Filed 4/11/12 P. v. Flores CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>MOISES ARNALDO FLORES,<br>Defendant and Appellant. | G044546<br>(Super. Ct. No. 09CF0780)<br>O P I N I O N |

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Affirmed.

Deborah Blanchard for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Scott C. Taylor and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Moises Arnaldo Flores of second degree murder (Pen. Code, § 187, subd. (a); all further statutory citations are to the Penal Code unless otherwise noted) and active participation in a criminal street gang (§ 186.22, subd. (a)). The jury found the murder was committed in association with a criminal street gang (§ 186.22, subd. (b)(1)), and a principal in the murder discharged a firearm causing death (§ 12022.53, subds. (d) & (e)(1)).

Flores contends his trial lawyer acted ineffectively by failing to seek suppression of his confession. He complains counsel made no effort to probe for "facts surrounding" his waiver of rights under *Miranda* v. *Arizona* (1966) 384 U.S. 436 (*Miranda*). He also argues police officers coerced his confession by suggesting he would benefit legally if he explained his role in the crime. For the reasons expressed below, we affirm the judgment.

## I

## FACTUAL AND PROCEDURAL HISTORY

On the afternoon of June 5, 2008, Gerardo "Reaper" Cisneros, a member of the Krazy Proud Criminals (KPC) street gang, was shot and killed on Durant Street in Santa Ana. Less than 25 minutes before the shooting, witnesses heard Cisneros and other young neighborhood men yelling "KPC" at passing cars. One witness heard arguing and an exchange of expletives between the men and three occupants of an older maroon or brownish car. The backseat passenger started to get out, but changed his mind when the neighborhood men approached, and the car drove off.

Just before the shooting, Cisneros was seated on the stairs adjacent to an apartment building. A short male concealed by a black-hooded sweatshirt approached with a foot-long handgun. The shooter fired four or five times at Cisneros, who fled

across the street, where he collapsed. Cisneros died later at a hospital. The absence of bullet casings suggested the shooter used a revolver.

The shooting occurred in territory claimed by KPC, which is adjacent to and west of territory claimed by Logan Street gang. According to the prosecution's gang expert, at the time of the shooting, longstanding rivals KPC and Logan Street had a "volatile" relationship.

Santa Ana gang homicide officers interviewed 18-year-old Flores, a Logan Street gang member, at the police station on July 27, 2008. Flores initially denied involvement in the murder but ultimately admitted he and his gang associates conferred before the shooting and agreed to go into KPC's gang territory. He was on Durant Street with his associates when Cisneros shouted comments at the Flores group that Flores and his cohorts considered disrespectful. One of Flores's fellow gang members pulled out a gun and began shooting. Cisneros was hit and took off running. At the end of the interview, Flores retracted his statements and claimed he had made everything up.

Following a trial in October 2010, the jury convicted Flores as noted above. In December 2010, the trial court sentenced him to an aggregate term of 40-years-to-life in prison.

## II

## DISCUSSION

### A. *The Record Does Not Support Flores's Claim His Trial Counsel Acted Ineffectively by Failing to Challenge Flores's* Miranda *Waiver*

Flores contends his trial counsel acted ineffectively by failing to ask the trial court to suppress his confession. Flores complains his lawyer made no effort to "probe for facts surrounding" his *Miranda* waiver, "which may have given rise to a basis for an objection." He concedes the record is "devoid of information surrounding the

circumstances where [Flores] waived his right to remain silent." Nevertheless, he suspects his confession was susceptible to several potential challenges, including whether the "full and complete [*Miranda*] warnings were given," and offers several possible scenarios describing how this would occur. Flores's contention is baseless.

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate defense counsel's representation fell below an objective standard of reasonableness, and but for counsel's error, there is a reasonable probability the result would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) In a direct appeal, the record must affirmatively disclose that counsel's omission lacked any tactical purpose. (*People v. Majors* (1998) 18 Cal.4th 385, 403.) We must reject an ineffective assistance claim if the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, unless counsel was asked for an explanation and failed to provide one, or unless no satisfactory explanation could exist. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267 (*Tello*).)

The record on appeal sheds no light on why Flores's lawyer did not seek to suppress Flores's confession, and the trial court did not ask counsel for an explanation. But one obvious and satisfactory reason is that counsel had investigated the potential issue and determined it lacked merit.

