IN THE COURT OF APPEALS OF THE STATE OF ALASKA

HECTOR ALVARENGA, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-10554 Trial Court No. 3AN-07-13731 CR MEMORANDUM OPINION AND JUDGMENT No. 5916 — February 6, 2013

Appeal from the Superior Court, Third Judicial District, Anchorage, Philip R. Volland, Judge.

Appearances: Christine S. Schleuss, Law Office of Christine Schleuss, Anchorage, for the Appellant. Diane L. Wendlandt, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Coats, Chief Judge, and Mannheimer and Bolger, Judges.

COATS, Chief Judge.

Hector Alvarenga was convicted of two counts of sexual abuse of a minor in the first degree and two counts of sexual abuse of a minor in the second degree for abusing his step-daughter, L.C., age nine. On appeal, Alvarenga argues that Superior Court Judge Philip R. Volland erred in admitting into evidence statements that Alvarenga

made to police detectives. Alvarenga contends that he was entitled to *Miranda* warnings before he talked to the police because he was in custody at the time he made the statements. He also claims that the statements were involuntary. We uphold Judge Volland's ruling that Alvarenga was not in custody at the time he made the statements and that Alvarenga's statements were voluntary.

Alvarenga claims that Judge Volland committed plain error by allowing into evidence the detectives' recording of their interview with Alvarenga. We do not find plain error.

Alvarenga also claims that Judge Volland erred in denying Alvarenga's motion to have his private attorney paid at public expense and in refusing to provide state funding for an expert witness who he wanted to hire to aid his defense. We uphold Judge Volland's ruling.

In addition, Alvarenga argues that his composite sentence is excessive. In a separate order, we have called for supplemental briefing in connection with this issue, and we will resolve Alvarenga's sentence appeal at a later time.

Factual and procedural background

In 2007, L.C., then nine years old, alleged that her step-father, Hector Alvarenga, sexually abused her. Alvarenga's wife, L.C.'s mother, contacted the Office of Children's Services (OCS) and OCS arranged for Detective Dawn Neer to interview L.C.

Following this interview, Neer obtained a *Glass* warrant to record a conversation between L.C.'s mother and Alvarenga.[1] Immediately after this

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[1] *See State v. Glass*, 583 P.2d 872, 881-82 (Alaska 1978).

conversation, Neer and Detective Brett Sarber went to Alvarenga's home to interview him. During this conversation, Alvarenga admitted that he had abused L.C.

Alvarenga was arrested the following day. He was indicted on two counts of sexual abuse of a minor in the first degree and two counts of sexual abuse of a minor in the second degree.

At trial, Alvarenga testified that he had falsely confessed to the police and that L.C.'s allegations were not true. He explained that Detectives Neer and Sarber had told him that they were going to mediate the dispute between Alvarenga and his wife about the allegations that he had sexually abused L.C. He therefore believed that the only way to resolve things with his wife was to talk to the detectives, and stated that if he did not "falsely accept" L.C.'s allegations he would lose everything he cared about.

At the end of trial, the jury convicted Alvarenga.

Why we uphold Judge Volland's decision denying Alvarenga's motion to suppress his statements to the police

Factual background

Judge Volland conducted an evidentiary hearing at which both detectives testified. In addition, Judge Volland listened to the recording of the interview. The following factual background is based on Judge Volland's findings.

After Detective Neer interviewed L.C., and recorded the conversation between Alvarenga and his wife, Neer and Detective Sarber went to Alvarenga's home to interview him. The detectives arrived at Alvarenga's residence dressed in plainclothes. When the detectives knocked on the door and asked if they could come in and talk, Alvarenga invited them in. Alvarenga acknowledged that he knew why the detectives were there because he had talked to his wife on the telephone just a few minutes before. The detectives informed Alvarenga that he could ask them to leave at

any time. They did not restrain his movement in any manner, nor did the officers make any show of force or make any threats or promises. Although the officers questioned Alvarenga as a suspect, Alvarenga knew the purpose of the interview, and the interview was not confrontational.

At one point in the interview, the telephone rang. Detective Neer directed Alvarenga to let it ring. But this occurred at part of the conversation when Alvarenga was telling the detectives something important. At another point, someone knocked on the door. When Detective Neer found out it was L.C.'s father, Neer answered the door because she was concerned that L.C.'s father might have heard about the allegations and might have come over to confront Alvarenga. Judge Volland concluded that neither of these incidents indicated that the officers restrained Alvarenga.

The interview lasted for approximately ninety minutes. At the end of the interview, Alvarenga acknowledged that he was aware that he could have asked the detectives to leave at any time and that the detectives had not restricted his movement around the house. Alvarenga was not arrested immediately after the interview. Detective Neer applied for an arrest warrant the next day.

Why we uphold Judge Volland's finding that Alvarenga was not in custody for Miranda purposes

Alvarenga contends that he was in custody during the police interview at his house. Accordingly, he argues that the police subjected him to custodial interrogation and were required to give him *Miranda* warnings before questioning him.[2] He therefore argues that Judge Volland erred in failing to suppress the statements he made during this interview.

