

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

CHAD NICHOLAS VANWAGONER,

Defendant-Appellee.

UNPUBLISHED

September 20, 2002

No. 240932

Jackson Circuit Court

LC No. 01-004448-FC

Before: Whitbeck, C.J., and Sawyer and Kelly, JJ.

PER CURIAM.

The people appeal by leave granted the trial court's order suppressing defendant's confession. We reverse and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant is charged with first-degree murder, MCL 750.316, and first-degree home invasion, MCL 750.110a(2), resulting from the beating death of Rehnold Ely during the course of a robbery in Ely's home. The police spoke with defendant at his home, searched his bedroom pursuant to consent, and found the murder weapon. Defendant's father retained an attorney to represent defendant. The attorney informed an assistant prosecutor of this fact prior to the time defendant was scheduled to take a polygraph examination.¹ The attorney left a telephone message for the officer in charge of the case; no evidence showed the message indicated that the attorney represented defendant or that he wished to speak with defendant. Defendant and the officer arrived for the polygraph examination as scheduled; however, prior to the examination defendant waived his *Miranda*² rights and confessed to killing Ely.

The trial court granted defendant's motion to suppress his confession. The trial court relied on *People v Bender*, 452 Mich 594; 551 NW2d 71 (1996), in which our Supreme Court held that Const 1963, art 1, § 17 requires the police to inform a suspect that a retained attorney is immediately available to consult with him. Failure to so inform a defendant before he makes an incriminating statement per se precludes a knowing and voluntary waiver of the rights to remain silent and to have counsel. *Id.*, 597. The trial court acknowledged that a prosecutor is not an

¹ The trial court so found as fact following the suppression hearing.

² *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

agent of the police, but reasoned that because the assistant prosecutor knew that defendant was scheduled to take a polygraph examination that morning, he had a duty to either inform the police that an attorney had been retained to represent defendant, or to inform the attorney that the polygraph examination was to take place soon so that the attorney would have been aware of the need to contact the police immediately. The court found that defendant was not coerced into waiving his rights; however, it concluded that under the totality of the circumstances, *People v Sexton (After Remand)*, 461 Mich 746; 609 NW2d 822 (2000), and *Bender, supra*, defendant's confession was involuntary.

We review a trial court's findings of fact on a motion to suppress for clear error, and the ultimate decision de novo. *People v Darwich*, 226 Mich App 635, 637; 575 NW2d 44 (1997).

In determining the admissibility of a confession, the trial court must review the totality of the circumstances surrounding the making of the statement to determine whether it was freely and voluntarily made. Appropriate factors for consideration include the defendant's age, level of education, and extent of prior contact with the police, the nature and duration of the detention and questioning, whether the defendant was advised of his *Miranda* rights, whether there was any unnecessary delay, whether the defendant was deprived of food, sleep, or medical attention, and whether the defendant was abused or threatened. *Sexton, supra*, 753.

The people argue that the trial court erred by suppressing defendant's confession. We agree, reverse the trial court's order, lift the stay previously imposed, and remand for further proceedings. The *Bender* Court held that a confession made during a custodial interrogation is per se involuntary if the police intentionally concealed from the defendant the fact that an attorney had been retained to represent him and was available for consultation. *Bender, supra*, 597. In the instant case defendant did not give his confession during the course of a custodial interrogation. No evidence showed that the police were aware that an attorney had been retained to represent defendant, or that the attorney made any attempt to contact defendant in order to consult with him. The trial court specifically found the prosecutor was not an agent of the police, but nevertheless concluded the prosecutor had a duty to convey the information that defendant was represented by an attorney. No authority so holds. The trial court's decision constituted a significant and unwarranted expansion of the rule announced in *Bender, supra*.

Furthermore, we hold that the trial court erred in concluding that defendant's confession was involuntary under the totality of the circumstances. The trial court specifically found that at the time defendant made his confession he was coherent and aware of his rights and that he freely waived his rights. These findings, which were not clearly erroneous, *Darwich, supra*, did not support a finding that defendant's confession was involuntary. *Sexton, supra*.

Reversed and remanded. We lift the stay of proceedings previously granted by this Court. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly