NOTICE

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IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JOHN SMITH, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11751 Trial Court No. 3PA-11-1104 CR MEMORANDUM OPINION as corrected on May 24, 2017 No. 6468 — May 17, 2017

Appeal from the Superior Court, Third Judicial District, Palmer, Vanessa White, Judge.

Appearances: Doug Miller, The Law Office of Douglas S. Miller, Anchorage, for the Appellant. Michael Sean McLaughlin (brief), and Timothy Terrell (oral argument), Assistant Attorneys General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge ALLARD, writing for the Court.
Judge MANNHEIMER, concurring.

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

Following a jury trial, John Smith [1] was convicted of two counts of second-degree misconduct involving a controlled substance for possessing morphine and heroin with intent to distribute/deliver.[2] At sentencing, Smith received a composite sentence of 20 years to serve.

Smith raises four claims of error on appeal. He argues that (1) the superior court erred in denying him vicarious standing to challenge the voluntariness of the statements made by his unindicted co-defendant to the trooper; (2) the superior court erred in finding Smith's own statements to the trooper voluntary; (3) the superior court erred in allowing the prosecutor to introduce a recording that included hearsay statements by the trooper; and (4) the superior court erred in failing to give Smith's proposed limiting instruction with regard to those hearsay statements.

For the reasons explained here, we find no merit to these claims. Accordingly, we affirm Smith's convictions.

Background facts

On May 4, 2011, Alaska State Trooper Investigator Kyle Young was running surveillance on John Smith based on tips he had received that Smith was selling drugs in the Palmer-Wasilla area. Smith was a former confidential informant for Trooper Young. After observing what appeared to be two drug deals conducted by Smith, the troopers moved in on the third deal. They stopped both vehicles involved and detained Smith and the other man apparently involved in the deal, who was later identified as Jack

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[1] The name "John Smith" is a pseudonym that we are using because the Appellant's appeal requires discussion of his previous work for the State as an undercover informant.

[2] Former AS 11.71.020(a)(1), *repealed by* ch. 36, §179, SLA 2016. Smith was also convicted of one count of second-degree failure to stop at the direction of a law enforcement officer. *See* AS 28.35.182(b).

Doe.[3] The two men were detained in separate vehicles. Both men received *Miranda* warnings and both men waived their right to remain silent and agreed to talk to Trooper Young.

In the interview with Doe, Trooper Young told Doe that the troopers were primarily interested in Smith's drug dealing activities and that if Doe cooperated with the investigation, they would not charge him with possession. Although initially reluctant to "tell on anyone," Doe ultimately told Trooper Young that he had purchased a "tenth" of heroin from Smith and that he had thrown the heroin out the window when the troopers arrived.

The troopers searched the parking lot for the heroin tossed by Doe, but were unable to find it. They did, however, find a small Altoids tin in the parking lot that contained morphine pills and several small balls of heroin wrapped in foil.

After speaking with Doe for about fifteen minutes, Trooper Young then spoke with Smith. Trooper Young told Smith (truthfully) that Doe was cooperating with the police and that they were securing a warrant to search Smith's hotel room. Trooper Young also told Smith that the DEA was interested in him and that he might be facing federal prosecution. Smith and Trooper Young discussed Smith's past work as an informant, and the evidence that the troopers had already collected against Smith. Smith expressed interest in working again as an informant and wanted to know if he could get a "proffer." Trooper Young indicated that he did not know if the prosecutor would be willing to use Smith as an informant again and he told Smith that he had no control over that decision. But the trooper also indicated that Smith's current cooperation in admitting that the Altoids tin belonged to him would be helpful to Smith in trying to secure such a deal. Smith subsequently admitted that the Altoids tin belonged to him.

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[3] This is also a pseudonym.

