IN THE COURT OF APPEALS OF IOWA

No. 1-424 / 10-1549
Filed July 13, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JORDAN MICHAEL FOY,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Stephen P. Carroll (motion to suppress), Colleen D. Weiland (trial), and Paul W. Riffel (sentencing), Judges.

Jordan Foy appeals his conviction and sentence for robbery in the second degree. **AFFIRMED IN PART, VACATED IN PART, AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Vidhya Reddy, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik and Matt Oetker, Assistant Attorneys General, and Carlyle D. Dalen, County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

DANILSON, J.

Jordan Foy appeals his conviction and sentence for robbery in the second degree, a class C felony, in violation of Iowa Code sections 711.1 and 711.2 (2009). Foy contends the district court erred in finding his statements to officers were voluntary and not induced by promissory leniency, and in denying his motion to suppress. Upon our review, we find the officers did not make any express or implied promises or assurances of leniency, and therefore affirm the district court's denial of Foy's motion to suppress. However, we vacate the portion of Foy's sentence that requires payment of $4832.75 in reimbursable attorney fees, and remand for a restitution hearing to set the attorney fee reimbursement in an amount not to exceed $3600, the maximum fee for a class B felony, for which Foy was originally charged.

I. Background Facts and Proceedings.

At approximately 3:30 p.m. on December 5, 2009, a young male and female entered North Side Liquors in Mason City. As they entered the store, a store clerk, Chevelle Awe, was exiting the store to get coffee from the Kum & Go across the street. Awe remembered seeing the two as customers in the store the previous night. After Awe exited the store, the male approached the clerk behind the counter, Rasheed Choodry, and demanded money from the register. The male repeated the demand, displaying a knife in his left hand. When Choodry handed money from the register to the male, the male stated "let's go" and ran out of the store with the female.

Mason City Police Officers arrived a few minutes later. The officers reviewed the store's surveillance video and observed the male and female. From

the Kum & Go across the street, officers were able to obtain still photographs of the two, and could identify the female as eighteen-year-old Alexandra Elliff. Later that evening, officers presented the clerks, Awe and Choodry, with a photographic line-up. Both identified Alexandra Elliff as the female involved in the robbery.

On December 7, 2009, officers located Elliff and transported her to the police station to be interviewed. During her interview,[1] Elliff admitted her involvement as the "lookout" in the North Side Liquors robbery, and identified Foy as the male. Elliff gave details about her relationship with Foy, why he was in Mason City visiting, and their plan for Elliff to help Foy rob the store in order for Foy to get gas money for his return trip home in Fort Dodge. Based on Elliff's interview, officers obtained an arrest warrant for Foy and sent a copy of the warrant to the Fort Dodge Police Department.

On December 10, 2009, Fort Dodge officers located Foy, placed him under arrest, and transported him along with his mother, at her request, to the police station. Foy was almost three months past his seventeenth birthday. He had an extensive juvenile record, but no prior experience with the adult offender system. Foy and his mother signed a *Miranda* waiver. The next day, Investigators Jeremy Ryal and Terrance Prochaska interviewed Foy. Foy's mother was no longer there, but Foy explained that his mother had already "signed the papers" allowing him to talk with officers if he wanted. Investigator

[1] Elliff subsequently entered into an agreement with the State to testify against Foy. In April 2010, Foy's counsel deposed Elliff. Foy stipulated to the admission of Elliff's deposition for purposes of a trial on the minutes.

Ryal interviewed Foy for approximately thirty-three minutes. Foy initially denied involvement with the robbery, but later admitted he was involved.

The State charged Foy with robbery in the first degree. Foy pleaded not guilty. Prior to trial, Foy moved to suppress his confession. The district court denied the motion. Foy waived his right to a jury trial and consented to a trial on the minutes. As part of the agreement for a trial on the minutes, the State amended the charge to robbery in the second degree. The court found Foy guilty as charged.

Foy appeals, contending (1) the district court erred in failing to suppress his statements to law enforcement officers on the ground of promissory leniency, or in the alternative, (2) that his trial counsel was ineffective in failing to challenge the admission of his statements on evidentiary grounds. We find error was preserved on his assertions of promissory leniency and find it unnecessary to analyze the issue under an ineffective-assistance-of-counsel rubric.

II. Promissory Leniency.

Foy contends that Investigator Ryal's statements during Foy's interview contained implied promises and assurances of more general lenient treatment and that Foy would remain in the juvenile court system. In Foy's view, the promises of leniency rendered his confession involuntary and inadmissible. If an officer's statements constitute promises of leniency, the federal totality-of–the-circumstances test must be applied to determine if a due process violation has arisen, unless by the evidence the court can determine the statements were or were not promises of leniency as a matter of law. *State v McCoy*, 692 N.W.2d 6, 27-28 (Iowa 2005).

Here, the district court decided this issue on an evidentiary basis, concluding no promises of leniency were made to Foy. We agree the issue should be decided on an evidentiary, rather than a constitutional, basis. *Id.* Our review, therefore, is at law. *Id.* at 27 (citing *State v. Mullin*, 249 Iowa 10, 14, 85 N.W.2d 598, 600 (1957)). As our supreme court stated in *Mullin*:

> [W]here there is no dispute as to the words used or their obvious meaning and the circumstances surrounding the expressions, then it is a matter of law upon which the court must pass and, in doing so, answer the query as to whether there appeared some assurance that the accused might gain in some manner relating to his punishment by issuing the solicited statement relative to his guilt.

Mullin, 249 Iowa at 15, 85 N.W.2d at 601.

