IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 06/14/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

STATE OF ARIZONA,	)	No. 1 CA-CR 10-0516
	)	
Appellant,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
CHELSEA ELIZABETH SIMON,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellee.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-144635-001SE

The Honorable George H. Foster, Jr., Judge

AFFIRMED

William G. Montgomery, Maricopa County Attorney — Phoenix
By Linda Van Brakel, Deputy County Attorney
Attorneys for Appellant

David Wroblewski & Associates — Phoenix
By Mark D. Benson
Attorneys for Appellee

K E S S L E R, Judge

¶1 The State of Arizona appeals from the trial court's grant of a motion to suppress a statement and all evidence

obtained as a result of that statement. This suppression led to the ultimate dismissal of the case. For the reasons that follow, we affirm the trial court's order suppressing the statement and evidence.

FACTUAL AND PROCEDURAL HISTORY[1]

¶2 Officer G. ("G.") and Officer K. ("K.") stopped a car because of its cracked windshield. The driver immediately pulled over without incident. Chelsea Elizabeth Simon ("Simon"), the owner of the car, was sitting in the front passenger seat and a third person was in the backseat. Simon informed the officers that she owned the car and intended to fix her windshield when she had the money. G. asked the driver for his license, the car's registration and proof of insurance and also requested some identification from Simon and the other passenger; all three complied. As K. ran warrant checks, G. asked Simon if he could speak to her outside. Simon agreed and got out of the car.

¶3 Although G. admitted that he did not have any reason to be suspicious at this point, he asked Simon if there was anything illegal inside her car. G. testified that it is "a pretty standard question that I ask any vehicle that I stop." When Simon asked for clarification of the meaning of "illegal,"

[1] We view the evidence in the light most favorable to support the trial court's decision. *State v. Hyde*, 186 Ariz. 252, 265, 921 P.2d 655, 668 (1996).

G. gave her examples such as illegal drugs or weapons. While there is a dispute as to how many times he asked her and whether she ever denied if she had illegal items in her car, we assume that G. asked Simon repeatedly, after her initial denial.[2] G. told Simon that "honesty goes a long way with me" and that he had the option of having a K-9 unit sniff her car for drugs. G. testified that he meant the statement about honesty to mean that he had a lot of discretion in only certain instances, but Simon testified that she believed his statement to mean if she was honest, he would be more lenient with her. There is also some dispute as to whether G. told Simon that he could have the K-9 unit come or if he said it was already on its way. Simon perceived G.'s comment about the K-9 unit to be a threat. The State does not contend Simon and the two other people were free to leave at this point because K. was still conducting the warrant check. Simon also testified that she felt that she did not have a right to refuse to answer G.'s questions. Simon then told G. that she had methamphetamine in her purse, which was on the front seat of the car.

[2] Where there is a conflict between the testimony of the defendant and that of police officers, the resolution is for the trial court. *State v. Jerousek*, 121 Ariz. 420, 424, 590 P.2d 1366, 1370 (1979). We construe the evidence in the light most favorable to upholding the trial court's decision. *See supra* n.1.

¶4 Upon finding the methamphetamine, G. arrested Simon and gave her the *Miranda*[3] warnings. G. estimated it to be about fifteen to twenty minutes from the initial stop and Simon's arrest. Meanwhile, K. was still running the warrant checks and discovered a warrant out for the backseat passenger, who was then also placed under arrest.

¶5 Simon was charged with one count of possession of dangerous drugs for sale and one count of possession of drug paraphernalia. The case was set for trial on April 28, 2010. On April 7, 2010, Simon filed a motion to suppress evidence on grounds that the police lacked reasonable suspicion to conduct a warrantless search. On April 27, 2010, an evidentiary hearing on the motion to suppress was held. After the trial court requested additional briefing on the *Miranda* issue, Simon moved to suppress her statement on the grounds that it was taken in violation of *Miranda* and that it was involuntary. The court concluded that as a matter of law, the stop of Simon's car and G.'s questioning about illegal items were permissible, however, it found that Simon's statement to the police was involuntary and therefore suppressed that statement and any "fruit of the poisoned tree." The case was dismissed and the State timely appealed. We have jurisdiction pursuant to Article 6, Section

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") section 13-4032 (2010).

DISCUSSION

I. TIMELINESS

¶6 The State contends that Simon did not raise her motion to suppress on grounds of involuntariness in a timely fashion pursuant to Rule 16.1(b) of the Arizona Rules of Criminal Procedure, which requires that all motions be made "no later than 20 days prior to trial, or at such other time as the court may direct." Untimely motions shall be precluded unless the basis was not then known and could not then have been known by exercising reasonable diligence. Ariz. R. Crim. P. 16.1(c). A trial court may, in its discretion, also entertain a motion for a voluntariness hearing during trial. *State v. Alvarado*, 121 Ariz. 485, 488, 591 P.2d 973, 976 (1979). Simon filed the motion to suppress on grounds of voluntariness after the date the trial was set to start and after the conclusion of the evidentiary hearing for the motion to suppress on grounds of lack of reasonable suspicion. It was within the discretion of the court to entertain the issue of voluntariness over the State's objection. Therefore, consideration of the motion to suppress due to involuntariness was not in error.

II. VOLUNTARINESS

¶7 When reviewing a trial court's order on a suppression motion, this court reviews the factual findings in the light most favorable to sustaining the order, and will not disturb the trial court's ruling absent clear and manifest error, but reviews the legal conclusions *de novo*. *State v. Hyde*, 186 Ariz. 252, 265, 921 P.2d 655, 668 (1996). Confessions are presumed to be involuntary, and the State has the burden of proving by a preponderance of the evidence that the confession was freely and voluntarily made. *State v. Montes*, 136 Ariz. 491, 496, 667 P.2d 191, 196 (1983). In reviewing the trial court's ruling, this court considers the totality of the circumstances. *Id*.