Smith was ultimately indicted on two counts of second-degree misconduct involving a controlled substance for possessing morphine and heroin with intent to distribute/deliver,[4] two counts of fourth-degree misconduct involving a controlled substance for possessing the same drugs,[5] one count of keeping a building or vehicle to facilitate drug transactions,[6] and one count of second-degree failure to stop at the direction of a law enforcement officer.[7]

Doe was not charged with any crimes. Doe was also not called as a witness at Smith's trial, and his statements were not used against Smith at trial.

Procedural history

Prior to trial, Smith filed several motions to suppress, arguing various theories related to the stop that are not relevant to this appeal. Smith also filed a motion to suppress Doe's statements as involuntary. Smith asserted that he had vicarious standing to seek suppression of Doe's statements under *Waring v. State*, because he claimed that Trooper Young deliberately violated Doe's rights in order to obtain evidence against Smith.[8]

In the motion, Smith argued that Doe had been coerced by Trooper Young into cooperating with the investigation against Smith. Smith further argued that Doe's statements and the fruits of those statements — which Smith argued included his own incriminating statement about the Altoids tin — should be suppressed.

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[4] Former AS 11.71.020(a)(1), *repealed by* ch. 36, § 179, SLA 2016.

[5] Former AS 11.71.040(a)(3)(A), *amended by* ch. 36, § 45, SLA 2016.

[6] Former AS 11.71.040(a)(5), *amended by* ch. 36, § 45, SLA 2016.

[7] AS 28.35.182(b).

[8] *Waring v. State*, 670 P.2d 357, 363 (Alaska 1983).

The superior court denied the suppression motion. In its written order, the court ruled that Smith did not have vicarious standing to bring the motion because he had failed to establish that Trooper Young's actions constituted "gross misconduct" or that Trooper Young had "deliberately violated Mr. [Doe's] rights."[9]

Smith's case then went to trial. During opening statements, the prosecutor referred to Smith's admission to Trooper Young that the Altoids tin with the drugs belonged to him. Smith objected to the use of this statement at trial, arguing (for the first time) that his statement was involuntary and therefore inadmissible.

The prosecutor argued that the mid-trial objection was untimely. The superior court agreed and chastised the defense attorney for failing to raise this issue in a pre-trial motion to suppress. The court noted that it had taken two years to litigate the pre-trial motions in this case and there had been more than adequate time to raise this issue beforehand. The court nevertheless allowed the parties to argue whether Smith's statement admitting ownership of the Altoids tin was coerced.

After reviewing the recording of Trooper Young's interactions with Smith, the court ruled against Smith, finding that the totality of the circumstances showed that the statement was voluntarily made and not coerced by any threats or promises.

The superior court also ruled, over Smith's attorney's objection, that the prosecutor would be permitted to play the portions of the interview where Trooper Young confronted Smith with his observations of Smith's behavior that day. Smith's attorney argued that the trooper's statements were hearsay and should not be admitted for the truth of the matters asserted. The superior court rejected this argument on the ground that the statements were admissible under the present sense impression exception to the hearsay rule. (The State concedes that this ruling was in error.) The court also

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[9] *Id.* at 363.

concluded that any hearsay problems with the trooper's statements could be addressed through a limiting instruction.

Smith's attorney subsequently proposed a limiting instruction that would have informed the jury that Trooper Young's statements in the recording were being introduced "so you will have some context" and specifically instructed the jury that the statements were not to be considered "for their truth." The prosecutor objected to the proposed instruction, expressing concern that the instruction would confuse the jury because Trooper Young's trial testimony covered the same observations and material as the recorded statement.

The superior court ultimately gave a modified version of the proposed limiting instruction. The modified version informed the jury that Trooper Young's statements in the recording were being admitted so that the jury would have "some context for the answers given by Mr. [Smith]." Additionally, it instructed the jury that they were to consider Trooper Young's recorded statements "for context only."

Following deliberations, the jury convicted Smith of all charges. At sentencing, the court imposed a composite sentence of 20 years to serve with no time suspended.

This appeal followed.