In a nutshell, *Miranda* provides that when a person is taken into custody, "[h]e 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." (*Miranda*, *supra*, 384 U.S. at p. 479.)

Once a suspect has been given *Miranda* warnings, he or she may knowingly and intelligently waive them and agree to answer questions or give a statement. (*Ibid.*)

As Flores notes, the preliminary hearing transcript reflects Detective Rondou testified Flores was advised of "all of his rights pursuant to *Miranda*," and Flores indicated "he understood those rights." While the colloquy may not have supported admission of Flores's statements over a foundational objection (*In re Dennis M.* (1969) 70 Cal.2d 444, 462 [a police officer's conclusory testimony he gave advice """per accordance with the *Miranda* Decision"""" is inadequate to discharge the prosecution's foundational burden to admit suspect's custodial statement]; *Miranda*, *supra*, 384 U.S. at p. 479 [no statement may be admitted in evidence unless the fact that full and complete warnings were given is "demonstrated by the prosecution at trial"]), it does suggest the possibility of a satisfactory explanation for counsel's failure to pursue this line of attack. (See *People v. Whitson* (1998) 17 Cal.4th 229, 247-248 [defendant impliedly waives *Miranda* rights when, after having been admonished of those rights, he responds affirmatively he understood them and provides a statement].) Counsel need not make meritless or futile objections when no basis exists to support the contention. (See also *People v. Gonzalez* (1998) 64 Cal.App.4th 432, 437 [defendant asserting counsel ineffectively failed to bring a suppression motion must demonstrate the motion would have been successful].)

The record does not demonstrate counsel rendered ineffective assistance by failing to raise a *Miranda* objection to Flores's pretrial statements. If evidence exists outside of the record reflecting counsel *was* ineffective in failing to mount such a challenge, nothing prohibits Flores from filing a petition for writ of habeas corpus. (*Tello*, *supra*, 15 Cal.4th at pp. 266-267.)

B. *The Record Does Not Show Flores's Statements Were Involuntary*

Flores also contends the "record as it now exists demonstrates that defenses involving the voluntariness of [his] confession could legitimately have been raised . . . ." He asserts Detective Rondou's comments during his interview "were calculated to make [him] believe he would be legally benefitted by explaining his role in the crime to them."

To support his argument, Flores cites the following comments from the interview:

"This is your opportunity to tell the truth . . . 'cause if you were with somebody and they did something stupid that you didn't know about, that's on them. Let them deal with that but don't make this about you by lying about it because you're only, not only trying to help yourself, you're trying to help the other person. [¶] . . . [¶] See what I'm saying? [¶] . . . [¶] So if you help somebody get away with murder it's just as if you did it? Does that make sense?"

"If you sit in here and lie about it, if you know that somebody did something wrong like that and you lie about it for them, that's helping them after the fact. That could cause you problems down the road."

"[W]hatever you say in here is what you have to live with down the road. We've had a lot of guys that we talk to them like this and then, you know, things go the way that they go and then they sit there and they, they look at us and say, man, I wish I would have told you when I had the chance. You know, all of a sudden now they're sitting in court."

"This isn't new and I've had countless times, most of the guys tell me, but the guys that didn't, countless times when they've looked over at me in court, []cause we're sitting with them at the table, damn man, I wish I had told you that day, and I look

back and say, I told you to tell us that day. [¶] . . . [¶] We gave you every chance and now look at you. . . . [W]e know you got caught up in some stuff that you weren't planning on doing. . . . As men, we put it on the table, we deal with it. . . . It's not the end of the world but you [*sic*] sitting in here lying. All that does is make us think you had a bigger deal in this, whether you were the one that planned this out or you had a bigger role than what you really did. . . ."

"This is your chance to tell your side of the story. If you want to go with what other people told us it's not going to be good for you."

Flores cites these statements as some of the "misleading and manipulative comments" made to him. He argues "[o]ver and over [the] police extolled the benefits of telling them the truth, and stated that it was his last chance, his one and only chance to reap the benefits of telling the truth." But Flores did not raise the issue below. Accordingly, his failure to raise a voluntariness claim in the trial court forfeits the issue on appeal.

