[Cite as *State v. McFarland*, 2010-Ohio-2395.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee :

C.A. CASE NO. 23411

v.

: T.C. NO. 2008 CR 4486

ALFRED D. McFARLAND : (Criminal appeal from Common Pleas Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 28th day of May, 2010.

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FROELICH, J.

{¶ 1} Alfred McFarland pled no contest in the Montgomery County Court of Common Pleas to rape, in violation of R.C. 2907.02(A)(2), a first degree felony, and gross sexual imposition, in violation of R.C. 2907.05(A)(4), a third degree felony. The trial court

had previously overruled his motion to suppress statements that he made to the police. The court found McFarland guilty and sentenced him to nine years for rape and to five years for gross sexual imposition, to be served concurrently. The court also found McFarland to be a Tier III sex offender.

{¶ 2} McFarland appeals from his conviction, arguing that the trial court erred in denying his motion to suppress and that his trial counsel rendered ineffective assistance. For the following reasons, the trial court's judgment will be affirmed.

I.

{¶ 3} Detective Phillip Olinger of the Special Assault Unit of the Dayton Police Department was the State's sole witness at the suppression hearing. His testimony established the following facts:

{¶ 4} On November 17, 2008, Detective Olinger was called to McFarland's residence in Dayton on a report that McFarland, who was 52 years old, had raped his nine-year-old step-daughter. When Olinger arrived at the residence, several other officers were already present and McFarland was standing on the porch. Olinger had met McFarland a couple of months before during a theft investigation. Olinger asked McFarland if they could go into the residence and talk privately. McFarland agreed, and the two went into the kitchen. Olinger advised McFarland of the allegation and asked for consent to search the house. McFarland gave his permission. Olinger read a consent to search form to McFarland; McFarland indicated that he understood the form and signed it. Olinger did not see any indication that McFarland was under the influence of drugs or alcohol.

{¶ 5} After McFarland gave consent to search the house, Olinger asked McFarland if he could interview him (McFarland) at the police station. McFarland agreed. Olinger had

another officer transport McFarland to the detective section of the police station located at 335 West Third Street. Olinger testified that McFarland "consensually went with the police" and he was not under arrest. Olinger stayed at the residence and obtained information from other officers and family members who were there.

{¶ 6} When Olinger arrived at the police station, he greeted McFarland in an interview room, shook his hand, asked him if he needed anything to eat or drink and if he needed to use the bathroom or the telephone, and provided him with a cup of water. Olinger did not have a weapon when he went into the room. Olinger asked McFarland about his education and if he could read and write. McFarland responded that he had an eighth grade education and could read and write, but not very well. Because of McFarland's answer, Olinger went "a little slower" to make sure that McFarland understood everything. McFarland also said that he had a driver's license.

{¶ 7} Olinger reviewed McFarland's constitutional rights with him using a pre-interview form. The interview form was dated November 17, 2008, at 6:40 p.m. Olinger advised McFarland that he was being interviewed regarding the crime of rape, and the detective wrote "rape" on the form. Olinger then read each of the rights to McFarland; McFarland indicated that he understood his rights. McFarland initialed each of the rights, wrote in his years of education, and signed the form. Olinger also signed the form. Olinger stated that he spent five to ten minutes reviewing the form with McFarland.

{¶ 8} McFarland was cooperative during the interview and did not ask to stop the interview. At several points, Olinger left the interview room to gather additional information; one break lasted approximately 40 minutes. Every time Olinger left, he asked if McFarland needed anything, and upon returning, Olinger always asked if the interview could

continue; McFarland stated that it could. Olinger checked on McFarland several times.

{¶ 9} Toward the end of the interview, Olinger asked McFarland if he would make a written statement. McFarland declined. Olinger asked McFarland if he would write answers if the detective wrote out a couple of questions. McFarland agreed. Olinger left the room and wrote four questions. Upon returning, he asked McFarland if he could read the questions; McFarland indicated that he could read the detective's writing. McFarland told Olinger the answers, wrote the answers ("yes" or "no"), initialed by his answers, and signed the paper. At the conclusion of the interview, Olinger took a saliva DNA sample from McFarland.

