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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

365

STATE OF IOWA,)

Plaintiff-Appellee,) Filed February 24, 1982

vs.)

DAVID MIKEL ROBBINS,) 1-396
65598

Defendant-Appellant.)

Appeal from Johnson District Court - Clinton E. Shaeffer, Judge.

Defendant appeals from his convictions of robbery in the first degree in violation of sections 711.1 and 711.2, The Code, and of conspiracy to commit a forcible felony in violation of sections 706.1 and 706.3, The Code. AFFIRMED.

Jerald W. Kinnamon and Richard E. Klausner, Cedar Rapids, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Michael Jordan, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant, David Mikel Robbins, appeals from his convictions of robbery in the first degree in violation of sections 711.1 and 711.2, The Code, and of conspiracy to commit a forcible felony in violation of sections 706.1 and 706.3, The Code. As grounds for reversal, defendant asserts: 1) trial court erred in refusing to suppress certain inculpatory statements made by him to an informant; 2) trial court erred in refusing to grant his motion for new trial based on the State's alleged failure to disclose exculpatory evidence and on the alleged discovery of new evidence after the trial; and 3) he received ineffective assistance of counsel. We affirm.

On November 16, 1979, defendant was charged by county attorney's information with robbery in the first degree. An amended trial information filed March 17, 1980, charged the additional offense of conspiracy to commit a forcible felony. The charges stemmed from the robbery of the Hilltop Tavern in Iowa City on September 12, 1979. An extensive recitation of the facts is necessary to enable this court to resolve the issues raised.

Law enforcement officers first became aware of defendant's alleged involvement in the crimes from an informant who they had enlisted to assist them in the investigation of defendant's involvement in an unrelated robbery/murder. The informant, who previously had met defendant while both were imprisoned for other crimes, implicated defendant in the murder and agreed to help the police obtain more information about defendant's involvement in that crime. In exchange for his assistance, the police agreed to release the informant from jail and grant him immunity from certain criminal charges. Since defendant was incarcerated in the Marshall County jail pending trial on an unrelated burglary charge, a scheme was developed whereby the informant would gain defendant's confidence by letting it be known that he (the informant) was willing to post bond for defendant, if defendant would agree to cooperate in the commission of another crime with the informant. The police department intended to provide the

informant with sufficient funds to post bond if necessary. While defendant and the informant were together, the informant was expected to elicit statements from defendant concerning defendant's involvement in the murder. The detectives planned to tape record these conversations. In carrying out this scheme, the informant conveyed his intention to post bond for defendant through conversations with defendant's family and friends. During these conversations with defendant's friends the informant learned of defendant's alleged involvement in the Hilltop robbery. The informant apprised the police of this fact, but they apparently took no note of it because of their preoccupation with the murder case. The officers testified at trial that they remembered learning of defendant's involvement in the Hilltop robbery when they listened to the taped conversations between the informant and defendant.

The informant first talked with defendant on November 1, 1979, at the Marshall County jail. During this conversation defendant allegedly made incriminating statements about his involvement in both the murder and the Hilltop robbery. A tape recording of this conversation was made, but after listening to it, the police lost it. However, it was recovered later from a post office drop box, erased and damaged, after an anonymous telephone caller informed the police where they could recover it. As a result of this loss, the police instructed the informant to continue the scheme and post defendant's bond.

On November 2nd, the informant again visited defendant, posted bond for him, and drove to a motel in Marshall County. The police followed the two men and tape recorded their conversation in the automobile. Defendant again made incriminating statements concerning his involvement in both crimes. The tape recording of this conversation, although of poor quality, survived.

Upon their arrival at the motel room, the two men conversed further. This conversation was also recorded and defendant again made incriminating statements. Shortly thereafter, the police arrested defendant in the motel room.

Upon defendant's pretrial motion, trial court suppressed all statements made by defendant at the Marshall County jail. Trial court reasoned that the circumstances constituted a custodial interrogation by a state agent which took place without the required Miranda warnings. Trial court, however, ruled that the statements made in the automobile and motel room were admissible, based on the court's conclusion that those conversations were not made under custodial circumstances requiring Miranda warnings to be given, and that these later statements had an independent source which purged them of the primary taint contaminating the statements made in jail.

