

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2595

September Term, 2015

STATE OF MARYLAND

v.

DAMIR MAHMUTAGIC

Berger,
Nazarian,
Harrell, Glenn T., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: July 7, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case turns on whether Damir Mahmutagic was properly read and properly waived his *Miranda*¹ rights. On July 19, 2015, Mr. Mahmutagic was stopped by police because his car matched the description of a vehicle involved in an armed robbery. He was arrested, taken to the police station, read his *Miranda* rights, and questioned, and he made incriminating statements during the interview. He moved to suppress the interview, and after a hearing on that motion in the Circuit Court for Anne Arundel County, the trial court found that he was properly advised of his *Miranda* rights, but did not waive them affirmatively before confessing.

On appeal, the State contends that the trial court erred in suppressing the statements because the Fifth Amendment does not require an express waiver of *Miranda* rights. Mr. Mahmutagic doesn't really disagree with the State's characterization of the law, but responds that the trial court suppressed the confession properly because, when the exchange is viewed in totality, he never had an appropriate opportunity to consider whether to waive his *Miranda* rights before the officers launched into questioning. He argues as well that his confession wasn't voluntary under Maryland law. We hold that the trial court erred in granting Mr. Mahmutagic's motion to suppress, and we decline to address Mr. Mahmutagic's "cross-appeal," which isn't actually a cross-appeal, because his alternative theory of suppression wasn't raised in the circuit court.

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

I. BACKGROUND

On July 19, 2015, Mr. Mahmutagic was pulled over by police because his car matched the description of a vehicle that had been involved in an armed robbery. After being identified by one of the robbery victims, Mr. Mahmutagic was arrested and taken to the police station for questioning.

Detectives Shomar Johnson and Richard Truitt led Mr. Mahmutagic into an interrogation room equipped with cameras and microphones. Both the circuit court and we have viewed the recording, and because this appeal relates entirely to whether he received and waived his *Miranda* rights, we reproduce the entire exchange from inception through advisement:

Detective Johnson: I'm Detective Johnson, ok, Annapolis City Police, and this is uh Corporal Detective Truitt, ok. Alright before we uh get started, talk to you, can you state your name for me?

Mr. Mahmutagic: Damir

Detective Johnson: Your full name.

Mr. Mahmutagic: Damir Mahmutagic

Detective Johnson: And what's your date of birth?

Mr. Mahmutagic: [provides date of birth]

Detective Johnson: And where do you live?

Mr. Mahmutagic: Bowie.

Detective Johnson: What's your address in Bowie?

Mr. Mahmutagic: [provides address]

Detective Johnson: And what's your phone number?

Mr. Mahmutagic: [provides phone number]

Detective Johnson: Cell phone number?

Mr. Mahmutagic: Yeah, that's the cell phone number. It's like a wi-fi and a text [unintelligible].

Detective Johnson: Got you. What kind of phone do you have?

Mr. Mahmutagic: Iphone.

Detective Johnson: Iphone what?

Mr. Mahmutagic: Five.

Detective Johnson: What color is it?

Mr. Mahmutagic: Blue. It's got a blue case.

Detective Johnson: It's got a blue case? Who do you pay your phone bill to?

Mr. Mahmutagic: T-Mobile.

Detective Johnson: T-Mobile. Alright. . . . alright, before we get started, I'm going to go ahead and do this uh advice of rights because you're under arrest right now. Ok? So . . .

Mr. Mahmutagic: Can I ask for what?

Detective Johnson: I'll tell you in a second, just let me go ahead and do this stuff right here first alright, ok? Only thing I need for you to do is to let me know if you acknowledge that you understand your rights, ok? And while you're saying that, I need you to say yes or no. Alright?

Mr. Mahmutagic: [nods affirmatively]

Detective Johnson: First one, you have the absolute right to remain silent. Do you understand?

Mr. Mahmutagic: [nods affirmatively]

Detective Johnson: Yes?

Mr. Mahmutagic: [nods affirmatively] Yes.

Detective Johnson: Ok. Anything you say will and can be used against you in a court of law. Do you understand that?

Mr. Mahmutagic: [nods affirmatively] Yes.