In this case, there is no dispute concerning the words and statements used by Investigators Ryal and Prochaska, as the interrogation was captured on videotape. The following excerpts[2] are instructive:

> INVESTIGATOR PROCHASKA: We're not going to be any bit of any help to you if you want to continue to sit there and tell us things that are not true. Um, I stress to you more than ever at this point that you probably should think about what you're saying and how you're going to say it because this situation is not going to go away.
>
> . . . .
>
> Yeah, but I'm not here to bullshit you. I don't do that. And neither does he [pointing to Investigator Ryal]. We're just here simply for your benefit. For your benefit. We don't have to talk to you. We just came out here—the—you're here, we've already arrested you for the robbery now, right? We're—at this point in our conversation—there's, there's simply—you know, an explanation basically from you—just—if you want to, I don't know.
>
> INVESTIGATOR RYAL: See Jordan, there is couple of ways that you can come out on how you can approach this on how you are going to face it, okay. Um, you know you are seventeen

[2] These excerpts are not based on a transcription of the videotaped statements, but on our review of the videotape. The parties do not dispute the actual words used by the officers.

> years old, um, you know you have been in and out of foster care and court systems you know how things go, you know. You are still young enough that you can be seen as two different ways on this—you can be seen as a kid who has had problems, you know, but you are still with your mom you are still with your family alright, um, and you're a kid that you know did something really dumb on the spur of the moment. Or you can be seen as the party guy who's put his youth behind him, who's decided, you know I am going to do—I am going to do it the hard way—I am going to make it difficult for everybody, including myself, all the way around. Um, you know it's your choice at this point and decide whether you want to come clean and own up to a mistake that you made albeit a very serious mistake. Or if you are going to, if you're continue to not—to not—you know, come clean with it so.

In assessing whether these statements amount to promises of leniency, we, like the Iowa Supreme Court in *McCoy*, consider what the court observed in *Mullin.* There, the court explained that the statements must be made by "one in authority" and must contain "clear" inducements or inducements that could be "reasonably inferred by the language used." *Mullin*, 249 Iowa at 16, 85 N.W.2d at 601. However, a mere instruction to tell the truth does not amount to an improper inducement. *Id.* at 16, 85 N.W.2d at 601; *see also McCoy*, 692 N.W.2d at 28 ("An officer can tell a suspect that it is better to tell the truth without crossing the line between admissible and inadmissible statements from the defendant.").

> However, when the officer or officers go further and explain just how it will be better or wiser for the accused to speak, these statements may suddenly become more than an admonishment or assume the character of an assurance or promise of special treatment which may well destroy the voluntary nature of the confession in the eyes of the law.

Mullin, 249 Iowa at 16, 85 N.W.2d at 601-02. The "line is crossed" if the officer tells the subject what advantage is to be gained or is likely to be gained from

making a confession. *McCoy*, 692 N.W.2d at 28 (citing *State v. Hodges*, 326 N.W.2d 345, 349 (Iowa 1982)).

Applying these principles, we conclude the statements by Investigators Ryal and Prochaska do not contain promises of leniency as a matter of law. *See McCoy*, 692 N.W.2d at 28-29 (finding officer's statement, "If you didn't pull the trigger, you won't be in any trouble," was a promise of leniency); *Hodges*, 326 N.W.2d at 349 (finding officer's statement that a lesser charge would be much more likely if he gave "his side of the story" was in clear violation of the rule). Although the investigators told Foy he had the option to "come clean" and tell the truth, or "not come clean," the investigators did not explain to Foy any advantage that he would gain if he confessed. An instruction to tell the truth is not an improper inducement. *Mullin,* 249 Iowa at 16, 85 N.W.2d at 601. We acknowledge Investigator Prochaska stated, "We're not going to be any bit of any help to you," if Foy did not tell the truth, and "[w]e're just here simply for your benefit." However, the investigators did not explain how they were going to "help" Foy, or what "benefit," they could provide him. As the district court observed, the interview did "not contain any clear inducements or inducements that could be reasonably inferred by the language used." *See id*. The investigators did not make any express or implied promises or assurances of leniency. We therefore affirm the district court's denial of Foy's motion to suppress.

III. Reimbursement of Attorney Fees.

Foy also contends the district court imposed an illegal sentence by ordering him to pay reimbursement of $4832.75 in attorney fees, in an amount

that he argues exceeds the legal limit. Iowa Code section 815.4 limits the attorney fee reimbursement obligation of a defendant represented by the public defender to the fee limitations established in section 13B.4, and set forth in relevant sections of the Iowa Administrative Code.

The fee limitations set by the public defender "are applied separately to each case," and if more than one offense is charged, "the fee limitation would be the limitation for the offense with the higher limitation." *See* Iowa Admin. Code r. 493-12.6(1) (2011). The term "case" is defined as "all charges or allegations arising from the same transaction or occurrence or contained in the same trial information or indictment in a criminal proceeding." *See* Iowa Admin. Code r. 493-7.1.

Here, Foy was charged by trial information with robbery in the first degree, a class B felony. The State later amended the trial information to charge Foy with robbery in the second degree, a class C felony, of which Foy was ultimately found guilty. The fee limitation for a class B felony (the offense Foy was charged with a higher limitation) is $3600. *See* Iowa Admin. Code r. 493-12.6(1). We therefore vacate the portion of Foy's sentence that requires payment of $4832.75 in reimbursable attorney fees, and remand for a restitution hearing to set the attorney fee reimbursement in an amount not to exceed $3600.

IV. Disposition.

We affirm the judgment and sentences imposed by the district court with the exception of the amount of the reimbursable attorney fees. We vacate that portion of the sentence and remand for a restitution hearing.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.