IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DAVID JAMES PAUL, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11773 Trial Court No. 1JU-11-823 CR MEMORANDUM OPINION No. 6526 — September 27, 2017

Appeal from the Superior Court, First Judicial District, Juneau, Philip M. Pallenberg, Judge.

Appearances: Megan R. Webb, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Diane L. Wendlandt, Assistant Attorney 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 SUDDOCK.

A jury found David James Paul guilty of manslaughter for the death of his girlfriend's four-month-old baby. Prior to trial, Paul moved to suppress statements that

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

he had made to the police on two separate occasions. Superior Court Judge Philip M. Pallenberg suppressed Paul's statements from the first police interview but did not suppress Paul's statements from the second police interview, which occurred eleven months later. On appeal, Paul argues that the superior court erred in failing to suppress his statements from the second police interview. For the reasons we explain in this opinion, we affirm the judge's ruling and Paul's conviction.

Background facts

Paul lived in Juneau with Jacqueline Orr and her four-month-old daughter, Rian Orr. On August 9, 2010, the couple took Rian to the Juneau hospital because she was having seizures. There, doctors diagnosed Rian with subdural bleeding in her brain and a broken leg. They also found evidence of healing rib fractures and bruises that appeared to be from older injuries. Rian died from her brain injury on August 15, 2010, at Harborview Hospital in Seattle.

Two Juneau police investigators interviewed Paul on August 18, 2010 at the Juneau police station. Although these officers told Paul that he was free to leave, they treated him as if he was not. For instance, when he asked to use the bathroom, one of the officers accompanied him and stood by as he used it. When he asked to speak to his girlfriend Orr, the officers did not allow him to. And when he requested an attorney, they did not terminate the interview, which eventually spanned four hours.

A third officer administered a polygraph exam and misrepresented its result to Paul. This officer repeatedly accused Paul of lying to the detectives.

These procedures eventually bore fruit in that Paul, who had initially denied all knowledge of Rian's injuries, said that he had accidentally dropped her on the floor, and he asserted that he had probably broken her leg when he tried unsuccessfully to arrest her fall.

Paul was released following this interview. Eleven months later, on July 8, 2011, Paul was indicted on two counts of second-degree murder and one count of manslaughter.[1] Paul was arrested later that day. Following his arrest, a different Juneau police officer, Sergeant Paul Hatch, administered *Miranda* warnings and then interviewed him. Paul initially reiterated his earlier account of accidentally dropping Rian in the bathroom. But eventually Paul stated that, after Rian fell to the floor, he shook her to make her stop crying.

The judge's suppression ruling

Paul moved to suppress his statement during the first interview that he had dropped Rian on the bathroom floor, arguing that it was the result of police misconduct and was involuntary. He also moved to suppress his statement eleven months later in which he reiterated this account and added that he had shaken Rian. Paul argued that this second statement was tainted by the earlier police misconduct.

Judge Pallenberg held an evidentiary hearing and suppressed Paul's initial admission that he had dropped Rian. The judge summarized his findings as follows:

> Mr. Paul asked for a lawyer and was denied one. He was escorted to and from the bathroom and supervised while he urinated. He asked to leave and was not allowed to do so. He took a polygraph and was given an inaccurate account of his performance. He was threatened with the possibility of life in prison for being dishonest, and promised leniency if he said that he caused [Rian's] injuries by accident. He was repeatedly told that [Jacqueline] Orr wanted him to say that he caused [Rian's] injuries by accident, and was told she would stand by him if he apologized. At the time of these events, Mr. Paul was twenty-one years old. Although he had

[1] AS 11.41.110(a)(1)-(2) and AS 11.41.120(a)(1), respectively.

> a number of misdemeanor convictions, he told police that he had never been interviewed before.
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> No one of these factors ... would require a finding that the subsequent statements were involuntary. However, ... [under] the totality of the circumstances, ... [the State has not] met its burden of showing that the subsequent statements were made voluntarily.