At trial, defendant's inculpatory statements made in the automobile and motel were admitted into evidence over defendant's objection. On May 23, 1980, the jury returned a verdict of guilty on each count. Defendant subsequently filed a motion for new trial alleging the grounds now urged on appeal. Trial court overruled this motion and sentenced defendant to 25 years in the men's reformatory. From this conviction and sentence, defendant appeals.

I. Scope of Review. Generally, our review of criminal proceedings is at law for correction of errors only, and not de novo. Iowa R. App. P. 4. "However, when, as here, issues as to violation of constitutional safeguards are raised, this court is obliged to make an independent evaluation of the totality of the relevant circumstances shown by the entire record under which ruling on those constitutional rights were made. That is, when a constitutional issue is presented, the evidence relevant to the issue is reviewed **de novo.**" Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975).

II. Suppression of Evidence. Defendant argues that the exclusionary rule, which bars use of evidence derived from unlawfully obtained statements, requires the exclusion of all defendant's inculpatory statements because those statements were obtained through exploitation of illegal police conduct. Defendant further argues that the "independent source" and "attenuation" exceptions to the

exclusionary rule do not apply under the circumstances of this case. See Wong Sun v. United States, 371 U.S. 471, 487, 83 S. Ct. 407, 417, 9 L. Ed. 2d 441, 455 (1963). The State argues that the inculpatory statements relating to the instant charge made by defendant while in jail were not in response to questions by the informant, but were volunteered. Accordingly, those inculpatory statements were not tainted by any illegality. We agree with the State's position. However, prior to our analysis on the merits, we must resolve defendant's assertion that this issue has not been properly preserved for review.

A. Preservation of Error. In its ruling on defendant's motion to suppress, trial court held that defendant's later statements arose from an independent source, thereby purging them of the original taint of illegality which arose from the violation of Miranda and which required suppression of the in-jail statements. Defendant contends that the State is precluded from asserting the voluntary character of defendant's in-jail statements as an alternative basis for admissibility of the subsequent statements because of the State's failure to challenge trial court's ruling in a timely manner. We disagree.

First, we note that "a pretrial suppression motion will suffice to preserve error for appellate review even though there is no attendant trial objection to the controverted material. . . ." State v. Hilpipre, 242 N.W.2d 306, 309 (Iowa 1976). Appellate review will be accorded upon proper assignment to the record made at the suppression hearing. State v. Untiedt, 224 N.W.2d 1, 3 (Iowa 1974). Thus, under the circumstances of this case, the fact that the State did not attempt to place into evidence defendant's statements that trial court suppressed, or did not challenge that ruling by seeking timely review, does not preclude our examination of trial court's ruling with regard to those statements. We must look to the totality of the circumstances upon which trial court made its ruling on the admissibility of the statements which were in fact introduced at trial (emphasis added); and, in this case, the admissibility of those statements depends upon the

circumstances under which the previous statements were made. We, therefore, will make an independent determination of the nature of defendant's statements made at the Marshall County jail.

B. Statements Made in Jail. While Miranda v. Arizona held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination[,]" 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706 (1966), the Court also specifically stated:

> In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

(emphasis added). Id. at 478, 86 S. Ct. at 1630, 16 L. Ed. 2d at 726. This statement clearly indicates that volunteered statements of any kind made without compelling influences are admissible in evidence. See also State v. Coburn, ___ N.W.2d ___, no. 63551, slip op. at 5 (Iowa Feb. 18, 1982).

Our analysis is further guided by the principles set forth by the United States Supreme Court in Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). In Innis, the court defined "interrogation" as encompassing "not only express questioning, but also . . . any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."

Id. at 301, 100 S. Ct. at 1689, 64 L. Ed. 2d at 308. Thus, to a large extent, interrogation focuses on the perception of the suspect. The court, therefore, must examine the likely response of the suspect in determining whether the utterance stemmed from the interrogation, or whether it was voluntary.

> A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation, but since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogatories can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.

(emphasis in the original). Id. at 301-302, 100 S. Ct. at 1690, 64 L. Ed. 2d at 308.

Applying these principles to the instant case, the question is whether, in the context of the jailhouse conversation, the police should have known defendant would suddenly be moved to make an incriminating response about acts not under investigation. The answer depends upon the nature of the conversation between the informant and defendant. Defendant argues that the conversation would tend to elicit all incriminating statements, because it appeared that the informant was looking for proof of defendant's general propensity to criminal activity. The record, however, does not substantiate this contention. Rather, the record clearly indicates that the informant specifically asked defendant to tell him about the robbery/murder, and that defendant voluntarily began talking about the Hilltop robbery.