The superior court did not err in ruling that Smith lacked standing to challenge the voluntariness of Doe's statements

In *Waring v. State*, the Alaska Supreme Court held that a defendant has standing to assert the violation of a co-defendant's Fourth Amendment rights if he or she can show (1) that a police officer obtained the evidence as a result of gross or shocking misconduct, or (2) that the officer deliberately violated a co-defendant's rights so as to

secure evidence against the defendant.[10] In *Geil v. State*, this Court extended the *Waring* rule of vicarious standing to Fifth Amendment violations.[11]

In the present case, the superior court ruled that neither *Waring* exception applied. On appeal, Smith does not argue that Trooper Young's conduct in Doe's interview qualifies as "gross or shocking misconduct," but he does argue that Trooper Young deliberately violated Doe's Fifth Amendment rights in order to obtain incriminating information about Smith.

We find no merit to this contention. Although the record is clear that Smith was the primary target of Trooper Young's investigation, the record does not support Smith's claim that Trooper Young deliberately violated Doe's constitutional rights. We have listened to the recorded interview between Doe and Trooper Young. It is clear that Doe was read his *Miranda* rights, and it is also clear that he voluntarily waived these rights and agreed to speak with Trooper Young. The interaction between the two was cordial and increasingly friendly and relaxed as the interview went on. Although Trooper Young offered to let Doe go uncharged if he cooperated with the investigation of Smith, Young did not threaten Doe. He also made it clear that if Doe did not cooperate in the investigation of Smith, Doe's case would be handled normally and Doe might or might not be charged. The record further demonstrates that Trooper Young fulfilled his promise to Doe, and that Doe ultimately was not prosecuted in this case. Indeed, Doe was never called to testify in Smith's case and his statements were never used against Smith at trial, rendering the majority of Smith's motion to suppress moot.

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[10] 670 P.2d 357, 362-63 (Alaska 1983).

[11] 681 P.2d 1364, 1366-67 (Alaska App. 1984).

Trooper Young's conduct in the interview with Doe stands in stark contrast to the conduct of the police in *Dimmick v. State,* a pre-*Waring* case.[12] In *Dimmick*, the co-defendant requested an attorney after being given *Miranda* warnings, but the police interrogated him without complying with his request.[13] The police also admitted that they did this knowing that the resulting statements could not be used against the co-defendant, but believing that the statements could still be used against Dimmick.[14] The co-defendant later testified against Dimmick at trial.[15] On appeal, the Alaska Supreme Court was equally divided as to whether Dimmick had vicarious standing to seek suppression of his co-defendant's statements.[16] Two justices believed that Dimmick was the target of what appeared to be a deliberate violation of his co-defendant's constitutional rights in order to obtain evidence against Dimmick, and they therefore argued that Dimmick had standing to bring his suppression claim — the position that was later adopted by the Court as a whole in *Waring*.[17]

Here, the record supports Smith's contention that he was the primary target of Trooper Young's investigation, but it does not support Smith's claim that Trooper Young deliberately violated Doe's rights in order to obtain evidence against Smith. We therefore affirm the superior court's ruling that Smith lacked standing under *Waring* to seek suppression of Doe's statements and the alleged fruits of those statements.

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[12] 473 P.2d 616 (Alaska 1970).

[13] *Id.* at 618-19.

[14] *Id.* at 619.

[15] *Id.* at 618.

[16] *Id.* at 619-20.

[17] *Id.* at 621-29 (Rabinowitz and Connor, JJ., dissenting).

The superior court did not err in finding Smith's statement to be voluntary

On appeal, the State argues that Smith failed to properly preserve his argument that his own statements were involuntary.[18] We agree with the State that Smith's mid-trial suppression motion was untimely under Alaska Criminal Rule 12(b)(3) and (c). However, we conclude that the matter is nevertheless preserved for appellate review because the superior court ultimately ruled on the merits of Smith's claim of involuntariness.[19]

"In determining whether a confession is the product of a free will or was the product of a mind overborne by coercion the totality of the circumstances surrounding the confession must be considered."[20] "Among the circumstances relevant to the court's determination of voluntariness are the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement."[21] The State bears the burden of proving the voluntariness of a confession by a preponderance of the evidence.[22]

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[18] *Pierce v. State*, 261 P.3d 428, 430-31 (Alaska App. 2011) ("[A] litigant is not entitled to pursue a claim on appeal unless that claim was presented to the lower court, and unless the lower court issued a ruling on the merits of that claim.").

[19] *See Wagner v. State*, __ P.3d __, Op. No. 2533, 2017 WL 382643, at *3 (Alaska App. Jan. 27, 2017) ("[W]hen the trial court overlooks the untimeliness and reaches the merits of the defendant's challenge [,] then an appellate court should not reject the claim on forfeiture grounds.").

[20] *Beavers v. State*, 998 P.2d 1040, 1044 (Alaska 2000) (quoting *Sovalik v. State*, 612 P.2d 1003, 1006 (Alaska 1980)).

[21] *Id.* (quoting *Sprague v. State*, 590 P.2d 410, 414 (Alaska 1979)).

[22] *Id.*

Here, Smith argued that Trooper Young coerced him into admitting ownership of the Altoids tin by allegedly threatening to report him to the DEA and by offering him an opportunity to be a confidential informant if he cooperated. Smith specifically compared his case to *Beavers v. State*, a case in which the Alaska Supreme Court suppressed a juvenile's confession as involuntary after the police threatened the juvenile that he would be "hammered" if he did not cooperate and confess.[23]

The superior court rejected the comparison to *Beavers*, noting that, unlike the juvenile in *Beavers*, Smith was a sophisticated criminal defendant with a prior history of working as a confidential informant for Trooper Young. The trial court also noted that Trooper Young had properly *Mirandized* Smith and that Smith gave no indication that he wanted counsel or that he did not wish to talk. The trial court also found it significant that Smith was familiar with how "proffers" worked and was clearly interested in resuming his activities as a confidential informant. After considering the totality of the circumstances, the court concluded that Smith's admission was not the product of an overborne will and was not coerced.

A trial court's determination concerning the voluntariness of a defendant's statement is a mixed question of law and fact.[24] The trial court's determination of voluntariness is a three-part process:

> First, the trial judge must find the external, phenomenological facts surrounding the confession. Second, from these external facts, the judge must infer an internal, psychological

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[23] 998 P.2d at 1048.

[24] *Id.*

> fact: the mental state of the accused. Finally, the judge must assess the legal significance of this inferred mental state.[25]

The first step requires the trial judge to make factual findings and weigh the credibility of witnesses; these determinations are only overturned on appeal if they are clearly erroneous.[26] The other two steps — inferring the accused's mental state and its legal significance — are reviewed *de novo*.[27] That is, we independently examine the entire record and make our own determinations based upon the totality of the circumstances.[28]

In the current case, the interaction between Trooper Young and Smith was recorded and the superior court was not required to resolve any factual disputes regarding what was said between them. Our review is therefore *de novo*.

At oral argument, both parties urged us to listen to the recorded interview between Trooper Young and Smith. We have done so. The recording shows the interaction between Trooper Young and Smith was cordial. The recording also demonstrates that Smith was a sophisticated criminal defendant who was familiar with the criminal justice system and familiar with Trooper Young and the role of a confidential informant. The recording also confirms the State's claim that Trooper Young did not overtly threaten Smith with increased prosecution if he failed to cooperate. Nor did Trooper Young ever make any specific promises to Smith about how he would be treated if he cooperated. To the contrary, Trooper Young was clear during the interaction about the limits of his authority to make any such promises.

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[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

We note, however, that the recording shows that Trooper Young did make various comments that suggested Smith would have a better chance of renewing his prior role as a police informant if Smith showed that he was willing to cooperate with the police and admit that the tin was his. We agree that, under some circumstances, such indirect inducements might indeed result in a defendant's will being overborne and require suppression of a statement as involuntary. Here, however, the totality of the circumstances in this case do not lead to that conclusion. Having reviewed the interaction in its entirety, we conclude that Smith's statement admitting ownership of the Altoids tin was not the product of a mind overborne by coercion. Accordingly, we affirm the superior court's denial of Smith's mid-trial motion to suppress his statement as involuntary.

The superior court erred in admitting Trooper Young's hearsay statements as present sense impressions, but the error was harmless

At trial, Smith objected to the State playing portions of the interview between Trooper Young and Smith in which Trooper Young recounted what the troopers had observed that day. Smith argued that these statements were inadmissible hearsay. The superior court concluded that the statements were admissible under the present sense impression exception to the hearsay rule. However, the court later instructed the jury that Trooper Young's statements in the recording were being admitted "for context only."

On appeal, the State concedes that the statements were not admissible under the present sense impression exception to the hearsay rule. This concession is well-founded.[29] The State argues, however, that the statements were properly admitted as

[29] *See Boles v. State*, 210 P.3d 454, 455 (Alaska App. 2009) (appellate court has the duty (continued...)

non-hearsay statements, to provide the necessary context in which to understand Smith's own statements in the interview.[30]

We conclude that this justification applies to some, but not all, of the statements. Some of the statements simply involve Trooper Young speaking about the investigation with little response from Smith. Contrary to the State's assertion, this portion of the interview was not needed to provide context for Smith's later incriminating statements.

We nevertheless conclude that any error in admitting these statements was harmless.[31] At trial, Trooper Young testified directly to his observations that day, repeating much of the same information that he reported to Smith in the interview. The recorded statements were therefore largely cumulative of the trial testimony that was given by Young. Moreover, the jury was specifically instructed that Trooper Young's statements on the tape were to be considered "for context only."

Smith argues that the superior court's limiting instruction was inadequate and that the court erred in failing to give the defense version of the limiting instruction. As a general matter, a trial court's decision to give one proposed jury instruction as

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[29] (...continued)
to independently evaluate whether a concession of error is well-founded).

[30] *See Lipscomb v. State*, 700 P.2d 1298, 1305 (Alaska App. 1985) (noting that Lipscomb's comments would have been nonsense without the officer's questions he was answering).

[31] *See Love v. State*, 457 P.2d 622, 629 (Alaska 1969) (concluding that test for whether error is harmless is "how [the error] may have affected a jury of reasonable laymen," not whether evidence was sufficient to support the conviction without the error).

opposed to another is assessed under the abuse of discretion standard, so long as the court's instruction does not misstate the law or lead the jury astray.[32]

We conclude that the superior court's limiting instruction adequately instructed the jury that Trooper Young's recorded statements were to be considered only as context for Smith's answers. Although we agree that Smith's proposed instruction was also proper, and arguably a better explanation of the non-hearsay purpose of this evidence, we find no abuse of discretion in the court's choice of instruction.

Conclusion

The judgment of the superior court is AFFIRMED.

[32] *Wilson v. State*, 967 P.2d 98, 102-03 (Alaska App. 1998).

Judge MANNHEIMER, concurring.

I write separately to clarify that a trial judge is not required to entertain a suppression motion that is raised after the trial begins.

In the middle of Smith's trial, his defense attorney raised a suppression claim for the first time: the claim that Smith's statements to Trooper Young should be suppressed because these statements were involuntary.

The trial judge correctly noted that this suppression motion was untimely. Under Alaska Criminal Rules 12(b)(3) and 12(c), any motion to suppress evidence on the ground that it was illegally obtained must be raised within 45 days of the defendant's arraignment, unless the court extends this deadline — and, in any event, the motion must be raised before trial.

But after noting that the motion was untimely, the trial judge indicated that she thought she was required to let the defense attorney litigate this claim, and that she was required to resolve the merits of this claim, because the defense attorney was arguing that Smith's constitutional rights had been violated:

> *The Court*: I understand [that] it could be characterized as a late-filed constitutionally based suppression motion. [But] it's constitutionally based, and so I am not going to engage in a process where I don't give that serious consideration.