But as to Paul's claim that earlier police misconduct tainted the admissions Paul made in the second interview eleven months later, Judge Pallenberg ruled that, under the totality of the circumstances, Paul's decision to speak with Sergeant Hatch was sufficiently an act of free will to purge it of any taint from the first interview.

Following a trial, the jury found Paul guilty of manslaughter. This appeal followed.

Why we affirm the superior court's suppression ruling

Whether a subsequent statement is tainted by an earlier illegality is a mixed question of law and fact.[2] We must accept the trial court's findings of fact unless they are clearly erroneous.[3] But we review de novo whether the trial court's findings of fact demonstrate that the defendant's later decision to speak with the police was voluntary and adequately insulated from the prior illegality so as to "escape its taint."[4]

In this case, the judge found that Paul's initial statement was involuntary. Thus, under the holding of *Brown v. Illinois*, the State had to first show that the subsequent statement was voluntary, and that Paul had received *Miranda* warnings and

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[2] *Kalmakoff v. State*, 257 P.3d 108, 118-19 (Alaska 2011).

[3] *Id.* at 118.

[4] *Id.* at 118-19.

waived his rights.[5] If these prerequisites were satisfied, then the State had to show that, under the totality of the circumstances, Paul's subsequent statement was "sufficiently an act of free will to purge the primary taint."[6]

In *Halberg v. State*, we set forth factors to be used when determining whether the relationship between an earlier involuntary statement and a subsequent voluntary one is sufficiently attenuated:

> [T]he purpose and flagrancy of the initial illegal act, the amount of time between the illegal act and the defendant's subsequent statement, the defendant's physical and mental condition at the time of the subsequent statement, whether the defendant remained in custody or was at liberty during this interval, whether the defendant had the opportunity to contact legal counsel or friends during this interval, whether the subsequent interview took place at a different location, whether the defendant's interrogators were the same officers who committed the prior illegal act, whether the evidence obtained from the prior illegal act affected the defendant's decision to submit to a subsequent interview, whether the police used lies or trickery to influence the defendant's decision, and whether there were other intervening events that affected the defendant's decision.[7]

Weighing these factors, Judge Pallenberg concluded that the second confession was "sufficiently insulated" from the earlier illegality. He found that eleven months separated the two interviews, during which Paul was at liberty. Sergeant Hatch did not participate in the earlier tainted interview, and Hatch did not use lies or trickery

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[5] *Brown v. Illinois*, 422 U.S. 590, 602 (1975).

[6] *Id.*

[7] *Halberg v. State*, 903 P.2d 1090, 1098 (Alaska App. 1995). These factors were later adopted by the supreme court in *Kalmakoff*, 257 P.3d at 125.

during the later interview. Paul was not in physical or mental distress at the time of the second interview, and he had an adequate opportunity to consult with counsel and friends during the interim.

Paul takes issue with three aspects of the judge's ruling. First, Paul argues that the judge did not properly weigh the factors in *Halberg* because the judge should have found that the procedures employed by the police during the earlier interview were "flagrantly illegal."

This Court has characterized flagrant police misconduct as "conduct that was obviously illegal, or that was particularly egregious, or that was done for the purpose of abridging the defendant's rights."[8] We agree with Paul that the tactics and procedures employed by the police during the earlier interview, viewed collectively, were sufficiently egregious to qualify as a flagrant violation of Paul's Fifth Amendment rights.[9] We review the judge's ruling in that light.

Second, while Paul concedes that Sergeant Hatch did not participate in the tainted initial interview, Paul argues that he *believed* that Hatch did so — *i.e.*, that he mistook Hatch for one of the original interviewing officers. Thus, the factor "whether [Paul's] interrogators were the same officers who committed the prior act" should have been resolved in his favor. Paul notes that immediately after Sergeant Hatch read Paul a *Miranda* advisement, he introduced himself to Paul by remarking that he and Paul had spoken to each other "a couple years ago." Paul concedes that this was a reference to an unrelated police contact between Sergeant Hatch and Paul that predated Paul's August 2010 interview. But Paul argues that, at the time of his arrest and interview, he took

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[8] *McBath v. State*, 108 P.3d 241, 248 (Alaska App. 2005).