We thus conclude that defendant's in-jail statements about the Hilltop robbery did not stem from the interrogation, but were voluntary and not made under circumstances that violated constitutional principles set forth in Miranda. Since there was no illegality in the circumstances producing those statements (i.e., primary illegality), subsequent statements which were made because the informant was able to gain defendant's confidence were not tainted. See Wong Sun, 371 U.S. at 485, 83 S. Ct. at 416, 9 L. Ed. 2d at 454.

C. Interrogation in the Automobile and Motel Room. Defendant further argues that the conversations in the automobile and motel room constituted a custodial interrogation within the meaning of Miranda. The State contends that the circumstances of these conversations did not create pressures on defendant which were tantamount to those which characterize custodial interrogations. We agree with the State's analysis.

The holding in Miranda, which requires exclusion of statements derived from a custodial interrogation conducted without the use of procedural safeguards which will secure the privilege against self-incrimination, is predicated upon the conclusion that "in-custody interrogation . . . contains inherently compelling pressures which work to undermine [an] individual's will to resist and . . . compel[s] him to speak where he would not otherwise do so freely. . . ." Hoffa v. United States, 385 U.S. 293, 304, 87 S. Ct. 408, 414, 17 L. Ed. 2d 374, 383 (1966), quoting Miranda, 384 U.S. at 467, 86 S. Ct. at 1624, 16 L. Ed. 2d at 719. Thus, "[t]he concern of the Court in Miranda was that the 'interrogation environment' created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination." Rhode Island v. Innis, 446 U.S. 291, 299, 100 S. Ct. 1682, 1688, 64 L. Ed. 2d 297, 306 (1980), quoting Miranda, 384 U.S. at 457, 86 S. Ct. at 1619, 16 L. Ed. 2d at 714.

We do not believe the circumstances of the conversation in the automobile or motel room are tantamount to this sort of compulsion. Defendant was unaware of any possibility that the police might restrain his freedom if he refused to accompany the informant after his release from jail. The informant's power under section 811.8, The Code 1979, which is analogous to a parole officer's power to return a parolee to jail, does not per se constitute a custodial setting. See State v. Hartman, 281 N.W.2d 639, 643-44 (Iowa App. 1979). In any event, there was no showing or suggestion that defendant was aware of this power. The facts show

that defendant voluntarily accompanied the informant. We believe the situation is analogous to a voluntary appearance at a police station for questioning by a parolee who is not subsequently restrained. See Hartman, 281 N.W.2d at 644; see also Oregon v. Mathiason, 429 U.S. 492, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977).

Finding no compulsion, we conclude that no custodial interrogation took place, that Miranda warnings were not required and that defendant's statements were admissible.

III. Voluntary Character of the Statements. Defendant next argues that the statements he made in the automobile and motel room were not made freely and voluntarily. He asserts he was "induced" to make incriminating statements by the informant's implication that continuation of his bond was contingent upon defendant's willingness and capability of entering into criminal activity.

The test for voluntariness and admissibility of inculpatory statements was set out in Schneckloth v. Bustamonte as follows:

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. [citation].
>
> In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. . . ."

412 U.S. 218, 225-26, 93 S. Ct. 2041, 2047, 36 L. Ed. 2d 854, 862 (1973), as quoted in State v. Cullison, 215 N.W.2d 309, 314 (Iowa 1974). A statement to be admissible, "must not be exacted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." State v. Ware, 205 N.W.2d 700, 703 (Iowa 1973), quoting Bram v.

United States, 168 U.S. 532, 542-43, 18 S. Ct. 183, 187, 42 L. Ed. 568, 573 (1897). A major concern addressed by this rule is that inducements made to a criminal defendant might produce false testimony. As stated in State v. Mullin:

> . . . a confession wrung from the mind by the flattery of hope, or by the torture of fear, comes in such questionable shape as to merit no consideration. [citation] It must be concluded, then, that confessions induced by hope, or extorted by fear, are of all kinds of evidence the weakest in testimonial reliability.