Detective Johnson: Ok. You are not promised anything to talk to me and no threats are or will be made against you. Do you understand that?

Mr. Mahmutagic: [nods affirmatively] Yes.

Detective Johnson: Ok. You are – you have a right to have a lawyer and have him present now and anytime during the questioning. If you should proceed to answer any questioning without your lawyer the questioning will stop if you should change your mind and request the presence of a lawyer. Do you understand that?

Mr. Mahmutagic: [nods affirmatively]

Detective Johnson: Ok. If you can't afford a lawyer one will be provided for you without any cost or any questioning. You understand?

Mr. Mahmutagic: [nods affirmatively]

After getting the last acknowledgment, Detective Johnson immediately began asking questions about the armed robbery, and Mr. Mahmutagic answered them, in the process making incriminating statements. At no point during the interrogation did Mr.

Mahmutagic say that he wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney, nor did he refuse to answer a question.

Mr. Mahmutagic was charged with robbery with a dangerous weapon and related handgun charges. He filed a motion to suppress the statements he made to police, and the court heard and granted the motion on January 15, 2016. At the hearing, the State presented the video recording of the entire interrogation, including the portion in which Detective Johnson advised Mr. Mahmutagic of his *Miranda* rights and Mr. Mahmutagic acknowledged that he understood his rights before the interrogation began. After viewing the relevant portion of the video, the trial court questioned the State about when Mr. Mahmutagic had actually waived his *Miranda* rights. The State argued that case law and the Fifth Amendment do not require an express waiver of *Miranda* rights and that a waiver could be inferred from Mr. Mahmutagic's actions:

[PROSECUTOR]: When the Defendant indicates that he understands that he has the right to remain silent and then voluntarily, willingly answers the detective's questions, a mere ten, 15 seconds after he's told that he can remain silent, he clearly is choosing not to remain silent.

The defense countered that Mr. Mahmutagic had not affirmatively waived his *Miranda* rights, and that the Detective had not given him an opportunity to do so:

[DEFENSE COUNSEL]: The problem that we have here is that we have essentially no overt actions by the detective to attempt to determine whether he is willing to waive those rights. It's a very slick maneuver on the part of the detective to very quickly recite the rights. He's not given a written form to look at and read as he's going through that. I know there's no requirement, but I think that's important because you have to look at the totality of the circumstances. He tries to ask a question before *Miranda* is given. He's interrupted. He's then

– the officer then, quite frankly, almost mumbling through the rights because he’s talking so quickly, doesn’t really give him a chance to say anything, and then immediately, seamlessly goes into interrogating him. So the record here is completely silent. A silent record does not establish that, in fact, there’s been a waiver.

The trial court found that Mr. Mahmutagic had been “properly advised” but agreed with the defense that he had not waived his *Miranda* rights affirmatively, and granted the motion to suppress:

THE COURT: [T]he burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retain[ed] or appointed counsel.

* * *

After the advisement of rights, there must be some acknowledgment by the defendant that, A, he or she understands the rights; and, B, he or she is waiving the rights. And the waiver can’t be unequivocal. You can’t have a process of advisement and simply moving into the questioning without asking for a waiver.

* * *

While they properly advised him of *Miranda* rights, there was no waiver of those rights; the right to remain silent under the Fifth Amendment, and the right to an attorney under the Sixth Amendment. The failure to prove that there was a waiver of the rights will result in the Court’s finding that the [confession] is to be [suppressed].

Even so, the court found that “the statement that was given was clearly voluntary”:

But it does appear to the Court on a due process basis that the statement that was given was clearly voluntary. There were no threats. There were no promises. There were no inducements. There was no overt action by the police which in any way would have indicated that the Defendant was forced or required

to confess. There was nothing improper that the Court can see in that area. So the Court, while it will suppress the statement under *Miranda* and find that that there has been no waiver and preclude the State from offering it in the state’s case in chief, will indicate that voluntariness has been complied with and the State can use the statement on impeachment if the Defendant testifies and it [sic] testifies contrary to what he has stated here.

The State filed a timely appeal.