In *People v. Ray* (1996) 13 Cal.4th 313 (*Ray*), the defendant argued his confession was involuntary because it was given in exchange for a promised benefit. The Supreme Court concluded the claim had been forfeited. The court noted the defendant had objected to the confession solely on grounds that the delay in advising the defendant of his *Miranda* rights tainted the entire interview, but the defendant failed to argue that his statements were involuntary. "As a result, the parties had no incentive to fully litigate this theory below, and the trial court had no opportunity to resolve material factual disputes and make necessary factual findings. Under such circumstances, a claim of involuntariness generally will not be addressed for the first time on appeal." (*Ray*, at p. 339.) Flores cites contrary authority (*People v. Castro* (1968) 257 Cal.App.2d 643,

645-646; *People v. Matteson* (1964) 61 Cal.2d 466), but we decline to follow these cases because they predate *Ray*, and therefore are no longer binding.

Flores does not claim his trial lawyer rendered inadequate assistance by failing to raise the issue below, perhaps assuming the law required us to review the issue even in the absence of an objection. Even assuming Flores raised the issue of his trial lawyer's competence in failing to object on grounds his statement was coerced, the record before us does not demonstrate Flores's statements were involuntary.

Flores complains the officers' exhortations to tell the truth impliedly suggested Flores would receive legal benefits beyond those that naturally flow from an honest disclosure of the facts. Flores argues the detectives made what amounted to "an implied promise of a better outcome in court." The record does not support Flores's contention.

The court in *Ray* explained that "In general, "'any promise made by an officer or person in authority, express or implied, of leniency or advantage to the accused, if it is a motivating cause of the confession, is sufficient to invalidate the confession and to make it involuntary and inadmissible as a matter of law.'" [Citations.] In identifying the circumstances under which this rule applies, we have made clear that investigating officers are not precluded from discussing any 'advantage' or other consequence that will 'naturally accrue' in the event the accused speaks truthfully about the crime. [Citation.] The courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable. [Citations.]" (*Ray*, *supra*, 13 Cal.4th at pp. 339-340.) We must bear in mind "the distinction between permissible and impermissible police conduct 'does not depend upon the bare language of inducement but rather upon the nature of the

benefit to be derived by the defendant if he speaks the truth as represented by the police.' [Citation.] 'When the benefit pointed out by the police . . . is merely that which flows naturally from a truthful and honest course of conduct,' the subsequent statement will not be considered involuntarily made [citation]." (*People v. Belmontes* (1988) 45 Cal.3d 744, 773, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Flores argues "the interview transcript shows that [his] initial refusal to admit his involvement was overcome by the police essentially 'explaining' to him that his refusal to tell who the shooter was constituted the most serious crime he was facing. Appellant, a month past [his 18th birthday], was particularly susceptible to the paternal, 'listen to us, we've seen a lot of kids in your shoes' type of approach the police employed. They affirmatively misled [him] on the legal consequences of not speaking to them. They told him that if he was lying to protect someone, that was the crime that would cause him problems in the future; they told him that they knew he innocently got caught up in something he hadn't planned, and although in itself not serious ('not the end of the world'), lying to them *would* have serious legal implications. . . . They talked to him about the concept of 'an innocent purpose' for being there, while knowing that his presence, as a gang member, was sufficient without much else to convict him of murder. They made statements implying that the interview with them was [his] last chance to present a defense version of the facts, saying things like 'this is your chance' . . . 'we gave you every chance' . . . 'they look over at me in court and say 'damn I wish I had told you that day.'"

Flores also complains the police gave him "disingenuous legal advice concerning his best legal options. The police did not use the term 'legal' when they

talked of consequences, but they made clear they were referring to legal, not moral, consequences by their repeated references to 'court.'. . ." He concludes, "The statements the detective made to [Flores] concerning this being his chance to make things better for himself down the line, in court, are implied promises of a benefit to telling the truth that is more than that which naturally flows from a truthful course of conduct. The nature of the benefit is an implied promise of a better outcome in court."