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[2] *See Miranda v. Arizona*, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966).

Judge Volland found that Alvarenga was not in custody during the interview and therefore the detectives were not required to warn Alvarenga of his *Miranda* rights. Judge Volland applied the custody test which the Alaska Supreme Court set out in *Hunter v. State*.[3] Under the *Hunter* test, the court is to determine "whether the defendant, as a reasonable person, would have felt free to break off questioning."[4]

In concluding that Alvarenga was not in custody, Judge Volland emphasized that the police officers interviewed Alvarenga in his own home, had asked Alvarenga permission to enter, and had not acted in a coercive manner. The officers had told Alvarenga at the beginning of the interview that he could ask them to leave at any time. At the conclusion of the interview, Alvarenga acknowledged that he knew he could have asked the police to leave and acknowledged that they had not restricted his movement in his home.

In reviewing whether a defendant is in custody for *Miranda* purposes, we are to uphold the factual findings of the trial court unless they are clearly erroneous. But the question of whether the defendant was in custody under those facts is a question of law which we review de novo.[5] Judge Volland's factual findings concerning the circumstances of the interview are supported by the record and, based on these findings, we conclude that Alvarenga was not in custody during the police questioning.

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[3] 590 P.2d 888 (Alaska 1979).

[4] *Id.* at 895.

[5] *State v. Smith*, 38 P.3d 1149, 1153 (Alaska 2002).

Why we uphold Judge Volland's finding that Alvarenga's statements to the police were voluntary

Alvarenga argues that Judge Volland erred in finding that his confession was voluntary. Alvarenga contends that the detectives used implied promises and exerted improper influence to induce an involuntary confession. He also contends that the detectives falsely assured him that they were only there to get his side of the story and that they would leave anytime Alvarenga asked. Alvarenga argues that rather than tell him that he was facing criminal charges, the detectives played on his emotions and religious faith to convince him that the detectives were there to mediate and to help his family heal.

When a confession is challenged as involuntary, the confession is inadmissible unless the State proves by a preponderance of the evidence that it was voluntary.[6] To determine voluntariness, the court must examine whether, given the totality of the circumstances, "the conduct of law enforcement was such as to overbear [the defendant's] will to resist and bring about confessions not freely self determined."[7]

Judge Volland concluded that there was "no factual support in the record for Alvarenga's suggestion that his confession was not voluntary." He found that "the tone of the interview [was] never overbearing" and that the detectives "never raise[d] their voices throughout the interview, which remain[ed] largely polite and conversational." He concluded that "[c]onsidering all the circumstances of Alvarenga's interrogation, ... the conduct of the police was not such as to overbear Alvarenga's will and bring about a confession not freely self determined."

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[6] *Cole*, 923 P.2d 820, 822 (Alaska App. 1996) (citations omitted).

[7] *Id.* (quoting *Stobaugh v. State*, 614 P.2d 767, 772 (Alaska 1980)).

Judge Volland's factual findings are supported by the record. Based on those findings we conclude that Alvarenga's statements to the police were voluntary.

Judge Volland did not commit plain error by admitting the recording of the police interview

Alvarenga argues that it was plain error for Judge Volland to admit the recording of his interview with the detectives. He argues that recording the conversation without his knowledge violated his constitutional right to privacy. But Alvarenga never objected to admission of the recording. Alvarenga argues that, in spite of his failure to object, Judge Volland committed plain error by admitting the recording.

In *City and Borough of Juneau v. Quinto*[8], the Alaska Supreme Court found that a suspect had no reasonable expectation that his conversation would not be recorded, when he knew or reasonably should have known that he was speaking with a police officer.[9] The Court specifically rejected the contention that a person would have a reasonable expectation of privacy under Article 1 § 22 of the Alaska Constitution that a conversation with a person he knew was a police officer would not be recorded.[10]

Where a defendant contends for the first time on appeal that the trial court erred in failing to suppress evidence, we will not find plain error unless there is a "[s]ingularly egregious violation[]."[11] In addition, to establish plain error, Alvarenga

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[8] 684 P.2d 127 (Alaska 1984).

[9] *Id.* at 129.

[10] *Id.*

[11] *Moreau v. State*, 588 P.2d 275, 280 n.13 (Alaska 1978).

would have to show that the error was obvious, prejudicial, and not a tactical decision.[12] Alvarenga argues that *Quinto* is distinguishable because the recording in *Quinto* was not made in the defendant's home. But *Quinto*'s reasoning does not suggest that it would bar the police from recording an interview in a defendant's home. It therefore cannot be said that the alleged error was obvious. In addition, Alvarenga's failure to object to the recording might very well have been tactical — Alvarenga claimed that he was induced to falsely confess because of the police interrogation tactics. The tape provided a record of the tactics that, according to Alvarenga, explained why he would falsely confess.

We conclude that Judge Volland did not commit plain error by admitting the recording of the police interview.

