendorf, for appellant.

Thomas J. Miller, Attorney General, Donald D. Stanley, Jr., Assistant Attorney General, William E. Davis, County Attorney, and Don Frank, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Zimmer and Hecht, JJ.

ZIMMER, J.

Michael Pena appeals from his conviction and sentences for possession of marijuana and delivery of cocaine in violation of Iowa Code sections 124.204(4)(m), 124.401(5), 124.206(2)(d) and 124.401(1)(c)(2) (1997). He contends the court erred in not suppressing his confession because it was involuntarily made. We affirm.

I. Background Facts and Proceedings. In November of 1998, a search warrant was obtained on the residence of Michael Pena. Shortly before the warrant was executed, surveillance of defendant's home resulted in an officer observing several people arrive, enter, and stay a short time before leaving. Barry Curtis was one of the people observed. Officers followed Curtis after he left Pena's residence by car. Officers stopped Curtis and he consented to a search of his vehicle. As Curtis was being placed in a police car, an officer observed him drop a baggie of cocaine on the ground.

Meanwhile, continued surveillance of the Pena residence resulted in officers observing Pena and another individual leaving the residence in a pickup truck. The vehicle was stopped pursuant to the warrant previously obtained by police. While Pena and the driver of the truck were being detained, the search warrant was executed at the Pena residence. The search led to the discovery of drugs, drug paraphernalia and handguns. While the house was being searched, Pena was arrested and given his Miranda rights by Davenport Police Corporal Sikorski. He was then returned to his residence to be questioned. While there, Pena admitted to Sikorski that he sold cocaine to Curtis.

Defendant was then taken to the Davenport Police station where Detective Smull interviewed him. At the start of the interview, Smull read Pena his Miranda rights, which Pena waived in writing. Smull then told Pena that he needed to tell the truth because the truth would benefit Pena more than lying. Pena indicated that he would tell the truth. Pena went on to inform Detective Smull of his involvement in selling drugs. At several points during the interview, Smull indicated that he did not believe Pena was being completely truthful. Approximately halfway through the interview, Smull told Pena that he could not help Pena if Pena did not help the police. Detective Smull further told Pena that if he cooperated by telling the truth, Smull could go to the county attorney and tell him that Pena was cooperative.

Pena was subsequently charged with possession with intent to deliver cocaine, failure to affix a drug tax stamp, possession of marijuana, and delivery of cocaine. Prior to trial, Pena brought a motion to suppress his entire confession to Detective Smull, alleging that it was involuntarily made. After a hearing at which Smull testified but Pena did not, the district court overruled Pena's motion. Pena was subsequently found guilty of possession of marijuana and delivery of cocaine following a stipulated bench trial. He was acquitted of the other charges. Pena was sentenced to one year in jail for the possession of marijuana offense. He received an indeterminate ten-year term of incarceration for the delivery of cocaine offense. His sentences were suspended and he was placed on probation. According to the record, Pena's probation was revoked a few days after his sentencing because of a violation of his terms of probation.

Pena appeals. He contends his confession should have been suppressed because it was induced by Detective Smull's promises of leniency. Pena does not allege his statements to Corporal Sikorski were involuntary.

II. Scope of Review. In reviewing a claim that a confession should not have been admitted because it was involuntarily made, this court makes a de novo review of the totality of the circumstances surrounding the confession. *State v. Hodges*, 326 N.W.2d 345, 347 (Iowa 1982). We give weight to the district court's factual findings because of its opportunity to assess the credibility of the witnesses. *State v. Countryman*, 572 N.W.2d 553, 557 (Iowa 1997). These fact-findings are binding on us if they are supported by substantial evidence. *State v. Cline*, 617 N.W.2d 277, 280 (Iowa 2000). "Evidence is substantial when a reasonable mind would accept it as adequate to reach the same findings." *State v. Krebs*, 562 N.W.2d 423, 425 (Iowa 1997).