Flores relies on *People v. Denney* (1984) 152 Cal.App.3d 530. There, the defendant asked for an attorney but the officers continued the interrogation and told the defendant they were trying to help him and wanted to keep him from getting the gas chamber. The court held this "blatant violation of the *Miranda* rules compels a finding that everything said by appellant from this point on was the product of the officers' threats." (*Denney,* at p. 540.) The defendant then waived his *Miranda* rights and continued to talk. One of the officers told the defendant a fictionalized hypothetical story involving a robbery murder where two of the individuals in the car during the robbery were granted leniency because they cooperated with law enforcement. The claims of leniency were blatantly false. The defendant confessed. At the hearing on the motion to suppress, the defendant testified that he had a definite feeling that if he cooperated he would receive a lesser sentence. The court found the defendant's statement to be involuntary and held "it is clear that appellant was induced to confess by the officer's hypothetical story and pressured by the implied threat that he would get the gas chamber if he did not confess." (*Denney,* at pp. 540-544.) The court noted "[a]ny reasonable person in [defendant's] shoes would have stood on his head or jumped through whatever hoops the officers held out in front of him to obtain the chance of [the] lenient treatment suggested by the officers." (*Id.* at p. 546; see also *People v. Flores* (1983)

144 Cal.App.3d 459, 471, 472 [interrogating officers told the defendant he could be subjected to the death penalty if he were found guilty of murder and robbery, suggested there might be a self-defense explanation for the homicide, and told him "'we need you to help yourself out of this mess'"; court held the defendant's incriminating admissions "were not a product of free intellect and rational choice," but rather the result of "a course of conduct designed at breaking down [his] will"].)

We assume, based on the preliminary hearing transcript, that Flores received *Miranda* warnings and was thus advised and presumably understood he had the right to remain silent, to an attorney, and that anything he said could be used against him in court.[1]

The officers' statements were permissible exhortations to tell the truth. It was not objectionable to emphasize the dangers of lying to the officers, which if later discovered, would damage Flores's credibility. As the Attorney General notes, the officers did not tell Flores he would receive any legal benefit if he told the truth and admitted his involvement. Statements suggesting a defendant has one chance to cooperate with the police and tell his version of the facts generally are permitted. (See *United States v. Gamez* (9th Cir. 2002) 301 F.3d 1138, 1144 [officer's "comment that it would 'behoove' [defendant] to disclose what he knew about [the victim's] murder and that this was his 'last chance' to come forward does not amount to coercion"].)

The detectives did not mislead Flores about his culpability. They suggested he may have been a victim of circumstances if he did not know his companions intended to shoot Cisneros. The officer explained if Flores did not know another's criminal

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[1] Other than the fact he was 18, Flores points to no other circumstance concerning the interrogation rendering it coercive. (*People v. Memro* (1995) 11 Cal.4th 786, 827 [court must consider totality of all the surrounding circumstances including characteristics of the accused and the details of the interrogation].)

purpose, blame was "on them" rather than him, but if he knew something and was lying to protect a murderer he could be liable as an accessory. Again, this was a correct, if simplified, statement of the law. Urging Flores truthfully to disclose any knowledge or involvement in the shooting is not coercive unless accompanied by other improper pressures. But the interviewing officers did not threaten, or promise a legal benefit for cooperation other than that which would normally flow from the truth.

The detectives made statements referring to other suspects who regretted lying during interviews after they got to court. But the detective never indicated these defendants would have received more *lenient treatment* had they cooperated. The officers implied these other individuals unwisely locked themselves into an untruthful version of events and could not later extricate themselves. This did not amount to an implied promise of leniency for cooperation.[2] (Cf. *People v. Vasila* (1995) 38 Cal.App.4th 865, 874 [officers made express promises that defendant's cooperation would insulate him from federal criminal proceedings and secure his early release]; *People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1486 [officers told defendant his silence would be interpreted as evidence he had premeditated a murder]; *People v. Hinds* (1984) 154 Cal.App.3d 222, 238 [officers repeatedly suggested that if defendant confessed to murder, his punishment might be less than the death penalty].) We conclude, based on our independent review of the record (*People v. Holloway* (2004) 33 Cal.4th 96, 114), Flores's confession was voluntary and not the product of coercion.

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[2] The Attorney General also argues that Flores's "recantation . . . demonstrates he was not under any misguided impression that confessing to his involvement" would come with "some sort of benefit."

## III

## DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.