II. DISCUSSION

A. The Trial Court Erred In Granting Mr. Mahmutagic’s Motion To Suppress.

The State contends that the circuit court erred in suppressing Mr. Mahmutagic’s confession because it was operating under the mistaken belief that the Fifth Amendment requires an express waiver of *Miranda* rights.² Mr. Mahmutagic counters that the trial court properly granted his motion to suppress, and argues as well that the court erred in finding that his confession was voluntary.³ But although the circuit court made findings regarding the voluntariness of the confession, we agree with the State that Mr. Mahmutagic never argued as a theory of suppression that the confession was involuntary, and thus that

² The State’s Question Presented is phrased as follows: Did the circuit court’s erroneous belief that the Fifth Amendment requires an express waiver of *Miranda* rights lead it to wrongly suppress Mahmutagic’s statement to police?

³ Mr. Mahmutagic characterizes himself as “Appellee/Cross-Appellant” and added a second Question Presented: Did the lower court err in finding that Mr. Mahmutagic’s confession was voluntary under Maryland non-constitutional law? But he didn’t actually file a notice of cross-appeal, nor could he, since he *prevailed* in the circuit court. As we discuss in greater detail below, Mr. Mahmutagic’s voluntariness argument is more properly characterized as an alternative theory on which we could affirm the circuit court’s decision to grant the motion to suppress.

it would be inappropriate for us to consider that theory as an alternative potential basis for affirming.

We review a motion to suppress based upon the facts developed at the hearing, *Hill v. State*, 418 Md. 62, 67 n.1 (2011), viewing the evidence in the light most favorable to the prevailing party, *Robinson v. State*, 419 Md. 602, 611-12 (2011), in this case, Mr. Mahmutagic. We defer to the motion court’s factual findings and uphold them unless they are shown to be clearly erroneous. *State v. Lockett*, 413 Md. 360, 375 n.3 (2010). But we also “make our own independent constitutional appraisal, by reviewing the relevant law and applying it to the facts and circumstances of this case.” *Id.* (internal quotations and citations omitted).

In *Miranda v. Arizona*, the Supreme Court formulated a warning that must be given to criminal suspects before custodial interrogation:

He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

384 U.S. at 479.

The issue in this case is not whether such a warning was given—it was—but whether Mr. Mahmutagic waived his *Miranda* rights before making incriminating statements. The circuit court found that Mr. Mahmutagic had not waived his *Miranda* rights because, the court stated, “after the advisement of rights, there must be some acknowledgement by the defendant that, A, he or she understands the rights; and B, he or she is waiving the rights.” We agree with the State, though, that an express waiver of *Miranda* rights is not required.

To the contrary, a waiver of a defendant’s right to remain silent may be inferred from his actions or words, and even from inaction. *Beghuis v. Thompkins*, 560 U.S. 370, 386 (2010); *North Carolina v. Butler*, 441 U.S. 369, 373 (1979); *Warren v. State*, 205 Md. App. 93, 119 (2012). The trial court was correct that the prosecution has the burden to prove that the waiver is both “voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception, and made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it,” *Berghuis*, 560 U.S. at 383, 384 (internal quotations and citations omitted), although “where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused’s uncoerced statement establishes an **implied waiver** of the right to remain silent.” *Id.* (emphasis added).

Mr. Mahmutagic does not attempt to argue that the circuit court had the law right. Instead, he argues the trial court did not find that “a waiver of one’s right to remain silent and the presence of counsel had to be expressly announced, but rather made a finding that nothing in the totality of the circumstances led to the conclusion that Mr. Mahmutagic knowingly and intelligently waived his rights.” But the trial court’s own words reveal its focus on whether Mr. Mahmutagic had been asked specifically whether he waived his right to remain silent, not on a broader analysis of the circumstances surrounding the interrogation:

THE COURT: In this case, where’s the waiver? Where is the —where does the detective then say to him, “Having advised you of these rights, do you wish to waive the rights and talk to us without an attorney and remain silent?”

* * *

So is there any case law that allows you to go from an advisement to questioning and, B, without a waiver? . . . so is there any case law that says you don't have to ask him?

[PROSECUTOR]: And, Your Honor, I think that the Court is able to infer from what happens in this video that he is saying to the—very clearly to the detective that he understands what the detective has told him—

THE COURT: But he never asked him, “Do you want a lawyer?” He never asked him, “Do you want to remain silent?”