III. Voluntariness of the Confession. The State has the burden of proving Pena's statements were made voluntarily. *State v. Payton*, 481 N.W.2d 325, 328 (Iowa 1992). This burden must be met by a preponderance of the evidence. *Id.* In determining the voluntariness of a statement, the court must examine the totality of the circumstances in which the statement was made. *State v. Foell*, 512 N.W.2d 809, 812 (Iowa Ct. App. 1993).

> Many factors bear on the issue of voluntariness including the defendant's age, experience, prior record, level of education and intelligence; the length of time the defendant is interrogated; whether physical punishment was used; defendant's ability to understand the questions; defendant's physical and emotional condition; whether any deceit or improper promises were used in gaining the admission; and any mental weaknesses the defendant may possess.

Id. A statement is considered to be voluntary so long as it was "the product of an essentially free and unconstrained choice, made by the defendant at a time when his will was not overborne nor his capacity for self-determination critically impaired." *Id.* (quoting *State v. Snethen,* 245 N.W.2d 308, 315 (Iowa 1976)).

Pena claims his inculpatory statements were not freely given because Detective Smull induced him into making the statements with promises of leniency. A statement that is the result of a promise of help or leniency by a person in authority is not considered voluntary and therefore is not admissible. *Hodges,* 326 N.W.2d at 348.

> An officer can ordinarily tell a suspect that it is better to tell the truth. The line between admissibility and exclusion seems to be crossed, however, if the officer also tells the suspect what advantage is to be gained or is likely from making a confession. Ordinarily the officer's statements then become promises or assurances, rendering the suspect's statements involuntary.

Id. at 349.

At the start of the interview, Detective Smull advised Pena that he needed to tell the truth because it would benefit him more than lying. This statement does not tell Pena what advantage is to be gained from making a confession and therefore does not cross the line of admissibility. *Id. See also Foell,* 512 N.W.2d at 813 ("An officer can tell a suspect it is better to tell the truth."). Pena then went on to make the bulk of his confession. Throughout the confession, Detective Smull tells Pena that he does not believe he is being completely truthful. However, repeatedly accusing a defendant of lying does not equate to improper action by a police officer that bars the admission of a confession. *See State v. Brown,* 589 N.W.2d 69, 73 (Iowa Ct. App. 1998) (finding police did not induce

confession where, among other things, police repeatedly accused defendant of lying).

Later in the interview, Detective Smull told Pena that he was only telling half-truths. Smull advised Pena that the police couldn't help him if he did not help the police. During the hearing on Pena's motion to suppress, Detective Smull testified he informed Pena that if he cooperated fully, Smull would put in a good word for him at the county attorney's office. Pena contends these statements amount to improper inducement by Smull. However, an offer to inform the prosecutor of a defendant's cooperation is not tantamount to a promise of leniency. *State v. Whitsel,* 339 N.W.2d 149, 153 (Iowa 1983) (citations omitted). *See also Brown,* 589 N.W.2d at 73 (holding that telling a defendant to tell the truth so police would have something to take to the county attorney does not state or imply a lesser charge would be more likely if defendant confessed); *State v. Nolan,* 390 N.W.2d 137, 143 (Iowa Ct. App. 1986) (holding that promising to inform county attorney that defendant was cooperative was permissible and not a specific assurance of leniency). After de novo review of the record, we find the totality of the circumstances reveals the inculpatory statements made by Pena were voluntary.

Even if we were to conclude that the statements should have been suppressed, the record reveals the admission of these statements was harmless beyond a reasonable doubt. *See State v. Hensley,* 534 N.W.2d 379, 383 (Iowa 1995). The district court found Pena guilty of Count III, possession of marijuana, without any mention of the statements defendant made to Detective Smull. In finding Pena guilty of Count IV, delivery of powder cocaine, the court noted that

Pena admitted to Corporal Sikorski that he sold the cocaine to Curtis. Pena does not contest the admissibility of this confession in this appeal. Furthermore, the confession Pena made to Detective Smull concerning the cocaine came at the beginning of the interview, before Smull made the statements that are now being challenged.

Based on the record before us, we find the district court correctly sustained Pena's motion to suppress the confession.

AFFIRMED.