{¶ 10} Olinger denied that he had made any threats or promises to McFarland during the interview. Olinger further stated that a female officer who had briefly entered the room also did not coerce McFarland in any way. Olinger acknowledged that he told McFarland that he did not believe McFarland and that McFarland needed to "tell [him] the truth." The entire interview lasted for approximately 95 minutes, including breaks totaling about 50 minutes. The interview was not recorded. It is unclear whether McFarland was arrested at the conclusion of the interview.

{¶ 11} McFarland also testified at the suppression hearing. He testified that he cannot read or write, and can only spell his name. McFarland agreed that Olinger left the room three or four times. He testified, however, that Olinger would return, saying, for example, "You need to answer me some questions, because my boss, he's much meaner than me." McFarland denied that he had written the answers to questions on the sheet of paper.

{¶ 12} On cross-examination, McFarland agreed that he had signed a consent to search form at his house, saying "they was going to get a search warrant anyway. I didn't

have nothing to hide." He acknowledged that Olinger read the consent and pre-interview forms to him and that he understands when someone reads something to him. McFarland also conceded that he had paid attention to Olinger when the detective reviewed his rights with him and that he had initialed and signed the form. Upon questioning by the court, McFarland clarified that the detective had read his rights at the beginning of the interview, but said he did not initial or sign the pre-interview form until the end of the interview. McFarland stated that he was not under the influence of drugs or alcohol and that Olinger offered water and an opportunity to use the bathroom. He believed that the interview had lasted approximately one and one-half hours. McFarland stated that he had told Olinger, at some point during the interview, that he wanted the interview to stop.

{¶ 13} In December 2008, McFarland moved to suppress the statements that he gave to the police, arguing that he did not knowingly, intelligently, and voluntarily waive his rights under *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, and that his statements were obtained as a result of coercion by Olinger. A hearing on the motion was held on January 23, 2009.

{¶ 14} At the conclusion of the hearing, the court orally overruled the motion. The court found that, even taking into account McFarland's "difficulty with reading and writing, *** [i]t did not appear to the Court that the Defendant has any kind of mental or intelligence deficiency other than the ability to read and write. *** And I find that based on the weight of the evidence that the Defendant was advised of his *Miranda* rights, that they were read to him, and that he did make a waiver of those rights. And it's clear to the Court that the Defendant understood those rights. ***" The trial court further found that the interview itself was not "in any way oppressive." The court did not consider statements by the detective such as "my

boss doesn't believe you" to constitute the type of threats that would cause McFarland to make involuntary statements. An entry overruling the motion to suppress was filed on January 26, 2009.

{¶ 15} In March 2009, McFarland pled no contest to one count of rape and one count of gross sexual imposition. Eleven other counts were dismissed.[1] The court sentenced him accordingly.

{¶ 16} McFarland appeals from his conviction, raising two assignments of error.

II.

{¶ 17} McFarland's first assignment of error states:

{¶ 18} "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS AS THE STATEMENTS WERE NOT A VALID WAIVER OF DEFENDANT'S RIGHTS UNDER THE FIFTH AMENDMENT [TO] THE UNITED STATES CONSTITUTION AS APPLIED TO THE STATES VIA THE FOURTEENTH AMENDMENT."

{¶ 19} McFarland claims that the trial court erred in denying his motion to suppress because he did not validly waive his *Miranda* rights and his statements were involuntarily given. He emphasizes that he could not read and write, that he did not sign the pre-interview form until the end of the interview, and that he did not write the responses to Olinger's written questions.

{¶ 20} "The trial court assumes the role of the trier of fact in a hearing on a motion to

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[1]In exchange for the plea, the State dismissed one count of rape of a child under the age of thirteen, three counts of gross sexual imposition of a child less than thirteen, three counts of attempted rape of child less than thirteen, two counts of importuning, and two counts of public indecency.

suppress; it must determine the credibility of the witnesses and weigh the evidence presented at the hearing." *State v. Morgan*, Montgomery App. No. 18985, 2002-Ohio-268, citing *State v. Curry* (1994), 95 Ohio App.3d 93, 96. In reviewing the trial court's ruling on a motion to suppress evidence, this Court must accept the findings of fact made by the trial court if they are supported by competent, credible evidence. Id. However, "the reviewing court must independently determine, as a matter of law, whether the facts meet the appropriate legal standard." Id.