Even so, Mr. Mahmutagic contends that “it would be wrong to conclude, under the circumstances of his interrogation, that he understood his rights.” In making this argument, Mr. Mahmutagic claims that Detective Johnson rushed through the *Miranda* warning at “break-neck speed,” and that the advice he was given regarding his right to counsel was “incomprehensible.” He emphasizes that he did not answer “yes” when asked about understanding the right to have a lawyer present, but instead nodded his head in an “affirmative response.” We disagree that this distinction matters. The trial court found, and after reviewing the video we agree, that the detective “properly advised him of *Miranda* rights.” Although Detective Johnson could have advised Mr. Mahmutagic more slowly, his recitation of the *Miranda* rights were not unintelligible, as Mr. Mahmutagic suggests.

To the contrary, the record demonstrates that Mr. Mahmutagic understood his *Miranda* rights and waived them. *First*, there is no indication that he did not understand his rights: after answering a series of background questions without any difficulty, Mr. Mahmutagic was read his *Miranda* rights. There is no question about his ability to speak and understand English, and he answered “yes” or nodded his head affirmatively when

asked by the detective whether or not he understood his rights. *Second*, Mr. Mahmutagic's responses to the detective's questions shows a "course of conduct indicating waiver" of that right. *Butler*, 441 U.S. at 373. If he had wanted to remain silent, he could have said nothing in response to the detective's questions or invoked his *Miranda* rights, either of which would have ended the interrogation. *Third*, Mr. Mahmutagic does not claim that his statements were coerced, nor is there any evidence to support such a finding. The interrogation took place at 2:17 in the afternoon and lasted one hour and six minutes. The detective did not threaten or intimidate Mr. Mahmutagic in any fashion, and the trial court found as much.

Viewed against the correct legal backdrop, we hold that Mr. Mahmutagic waived his *Miranda* rights when he answered the detective's questions without invoking his right to remain silent, and that the trial court erred when it suppressed his statements to police.

B. Mr. Mahmutagic Did Not Raise His Argument That His Confession Was Not Voluntary As A Theory Of Suppression In The Circuit Court.

In his brief in this Court, Mr. Mahmutagic asserts for the first time that the trial court erred in finding that his confession was voluntary under Maryland (non-constitutional) law. Specifically, he contends that the confession was the product of an improper inducement by police. Although it is true that Maryland common law deems a confession involuntary if it is the "product of certain improper threats, promises, or inducements by the police," *Lee v. State*, 418 Md. 136, 161 (2011), Mr. Mahmutagic's voluntariness argument is not before us because he did not raise this in the circuit court, as required by Maryland Rule 4-252. That Rule provides that in the circuit court, a motion claiming an unlawfully

obtained admission, statement, or confession must be raised in conformity with the Rule, shall be in writing unless directed otherwise by the court, and shall state the grounds upon which it is made. Md. Rule 4-252(a)(4), (e). Unless a defendant shows good cause to excuse lack of conformity with the rule, it is waived. Md. Rule 4-252(a).

In the circuit court, the defense focused on the advisement and waiver of rights. His sole argument at the suppression hearing was that the State did not prove that Mr. Mahmutagic waived his *Miranda* rights, and the record reveals no contention that the confession was not voluntary, or that it was improperly induced by police. In the absence of good cause, though—and he has not offered any—Md. Rule 4-252 prohibits a criminal defendant from raising a theory of suppression on appeal that was not argued in the circuit court, *Ray v. State*, 435 Md. 1, 19 (2013); *Joyner v. State*, 208 Md. App. 500, 519 (2012); *Carroll v. State*, 202 Md. App. 487, 513 (2001), *aff'd*, 428 Md. 679, (2012), and even plain error review is unavailable here. *Savoy v. State*, 218 Md. App. 130, 145 (2014). Accordingly, Mr. Mahmutagic's voluntariness theory is not before us and we decline to consider it.

**JUDGMENT OF THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY
REVERSED AND CASE REMANDED FOR
FURTHER PROCEEDINGS CONSISTENT
WITH THIS OPINION. COSTS TO BE
PAID BY APPELLEE.**