249 Iowa 10, 16, 85 N.W.2d 598, 601 (1957).

Although "[i]n 'general' . . . we may say the question is whether the language used amounts to an inducement which is likely to cause the subject to make a false confession," Id. at 17, 85 N.W.2d at 602, we believe we must also focus on the nature of that inducement. "The test the court must apply, then, is: (1) Will the statements by the interrogating officer likely cause the subject to make a false confession? (2) Do they relate to an escape or mitigation of punishment to him? (3) Were the admitted statements made to the subject before the confession?" Id.

Applying this test, we do not believe defendant's statements were involuntarily induced. First, the record reflects that the informant, from the outset, pressed for statements concerning defendant's involvement in the murder only, not the Hilltop robbery. Defendant's statements concerning the current charge were spontaneously volunteered. Second, defendant was offered release from jail, which he received, not promises of leniency or escape from punishment for the burglary which originally charged, or for any other crime. The assertion that defendant was fearful that he would be returned to jail if he did not speak is tenuous at best. We conclude that the record reflects defendant's statements were made under no compulsion.

IV. New Trial. Defendant next argues that trial court erred in overruling his motion for new trial made on the basis of 1) the State's alleged failure to disclose exculpatory evidence in its possession and 2) newly discovered evidence.

The evidence defendant refers to concerns the identity of a second police officer who was in the police vehicle listening to the conversations between defendant and the informant during their ride from the jail to the motel, and the assertion that the officer would have testified that he did not hear any incriminating statements by defendant.

A. Failure to Disclose Exculpatory Evidence. First, we have doubts as to whether there was any failure by the prosecution to disclose exculpatory evidence. The prosecution did not interview the officer and was, thus, not in possession of information that may have been exculpatory. The prosecution did apprise defendant of the identity of this officer and the fact that he was in the police vehicle monitoring the conversation. We do not believe that the consequences of defendant's failure to interview this office should be visited upon the State.

Further, focusing upon the merits, we believe defendant's argument is unpersuasive. "Suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215, 218 (1963). Our analysis of "the due process question turns on two factors: the nature of defendant's request and the materiality of the evidence." State v. Love, 302 N.W.2d 115, 123 (Iowa 1981). From these two factors, three situations have been analyzed: "1) where the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury; 2) where there has been a pretrial request for specified evidence; and 3) where there has been a general request for exculpatory evidence." State v. Beeman, ___ N.W.2d ___, no. 65970, slip op. at 16 (Iowa Feb. 17, 1982). Defendant's request to produce was of the third type.

The standard of materiality applied to a general request for exculpatory evidence is:

> . . . if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

United States v. Agurs, 427 U.S. 97, 112-13, 96 S. Ct. 2392, 2402, 49 L. Ed. 2d 342, 355 (1976), as quoted in Beeman, slip op. at 17.

In the instant case, we conclude that the evidence which was allegedly suppressed by the prosecution does not meet the test of materiality because it does not "create a reasonable doubt that did not already exist" (emphasis added). The contention that defendant made no inculpatory statements in the automobile while traveling to the motel was independently established by the defense. Defendant himself testified that he did not make any inculpatory statements. Further, the tape recording of the conversation which was introduced into evidence at trial reveals no such statements. Since the omitted evidence does not meet the materiality standard, there is no merit to defendant's assignment.

B. Discovery of New Evidence. We also reject defendant's assertion that late discovery of new evidence warrants a new trial. To prevail on this issue, defendant must demonstrate that: 1) the evidence was discovered after trial and before judgment; 2) it could not have been discovered before trial in the exercise of due diligence; 3) it is material to the issue and not merely cumulative or impeaching; and 4) the evidence would probably change the result of the trial. State v. Overstreet, 243 N.W.2d 880, 886 (Iowa 1976). Defendant has made no showing that the evidence could not have been discovered before trial with the exercise of due diligence. Further, we conclude that the evidence is merely cumulative and impeaching.

We thus find no error in trial court's denial of defendant's motion for new trial.

V. Ineffective Assistance of Counsel. Defendant's final argument is that he was denied effective assistance of counsel by counsel's failure to discover the fact that a police officer had not heard any incriminating statements while monitoring the defendant's conversations with the informant.[1] We conclude that defendant has failed to establish, on this record, that his counsel's performance fell below the range of normal competency. See State v. Williams, 285 N.W.2d 248, 271 (Iowa 1979).

AFFIRMED.

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[1] This is the same circumstance urged by defendant as his second ground in his motion for new trial.