But the fact that Smith's suppression motion was "constitutionally based" did not set it apart from other suppression motions. Almost all motions to suppress evidence are based on a claim that the government violated the defendant's rights under the Fourth, Fifth, or Sixth Amendment.

It is true that Criminal Rule 12(e) gives trial judges the authority to allow a defendant to litigate a suppression motion even if that motion was filed after the court's deadline for pre-trial motions. Indeed, in *Fox v. State*, 685 P.2d 1267 (Alaska App. 1984), this Court held that a trial judge abused his discretion when he refused to consider the merits of a suppression motion that was filed after the deadline. We declared that, in such circumstances, if the defendant can demonstrate good cause for reaching the merits of the suppression motion, a court should ordinarily use monetary sanctions to enforce compliance with its filing deadlines rather than prohibiting the litigation of the motion. *Id.* at 1269-1270.

But in *Fox*, even though the suppression motion was filed after the motions deadline, the motion was filed before the trial started. We declared that this fact was significant to our analysis — because "there is abundant precedent to support the conclusion that a suppression motion filed for the first time during trial may be deemed untimely and need not be considered on its merits." *Id.* at 1269.

Indeed, later that same year, in *Wortham v. State*, 689 P.2d 1133 (Alaska App. 1984), this Court upheld a trial judge's refusal to reach the merits of a severance motion that was filed on the first day of trial. We explained:

> Unfortunately, when a motion is filed on the day of trial, a party may obtain a significant [unfair] advantage. In the instant case the motion was raised orally without any citation to authority and apparently without warning. The trial judge was ready to proceed with the trial and in all probability had a jury waiting. This is a situation which makes it difficult for the opposing party to respond and for the trial judge to fully consider the motion before he rules. The dangers of a party obtaining an advantage from filing a late motion are significant enough that it appears to be unwise to hold that the trial judge must consider any motion and can only apply monetary sanctions.

Wortham, 689 P.2d at 1137-38.

This is not to say that trial judges can reflexively deny suppression motions simply because they are filed after the trial begins. In *Wortham*, we cautioned that "some motions are significant enough that failure to consider those motions would be an abuse of discretion." *Id.* at 1138. But the mere fact that a suppression motion raises a constitutional claim does not make it "significant" among suppression motions.

For instance, in *Annas v. State*, 726 P.2d 552 (Alaska App. 1986), a trial judge was confronted with several suppression motions that were filed on the day that trial was scheduled to begin. The judge declared that he would resolve the motions that involved pure claims of law, as well as the motions that could be decided on the evidence already in the record. But with respect to the motions that would require the taking of additional evidence, the judge denied those motions as untimely. This Court upheld the judge's denial of those motions. *Id.* at 558-59.

The law on this point is summarized in *Best v. Anchorage*, 749 P.2d 375 (Alaska App. 1988), and *Selig v. State*, 750 P.2d 834 (Alaska App. 1988).

When a suppression motion is filed late, but in good faith and before trial, and there is ample time to hear the motion without disrupting the scheduled trial or otherwise prejudicing the prosecution, it is an abuse of discretion for the trial judge to decline to hear the motion — although the judge may impose monetary sanctions on the dilatory attorney or party. *Best*, 749 P.2d at 381; *Selig*, 750 P.2d at 837.

On the other hand, when a defendant fails to seek pre-trial resolution of a suppression motion in time to avoid disrupting the trial date or otherwise prejudicing the prosecution, the trial judge has the discretion to decline to hear the motion. *Best*, 749 P.2d at 381. This includes motions which, although they are timely filed, are so

procedurally deficient that the issues raised can not be resolved without disruption of the trial date or other significant prejudice to the prosecution. *Selig*, 750 P.2d at 837.

I express no opinion as to whether the trial judge in Smith's case should have exercised her discretion to address the merits of Smith's suppression motion. I only wish to clarify that the judge had no duty to hear the motion simply because the motion was based on a claim that Smith's constitutional rights were violated.