¶8 The State argues that the trial court erred in suppressing the evidence because Simon's statement was voluntarily made and led to the legal discovery of drug evidence.[4] We, however, find no error by the trial court.

¶9 The critical issue here is whether there was an improperly implied promise of leniency. To be admissible, a statement must be voluntary and not obtained by coercion or improper inducement. *Haynes v. Washington*, 373 U.S. 503, 513-14 (1963). If the defendant's will was overborne by police behavior or the totality of the circumstances, then the

[4] The State does not contend that if the confession was coerced, the physical evidence was still admissible. Thus, the key issue is whether the confession was coerced.

statement is involuntary. *Rogers v. Richmond*, 365 U.S. 534, 544 (1961). The question of voluntariness is to be determined by an objective evaluation of police conduct and not by defendant's subjective perception of reality. *State v. Carrillo*, 156 Ariz. 125, 136-37, 750 P.2d 883, 894-95 (1988).

¶10 "Promises of benefits or leniency, whether direct or implied, even if only slight in value, are impermissibly coercive." *State v. Lopez*, 174 Ariz. 131, 138, 847 P.2d 1078, 1085 (1992). A confession is rendered involuntary as the result of a promise if: (1) there was an express or implied promise and (2) the defendant relies on that promise in making the confession. *State v.* Blakley, 204 Ariz. 429, 436, ¶ 27, 65 P.3d 77, 84 (2003). However, when a promise is a mere possibility or an opinion, it is insufficient to render a confession involuntary. *State v. McVay*, 127 Ariz. 18, 20, 617 P.2d 1134, 1136 (1980).

¶11 It is irrelevant what G.'s actual intentions were in making the comment that honesty goes a long way with him. He implied a benefit to Simon in exchange for information and Simon relied on that promise, so the statement was involuntary. *See State v. Burr*, 126 Ariz. 338, 340, 615 P.2d 635, 637 (1980). The "with me" in his statement supports the trial court's conclusion that his statement was an implied promise because G. explicitly made it personal as opposed to other cases where the

court has held that general advice does not make a confession involuntary. *See State v. Amaya-Ruiz*, 166 Ariz. 152, 165, 800 P.2d 1260, 1273 (1990) (holding that comments like "if you want any forgiveness, you should tell the truth" are merely advice and do not amount to an implied promise of benefit).

¶12 Moreover, Simon, who was in custody at the time, faced added pressure if she wanted that leniency. Concurrently with telling Simon that honesty would go a long with him, G. told her that he could or would get a K-9 unit out to sniff the car. The trial court was well within its discretion in concluding that any promised leniency would end if the K-9 unit came to the car and alerted to the drugs. G. implied a benefit to Simon that he could do something to help her if she told him the truth because honesty went a long way *with him*. In this case, offering leniency ("honesty goes a long way with me") was a coercive tactic to obtain a confession. It was reasonable for Simon to believe she should confess in hopes of leniency.

¶13 The State argues that Simon's case is distinguishable from *State v. Thomas* where the court held that the State failed to prove voluntariness of the confession of a defendant who was told he would be eligible for an alternative program to prison if he confessed. 148 Ariz. 225, 227, 714 P.2d 395, 397 (1986). However, both the defendant in *Thomas* and Simon (after initially denying the fact) only confessed when some benefit was extended

to them. G.'s implied promise of leniency induced the same eagerness to confess in Simon as it did in Thomas, which courts have held is unduly coercive. *Burr*, 126 Ariz. at 340, 615 P.2d at 637. Statements that are given in reliance of a benefit are involuntary, unless the defendant solicited the promise or initiated the bargaining, which Simon did not do. *McVay*, 127 Ariz. at 20-21, 617 P.2d at 1136-37.

¶14 The refusal to cooperate and incriminate oneself is every person's Fifth Amendment right. *United States v. Tingle*, 658 F.2d 1332, 1336 (9th Cir. 1981). Here, Simon was not aware of these rights because she did not receive her *Miranda* warnings until after the statement was made, and was unaware that she could refuse to answer G.'s questions. Simon was detained, unaware of her rights and without counsel, so any confession made to police under those circumstances is presumed to be involuntary. *See Brady v. United States*, 397 U.S. 742, 754 (1970) (holding that in such circumstances even a mild promise of leniency is deemed sufficient to bar a confession because the defendant is too sensitive to inducement and the possible impact on them is too great to ignore).

¶15 Given this record, we find no error in the trial court's finding that "[t]he statement by the officer that he could summon a K-9 to sniff the vehicle in conjunction with the statement that honesty goes a long way with him was coercive . .

. . The statement implied that if the defendant confessed to possession of drugs that the officer would be lenient."[5]

CONCLUSION

¶16 For the foregoing reasons, we affirm the trial court's grant of Simon's motion to suppress statements made to the police as well as any evidence seized as a result of that statement.

/s/

DONN KESSLER, Judge

CONCURRING:

/s/

PATRICIA A. OROZCO, Presiding Judge

/s/

MICHAEL J. BROWN, Judge

[5] We can affirm the trial court for any reason supported by the record. *State v. King*, 213 Ariz. 632, 635, ¶ 8, 146 P.3d 1247, 1277 (2006). While the trial court found that the additional detainment of waiting for a K-9 unit to be a factor in suppressing the evidence, there is no evidence to support that Simon knew how long that delay would be. Regardless, there is no need for us to address the delay; the offer of leniency and the implied threat that the leniency would expire if and when the K-9 alerted to the drugs is enough to find that Simon's statement was coerced.