{¶ 21} Police are not required to give *Miranda* warnings to every person that they question, even if the person being questioned is a suspect. *State v. Biros* (1997), 78 Ohio St.3d 426, 440. Nor are *Miranda* warnings required merely because the individual is being questioned at the police station. Id. Instead, *Miranda* warnings are only required for custodial interrogations. Id. The State may not use any statements made during a custodial interrogation unless it "demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda*, 384 U.S. at 444. In order for a defendant's statements made during a custodial interrogation to be admissible, the prosecution must establish that the accused knowingly, voluntarily, and intelligently waived his Fifth Amendment right against self-incrimination. *State v. Edwards* (1976), 49 Ohio St.2d 31, 38, overruled on other grounds, (1978), 438 U.S. 911, 98 S.Ct. 3147, 57 L.Ed.2d 1155; *Miranda*, supra.

{¶ 22} Even when an individual is not in custody and *Miranda* warnings are not required, a defendant's statement may be involuntary and subject to exclusion. *State v. Porter*, 178 Ohio App.3d 304, 2008-Ohio-4627, ¶14, citing *Dickerson v. United States* (2000), 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405. "In deciding whether a defendant's

confession is involuntarily induced, the court should consider the totality of the circumstances, including 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." *Edwards*, 49 Ohio St.3d at paragraph two of the syllabus. See, also, *State v. Brewer* (1990), 48 Ohio St.3d 50, 58; *State v. Marks*, Montgomery App. No. 19629, 2003-Ohio-4205. A defendant's statement to police is voluntary absent evidence that his will was overborne and his capacity for self-determination was critically impaired due to coercive police conduct. *Colorado v. Spring* (1987), 479 U.S. 564, 574, 107 S.Ct. 851, 93 L.Ed.2d 954; *State v. Otte*, 74 Ohio St.3d 555, 562, 1996-Ohio-108.

{¶ 23} As a threshold matter, we note that Olinger testified that McFarland agreed to be interviewed at the Dayton Police Department, that he was not under arrest when he was transported to the Dayton Police Department by other officers, and that he went consensually. McFarland did not refute that testimony. Although the parties did not address whether McFarland was in custody during his subsequent interview with Olinger, this limited information suggests that McFarland might not have been subjected to a custodial interrogation, even though the interview occurred at the police station. If McFarland's presence at the police station were, in fact, consensual, *Miranda* warnings would not have been necessary.

{¶ 24} Regardless, the record supports the trial court's conclusion that McFarland knowingly, intelligently, and voluntarily waived his *Miranda* rights. McFarland was 52 years old at the time of the interview and, although McFarland has a limited ability to read and write, if any, the trial court reasonably concluded that McFarland did not have any deficiency

with respect to his intelligence. Olinger testified that he proceeded more slowly to ensure that McFarland understood and took approximately five to ten minutes to review the form with him. Olinger and McFarland both agreed that the detective read the pre-interview form to McFarland at the beginning of the interview. McFarland acknowledged that he had paid attention to Olinger when the detective reviewed his rights with him and that he understands when someone reads a document to him. McFarland initialed and signed the pre-interview form. Although McFarland claimed he did not sign the form until the end of the interview, Olinger testified that McFarland signed the form at the beginning, and the court could have reasonably credited that testimony. Olinger and McFarland both indicated that McFarland was not under the influence of drugs or alcohol. Olinger's testimony established that he began the interview respectfully; he shook McFarland's hand and offered him water and the use of the bathroom and a telephone. Upon review of the totality of the circumstances, McFarland knowingly, intelligently, and voluntarily waived his *Miranda* rights and proceeded to speak with Olinger.

{¶ 25} We also agree with the trial court's conclusion that McFarland's statements to Olinger were voluntarily made. As stated above, McFarland was 52 years old. He was informed and understood that he was being interviewed regarding an allegation of rape made by his step-daughter. The interview occurred during the evening and lasted approximately 95 minutes, although Olinger was out of the interview room for more than half of that time. Olinger offered McFarland an opportunity to use the bathroom and telephone and provided him water at the beginning of the interview, and the detective checked on McFarland and asked if he needed anything during the breaks. McFarland was not under the influence of drugs or alcohol, and he did not doze during the breaks or in the interview. At the end of each

break, Olinger asked if McFarland were willing to continue the interview. Olinger was unarmed while he was interviewing McFarland.