Why we conclude that Alvarenga was not entitled to have his privately selected attorney paid at public expense, and why Alvarenga failed to show that he was entitled to hire a proposed expert witness at public expense

Alvarenga was represented by a privately retained attorney, Hugh Fleischer. Prior to trial, Fleischer filed a motion in which he asserted that Alvarenga had become indigent (he stated simply that Alvarenga had "exhausted his financial wherewithal"). Based on Alvarenga's alleged indigency, Fleischer asked the superior court to appoint him to be Alvarenga's attorney at public expense. Fleischer also asked the superior court to authorize him to use public funds to hire a proposed expert witness, Gregg McCreary. According to Fleischer, Mr. McCreary was an expert on false confessions.

In support of these motions, Fleischer relied on Alaska Criminal Rule 39, which authorizes the court to appoint an attorney to represent an indigent defendant at public expense. But, as Judge Volland pointed out when he denied these motions,

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[12] *Adams v. State,* 261 P.3d 758, 764 (Alaska 2011); *Burton v. State*, 180 P.3d 964, 968 (Alaska App. 2008).

Criminal Rule 39 does not authorize a court to order public reimbursement of a private attorney selected by the indigent defendant. Rather, Criminal Rule 39 declares that when indigent defendants are entitled to an attorney at public expense to represent them in criminal proceedings, the court shall appoint the Public Defender Agency or, if that Agency is disqualified, the Office of Public Advocacy.[13]

On appeal, Alvarenga contends that his act of *filing* the motion to have Fleischer paid at public expense should have alerted the superior court that it should hold a hearing to determine whether Alvarenga qualified for representation by the Public Defender Agency or the Office of Public Advocacy.

We do not agree. After Judge Volland denied the motion to have Fleischer paid at public expense, the obvious next step was for Fleischer to move to withdraw and ask the court to appoint substitute counsel at public expense under Criminal Rule 39. But Fleischer never made such a request. More particularly, Fleischer never indicated in any fashion that he was unwilling or unable to continue to represent Alvarenga. In fact, Fleischer continued to represent Alvarenga throughout the ensuing proceedings.

Given this record, we conclude that the superior court was under no obligation to take action *sua sponte* to determine whether Alvarenga qualified for a new attorney at public expense under Criminal Rule 39.

As we noted earlier, Alvarenga's trial court motion contained two requests for public funding: first, public funds to pay Fleischer's fee; and second, public funds to hire the proposed expert witness on false confessions. Alvarenga relied on the rules applicable to court-appointed counsel to support both requests.

But Criminal Rule 39 contains no provision authorizing a court to spend public funds to hire an expert witness. Rule 39 assumes that, after the Public Defender

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[13] *See* Criminal Rule 39(b)(3) and Alaska Administrative Rule 12(b)-(c).

Agency or the Office of Public Advocacy has been appointed to represent an indigent defendant, expert witnesses will be compensated with funds from the appointed agency's budget.[14]

On appeal, Alvarenga no longer relies on the Alaska court rules to support his argument for public funding of his proposed expert. Instead, he argues that he had a federal constitutional right, under the Due Process Clause, to have the public fund his proposed expert.[15]

Because Alvarenga did not raise this constitutional argument in the superior court, he must now show that the superior court committed plain error by failing to order public funding of Alvarenga's proposed expert witness. But as we pointed out earlier, if Alvarenga had no more funds to pay his private attorney or hire his proposed expert, Alaska law gave him a remedy: he could apply for court-appointed counsel under Criminal Rule 39. If his request was granted, then his proposed expert witness would be hired at public expense (through the court-appointed legal agency).

Because Alvarenga made no such request, and because Alvarenga's privately retained attorney, Fleischer, gave no indication that he was unwilling or unable to continue to represent Alvarenga, the superior court could reasonably assume that Fleischer was willing to continue to handle Alvarenga's case despite Alvarenga's alleged financial difficulties. Moreover, because Alvarenga did not raise a due process argument in the superior court, Alvarenga made no effort to show that he met the foundational

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[14] *See* AS 18.85.100(a)(1)-(2) and AS 44.21.410(a)(5). *But see* Administrative Rule 12(e)(5)(D), which authorizes the payment of expert witnesses at public expense as an "extraordinary expense" in cases where a litigant is constitutionally entitled to the assistance of counsel, but where private counsel must be appointed because the case falls outside the purview of the Public Defender Agency or the Office of Public Advocacy.

[15] *See Ake v. Oklahoma*, 470 U.S. 68, 83; 105 S.Ct. 1087, 1096; 84 L.Ed.2d 53 (1985).

requirements for having the expert witness paid at public expense — *i.e.*, that the expert's testimony would have been helpful to Alvarenga's defense, and that the expert's testimony would have been admissible.[16]

For these reasons, we conclude that Alvarenga has failed to show plain error with respect to the issue of public funding for his proposed expert witness.

Conclusion

Alvarenga's convictions are AFFIRMED. We will issue a separate decision dealing with Alvarenga's sentence appeal.

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[16] On this latter issue, *see Vent v. State*, 67 P.3d 661, 667-69 (lead opinion), 670-71 (Mannheimer, J., concurring) (Alaska App. 2003).