STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED May 10, 2012
v	No. 304329 Wayne Circuit Court
VICTOR OQUENDO, Defendant-Appellee.	LC No. 10-013218-FC

Before: SAAD, P.J., and K. F. KELLY and M. J. KELLY, JJ.

M. J. KELLY, J. (*dissenting*).

I concur with the majority's conclusion that the lower court erred when it determined that the defendant's statement should be suppressed on the grounds that he did not validly waive his rights under *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). However, I do not agree that the lower court erred when it found that defendant's statement was induced through improper promises of leniency. Therefore, I must respectfully dissent.

An incriminating statement must be voluntary in order to be admissible. *People v Cheatham*, 453 Mich 1, 13; 551 NW2d 355 (1996). To determine whether a defendant's statement was voluntary, courts examine the totality of the circumstances surrounding the making of the statement, including a variety of factors. *People v Sexton*, 458 Mich 43, 66-67; 580 NW2d 404 (1998). And, although promises of leniency are a factor in evaluating whether a defendant's statements were voluntary, the mere fact that there were promises does not automatically render a confession inadmissible. *People v Givans*, 227 Mich App 113, 119-120; 575 NW2d 84 (1997). Nevertheless, a promise of leniency can, under some circumstances, be such a strong motivator that it overpowers a defendant's will. See *United States v Lopez*, 437 F3d 1059, 1065 (CA 10, 2006) (noting that the promises in that case were "of the sort that may indeed critically impair a defendant's capacity for self-determination.").

"[A]dmonitions to tell the truth, coupled with other factors which could lead the defendant to believe that it is in his best interest to cooperate may amount to a promise of leniency." *People v Conte*, 421 Mich 704, 740; 365 NW2d 648 (1984) (opinion by Williams, C.J). The promise "need not be express, as subtle [intimations] can convey as much as express statements." *Id.* The defendant's state of mind is the focus in determining both whether the police made a promise and whether defendant relied on the promise in making his decision to incriminate himself. *Id.* at 741. The promise "must have more than an attenuated causal

connection with the confession, but need not be the only or even principal motivating factor." *Id.*

Here, Sergeant Kenneth Gardner questioned defendant for about 55 minutes before defendant made his incriminating statement. Gardner told defendant that his codefendant, Jonathon Lopez-Briones, had told officers that defendant had committed both murders, and that Lopez-Briones was trying to put the life sentence on defendant. Gardner stated repeatedly that he was just trying to help defendant:

> It's up to you…I don't want to see you go down by yourself.
>
> You said that you wanted an opportunity to be out, to see your kids and stuff . . . well, here it is. It's time to tell me the truth.
>
> This is my last effort with you because, if not, then you're going to find yourself on this murder charge. You're going to find yourself *never* getting out of prison.
>
> In order for you not to end up with a life sentence, you have to tell me what happened, now, man, you can't wait anymore.
>
> If you don't want to spend the rest of your life in prison, now is the time.
>
> Don't leave here today facing a life sentence.
>
> If you had to take one or the other: do *some* time, and get out, and see your kids, or *never* get out and see your kids. . . . That's what I'm saying to you. That's what's on the table, my friend. That's it.

Gardner also drew the distinction between doing a term of 25 years and doing a life sentence:

> [L]ife means you *never* come out. You *die* in prison. . . . Wherever they send you, you will die up there, which means you will never see your kids. So you answer that question: some, or all? Do the right thing, my man, like I've been telling you from the beginning."

And, after defendant claimed he would commit suicide if he went to prison, Gardner responded, "Let's not get there. . . . That's why we're here today, to stop you from getting to that point."

Throughout the interview, defendant denied his involvement in the crime, until he finally made an incriminating statement around the one-hour mark. Defendant testified he felt Gardner was promising him that if he told Gardner what he wanted to hear, he would get a term of years rather than life without parole, or would even possibly become a witness. Although Gardner never made an express promise, his statements gave the powerful impression that if defendant confessed, he would receive a term of years rather than a life sentence, which constituted an implied promise of leniency. Further, there is evidence that defendant believed Gardner was making such a promise. Therefore, I conclude that the trial court did not clearly err when it found that Gardner impliedly promised defendant leniency in exchange for his statement. See

Lopez, 437 F3d at 1065 (stating that whether an officer's statements amounted to an implied promise of leniency is a factual finding that must be reviewed for clear error).

The trial court also found that defendant relied on this promise of leniency. I cannot agree that this finding was clearly erroneous. Defendant repeatedly denied his involvement for the first hour. When he finally made his statement, which took just minutes, he did so only after Gardner repeatedly implied that he would never get out of prison unless he admitted to his role in the events at issue and only after Gardner repeatedly played on defendant's fear that he would never be able to see his children again. This is strong evidence that defendant only agreed to implicate himself because he thought he would get a more lenient sentence. The trial court also did not clearly err when it found that defendant relied on Gardner's promises of leniency in making his incriminating statement.

As noted, however, promises of leniency do not render a statement per se involuntary. *Givens*, 227 Mich App at 119-120. Rather, courts must consider the promises in light of the totality of the circumstances and determine whether the defendant made the statement voluntarily. *Id.* The trial court made findings with respect to several additional factors, finding that the interview was relatively brief, defendant had previous contacts with law enforcement, he did not receive proper *Miranda* rights, defendant had only a tenth-grade education, and Gardner manipulated defendant emotionally by repeatedly bringing up the possibility that he would never see his children again. The trial court did not find, and there is no indication in the record, that defendant was deprived of any physical needs, injured, intoxicated, abused or threatened with abuse, or delayed in being brought before a magistrate. The briefness of the interrogation and the previous contact with police weigh in favor of finding the statement voluntary. Although the trial court indicated it found defendant's lack of education also contributed to the involuntariness of defendant's statement, I am not convinced it had any effect in this case, as defendant appeared fully capable of understanding his rights. Nor am I convinced that emotional manipulation contributed to involuntariness here except as it related to Gardner's promises of leniency. Nonetheless, and despite my disagreement with the trial court's finding that defendant did not waive his rights under *Miranda*, the promises of leniency made here were so frequent and coercive that I believe they rendered defendant's statement involuntary. Therefore, I conclude the trial court did not err in determining defendant's statement was involuntary and should be suppressed.

For these reasons, I would affirm.

/s/ Michael J. Kelly