{¶ 26} Even accepting McFarland's testimony that Olinger told him, "You need to answer me some questions, because my boss, he's much meaner than me," and the like, we agree with the trial court that these statements do not rise to the level of police coercion or overreaching. Finally, although the parties dispute who wrote the answers to Olinger's written questions, McFarland initialed and signed the paper, and the trial court could have reasonably concluded the written answers reflected McFarland's oral responses to Olinger. Considering the totality of the circumstances, the record reflects that McFarland's statements to Olinger were voluntary.

{¶ 27} The first assignment of error is overruled.

III.

{¶ 28} McFarland's second assignment of error states:

{¶ 29} "THE DEFENDANT'S RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT [TO] THE UNITED STATES CONSTITUTION, AS INCORPORATED TO THE STATES VIA THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, WAS VIOLATED BY INEFFECTIVE ASSISTANCE OF COUNSEL."

{¶ 30} Although McFarland's second assignment of error asserts that his trial counsel rendered ineffective assistance, McFarland's appellate counsel (who is different than trial counsel) states:

{¶ 31} "Pursuant to *Anders*, the undersigned counsel has thoroughly reviewed the record and finds there is no merit to this Assignment of Error. See *Anders v. Ca[lifornia]* (1967), 386 U.S. 738[, 87 S.Ct. 1396, 18 L.Ed.2d 493]. Further, pursuant to *Anders*, the

undersigned counsel is providing a copy of this brief to Appellant so that he may raise any issues on appeal that he feels necessary through a *pro se* brief. The undersigned counsel finds this Assignment of Error to be wholly frivolous, but would request the Court to allow Appellant sufficient time to raise any issues he may feel are appealable."

{¶ 32} McFarland filed a supplemental brief on December 17, 2009. The State filed a motion to strike the supplemental brief, which we granted. We stated: "This court does not permit pro se parties to file briefs, including supplemental briefs, when represented by counsel. McFarland's appointed attorney filed a brief on his behalf on October 26, 2010."

{¶ 33} We have previously addressed similar situations where appellate counsel has raised several assignments of error, one of which included a disclaimer, pursuant to *Anders*, that the argument was wholly frivolous. As we stated in *State v. Padgett* (June 30, 2000), Greene App. No. 99 CA 87:

{¶ 34} "*Anders* briefs (not arguments), however, are appropriate when appellate counsel has conscientiously concluded that there are *no* issues to be raised that merit consideration by the appellate court. [*Anders*, supra.] If appellate counsel determines there are any issues warranting appellate review, even if there is only one, discussion of non-meritorious issues is neither appropriate nor desirable. Were it otherwise, this court would be required to provide appellants with an opportunity to present their own *pro se* briefs addressing issues already determined by their appellate counsels to be devoid of merit. While this is a proper procedure in situations where counsel has decided that any appeal would be frivolous, it is not where the appellant's attorney has found an issue or issues worthy of review."

{¶ 35} In *Padgett* and other similar cases, we declined to address the issue which

appellate counsel had advanced as "non-error." See, e.g., *Padgett*, supra; *State v. Connors-Camp*, Montgomery App. No. 20850, 2006-Ohio-409, ¶51-58; *State v. Blackwell*, Montgomery App. No. 21154, 2006-Ohio-5379, ¶26-29; *State v. Pilgrim*, Greene App. No. 2001 CA 21, 2002-Ohio-397. For the same reasons, we will not address the allegedly frivolous claim that McFarland's trial counsel had rendered ineffective assistance.

{¶ 36} Moreover, as best we can tell, the ineffectiveness alleged by McFarland, pro se, deals with matters outside the record and cannot be recognized on direct appeal.

{¶ 37} The second assignment of error is overruled.

IV.

{¶ 38} The trial court's judgment will be affirmed.

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FAIN, J. and GRADY, J., concur.

Copies mailed to:

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