IN THE COURT OF APPEALS OF IOWA

No. 8-458 / 97-1094

STATE OF IOWA,

Appellee,

vs.

MARK LEE JACKSON,

Appellant.

FILED
DEC 28 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Muscatine County, Patrick J. Madden, Judge.

Mark Jackson appeals the judgment and sentence entered upon his conviction of three counts of third-degree burglary. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shellie L.Knipfer, Assistant State Appellant Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Richard R. Phillips, County Attorney, and Dana Christiansen, Assistant County Attorney for appellee.

Heard by Streit, P.J., Mahan, J., and McCartney, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

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MC CARTNEY, S.J.

Defendant-appellant Mark Lee Jackson appeals the judgment and sentence entered upon his conviction of three counts of third-degree burglary in violation of Iowa Code sections 713.6A and 713.1 (1995). He argues the district court erred denying his motion to suppress his confession because it was given involuntarily in connection with promises of leniency. We affirm.

Jackson was arrested on January 15, 1997, by Muscatine police detectives Hasty and Quinn. The detectives arrested Jackson in connection with the burglary of a storage shed. Jackson was taken to the Public Safety Building and given his *Miranda* rights.

Jackson indicated he would provide information regarding unsolved burglaries if a deal was made regarding the amount of prison time he would serve. Hasty told Jackson only the county attorney could offer such a deal. However, Hasty and Quinn told Jackson they would contact the county attorney if Jackson demonstrated he had truthful information regarding the burglaries. After indicating they were particularly interested in the burglary of a local fast food restaurant, Jackson led police to a bag containing a combination knob to the restaurant's safe.

Jackson subsequently asked to speak with the county attorney. The county attorney told defendant if he fully cooperated with the investigation of the burglaries, he would recommend defendant be sentenced for three crimes, but serve each five year sentence concurrently. The arrangement was clearly contingent upon Jackson's cooperation, the county attorney's ability to make the sentencing recommendation,

and the concurrence of the trial court. The county attorney also indicated the agreement was for a recommendation only and that he could not guarantee the sentencing. Jackson agreed to the arrangement and during a subsequent meeting with Hasty and Quinn made several incriminating statements and confessed in writing to several crimes.

On January 31, 1997, Jackson and the county attorney reduced the plea agreement to writing. On that same day, defendant was arraigned. He was charged with three counts of third degree burglary. The trial court reserved acceptance of the plea until the presentencing report had been completed. On February 21, 1997, the trial court rejected the plea agreement and Jackson was allowed to withdraw his guilty plea.

On March 17, 1997, defendant filed a motion to suppress his statements and confession as well as all evidence derived therefrom. The district court denied the motion. Following a trial to the bench upon stipulated evidence, defendant was found guilty as charged. He was sentenced to serve three consecutive five-year terms. This appeal follows.

I. Preservation of Error. The trial court denied Jackson's motion to suppress on the merits. Nevertheless, the State contends on appeal Jackson failed to timely file his motion to suppress pursuant to Iowa Rule of Civil Procedure 10(4). It argues Jackson waived this challenge by failing to file a timely motion to dismiss. *See State v. Terry*, 569 N.W.2d 364, 368 (Iowa 1996). We pass this issue and reach the merits. *See State v. Vogel*, 548 N.W.2d 584, 586 & n.1 (Iowa 1996).

II. Admissibility of Defendant's Inculpatory Statements. Jackson claims the district court erred in not suppressing defendant's confession because it was involuntarily given and was a direct result of promissory leniency. The State contends defendant's statements and confession were voluntary and that the doctrine of promissory leniency is inapplicable in this case. We agree and affirm the ruling of the trial court.

The importance that confessions be obtained voluntarily cannot be understated. As the Iowa Supreme Court recently quoted:

> A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.

State v. Smith, 546 N.W.2d 916, 926 (Iowa 1996) (quoting *The King v. Warickshall*, 168 Eng. Rep. 234, 234 (K.B. 1783)).

To prove a defendant has confessed voluntarily, the State must show an "essentially free and unconstrained" choice made at a time when his "will was not overborne nor his capacity for self-determination critically impaired." *State v. Washburne*, 574 N.W.2d 261, 264 (Iowa 1997) (citing *State v. Payton*, 481 N.W.2d 325, 328 (Iowa 1992)). Our courts address the totality of circumstances, and will consider

> [t]he defendant's knowledge and waiver of his Miranda rights, the defendant's age, experience, prior record, level of education and intelligence, the length of time defendant is detained and interrogated,

> whether physical punishment was used, including the deprivation of food or sleep, defendant's ability to understand the questions, the defendant's physical and emotional condition and his reaction to the interrogation, whether any deceit or improper promises were used in gaining the admissions, and any mental weakness the defendant may possess.

State v. Vincik, 398 N.W.2d 788, 790 (Iowa 1987) (quoting *State v. Whitsel*, 339 N.W.2d 149, 153 (Iowa 1983). *See also State v. Smith*, 546 N.W.2d 916, 926 (Iowa 1996).

At the time of interrogation Jackson was thirty years old and had obtained his GED. He had been previously convicted of several offenses including second degree burglary on two different occasions as well as second degree theft. The sentencing court described Jackson as a "career criminal." Detective Quinn testified Jackson was "street smart" and has "been around the block." The police interviews and "interrogation room drama" were obviously not a new experience for Jackson. Furthermore, his age and education reasonably indicate he understood the situation and the questions he faced, and there is nothing in the record to the contrary. Jackson signed a written waiver of his Miranda rights.

Nor were the interrogation conditions overbearing. Jackson was questioned for approximately six to seven hours during reasonable waking hours. *See State v. Brown*, 341 N.W.2d 10, 16 (Iowa 1983) (ruling a defendant's statements to police were voluntarily made where defendant was, among other things, questioned during normal waking hours). Furthermore, the interrogation was broken up into at least two

sessions separated by a fairly lengthy break. During the interview, Jackson was given food, soda, and cigarettes. There are no allegations of physical abuse.

Finally, the police made no promises to "go easy" on Jackson if he confessed to the crimes. Nor did they promise leniency in return for his showing he had truthful information regarding the burglaries. Their only comments were that they were not authorized to offer him any kind of leniency, but that they would let the county attorney know if he was cooperative. Offers to inform the prosecutor of a defendant's cooperation are not considered promises of leniency. *See State v. Whitsel*, 339 N.W.2d 149, 153-54 (Iowa 1983). Nor did the officers promise Jackson the county prosecutor would offer him any concessions. We also determine it significant Jackson initiated the discussions of a deal. *Id.* (citing *United States v. DeLuca*, 692 F.2d 1277 (9th Cir. 1982) (affirming trial court's finding defendant's inculpatory statements were voluntary, and not made in response to a promise of leniency, based on the fact defendant had initiated the meeting with the agents in an attempt to generate an offer of immunity and the agents had only promised to inform the prosecutor of defendant's cooperation)).

Jackson also argues his statements should be suppressed because the county prosecutor also made promises of leniency. However, the county prosecutor indicated to Jackson only that a sentencing recommendation would be made. The written plea agreement specifically stated the recommendation was subject to court approval. Jackson does not dispute that the prosecutor never promised concurrent sentences. In

submitting the plea agreement to the sentencing court, the county prosecutor did specifically what he promised to do.

We determine Jackson's statements and confession were not obtained involuntarily. We affirm the ruling of the district court.

AFFIRMED.