[9] *See Kalmakoff*, 257 P.3d at 127 (finding interview to be flagrantly illegal because, *inter alia*, troopers disregarded a request to leave and ignored invocation of a right to silence).

Sergeant Hatch's reference to this earlier police contact as a reference to the first interview, as evidenced by Paul's response that "[i]t was almost exactly a year ago now." The interview then turned to other matters.

Paul now argues that this brief exchange was "particularly significant" because it indicated that Paul thought that Sergeant Hatch was one of his earlier interviewers. But Paul did not argue this point when he presented his motion to suppress, nor did he develop it at the subsequent evidentiary hearing. Judge Pallenberg therefore never made a finding on this issue. Accordingly, Paul has not preserved this particular issue for appeal.

Lastly, Paul argues that the judge erred when he found that Paul, rather than Sergeant Hatch, was the first to bring up the topic of the earlier interview. But this argument misstates the judge's actual finding; the judge *did* find that it was Sergeant Hatch who first mentioned the earlier interview, informing Paul that the police thought that Paul had not told the police the whole story about what had happened to Rian:

> While [Sergeant Hatch] made a passing reference to the earlier interview ... he did not refer to the substance of that interview. His only reference to that interview was that the police thought more had happened than what he [previously disclosed]. It was Mr. Paul, and not Sergeant Hatch, who first brought up the substance of the earlier interview — the statement that Mr. Paul dropped [Rian].

The judge's finding is supported by the record and is not clearly erroneous. But while the police may not use a prior tainted confession to induce a defendant to waive the right to silence, the police may, after a defendant validly agrees to speak, discuss the content of a prior tainted statement.[10] Sergeant Hatch only mentioned the earlier interview after Paul had already waived his *Miranda* rights.

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[10] *Halberg*, 903 P.2d at 1099.

The second interview was conducted by a different police officer who did not engage in trickery or other manipulative practices. When Paul gave his second statement he knew he was under indictment for second-degree murder, and he had been advised of his *Miranda* rights.

Under these circumstances, the passage of time is a critical factor. We note that both the Alaska Supreme Court and this Court have found attenuation of taint after an intervening delay of only a few hours between a coerced statement and a later one.[11] Paul has cited no comparable case where a court has found taint after an interim of eleven months. Paul's argument that the eleven-month period is insufficient to dispel the taint of earlier illegality verges on an argument that *no* time period would suffice for that purpose. We disagree.

The judge's findings establish that the coercive circumstances of the initial interview played no legally cognizable role in Paul's decision eleven months later to speak with Sergeant Hatch.

While we agree that the initial interviewers flagrantly violated Paul's Fifth Amendment rights, this is but one factor to be considered. Given the totality of the circumstances, we agree with the judge's conclusion that the July 2011 interview was sufficiently insulated from the August 2010 illegality to escape its taint.

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[11] *See, e.g.*, *Kalmakoff*, 257 P.3d at 129; *Noyakuk v. State*, 127 P.3d 856, 864 (Alaska App. 2006); *Vent v. State*, 67 P.3d 661, 665 (Alaska App. 2003); *see also United States v. Yorgensen*, 845 F.3d 908, 914 (8th Cir. 2017) (holding that a two-day interim between statements was sufficient for attenuation under the circumstances of that case); *United States v. Gross*, 662 F.3d 393, 406 (6th Cir. 2011) (two-month interim was sufficient); *United States v. Gray*, 491 F.3d 138, 156 (4th Cir. 2007) (six-month interim was sufficient); *United States v. Bautista*, 145 F.3d 1140, 1150 (10th Cir. 1998) (six-day interim was sufficient).

Conclusion

We AFFIRM the judgment of the superior court.