STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 23, 1997
v	No. 194159 Recorder's Court
HASSAN AZZARD MOHAMMED, Defendant-Appellant.	LC No. 89-003751 ON REMAND

Before: White, P.J., and Bandstra and Smolenski, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of first-degree felony murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to life imprisonment without parole for the murder conviction and two years for the felony-firearm conviction. He filed a delayed application for appeal with this Court. We denied his application for leave to appeal in docket no. 179404. Defendant then filed a delayed application for leave to appeal with the Supreme Court. In lieu of granting leave to appeal, the Supreme Court remanded the case to this Court for consideration as on leave granted. *People v Mohammed,* 451 Mich 863; 546 NW2d 265 (1996). We remand to the trial court for an evidentiary hearing.

Defendant contends on appeal that his confessions were admitted in error by the trial court. First, defendant claims that his arrest was illegal and therefore his statements should be suppressed. Second, defendant argues that, even if his arrest was legal, under the totality of the circumstances, his confession was given involuntarily.

The first theory was not properly preserved for appeal. In fact, defendant's attorney argued at the *Walker*[1] hearing that the trial court should not consider the issue of probable cause to arrest. However, appellate review may be granted for an issue raised for the first time on appeal when it is a claim of constitutional error and the alleged error could have been decisive of the outcome. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). Because defendant is claiming that his person was unlawfully seized, which both the United States and Michigan Constitutions protect against, we will review his claim.[2] US Const, Am IV; Const 1963, art 1, § 11.

Police officers have the authority to arrest without a warrant for a felony committed outside of their presence; however, the police officer must have probable cause to believe that the accused committed the offense. See US Const, Am IV; Const 1963, art 1, § 11; *People v Hamoud,* 112 Mich App 348, 351-352; 315 NW2d 866 (1981). "[P]robable cause to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing in the circumstances shown, that the suspect has committed, is committing or is about to commit an offense." *Hamoud, supra*. The reviewing court must determine whether the facts available to the officer at the moment of arrest amount to probable cause to arrest. *People v Oliver,* 417 Mich 366, 374; 338 NW2d 167 (1983).

Some of the facts surrounding defendant's arrest were elicited during the *Walker* hearing. The officer in charge of the case testified that defendant was arrested only for questioning. He even admitted that he had not made up his mind whether defendant had committed the homicide when defendant was taken into custody. It appears that defendant was held in a cell that did not have a bed and was held there for over forty-two hours when he gave his second, more incriminating statement. This Court has held that "[a]n investigatory arrest is an illegal arrest. It is an admission that probable cause to arrest does not exist." *People v Casey,* 102 Mich App 595, 602; 302 NW2d 248 (1980), aff'd 411 Mich 179; 305 NW2d 247 (1981). However, we will not decide the issue in the first instance on the record as it presently stands because the prosecution has not had a full opportunity to address the issue in the trial court. We remand for an evidentiary hearing so that both sides may address the issue and the trial court can determine whether probable cause existed to arrest defendant. *People v McCray*, 210 Mich App 9, 11; 533 NW2d 359 (1995).

Even though an arrest may be illegal, statements obtained following the illegal arrest are not automatically suppressed. *People v Malach,* 202 Mich App 266, 274; 507 NW2d 834 (1993). There must be a causal connection between the unlawful detention and the statement. *Id*. Relevant factors to determine whether there was a causal connection include: (1) the time lapse between the arrest and the statement, (2) the flagrancy of official misconduct, (3) any intervening circumstances, and (4) any antecedent circumstances. *Id.* Evidence that will not be suppressed as fruits of an unlawful arrest include: "voluntary statements made shortly after arrest; physical evidence inadvertently discovered in the detainee's possession (absent a general plan or pattern to marshal evidence against him); and evidence obtained by means sufficiently distinguishable to be purged of the taint of the unlawful detention." *Id.* at 274-275.

Thus, if probable cause did not exist, then the trial court, using the above factors, must determine if there is a causal connection between defendant's statements and the unlawful arrest. *Malach, supra; Brown v Illinois,* 422 US 590, 602-603; 95 S Ct 2254; 45 L Ed 2d 416 (1975). If, on remand, the trial court determines that defendant's arrest was illegal and that there was a causal connection between the unlawful arrest and the statements, his statements must be suppressed and a new trial granted even though, as decided in the next issue, defendant's statements were given voluntarily. The United States Supreme Court has stated:

> Arrests made without warrant or without probable cause, for questioning or "investigation," would be encouraged by the knowledge that evidence derived

> therefrom could well be made admissible at trial by the simple expedient of giving Miranda warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a "cure-all," and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to "a form of words." [*Brown, supra.*].

The second challenge to the admission of defendant's confession is that, under the totality of circumstances, defendant did not give his statements voluntarily. Defendant claimed that his statements were given involuntarily because his arraignment was delayed, promises of leniency were made to him by the police, he was held in a cell with no bed, and he was denied the opportunity to consult with counsel prior to giving each statement. We disagree.

A *Walker* hearing was held on this issue and the trial court found that defendant's statements were given voluntarily. The Supreme Court has provided the following factors to determine the voluntariness of a confession: the age of the accused; his level of intelligence; his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention before the accused gave his statement; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in arraignment before he gave his confession; whether the accused was drugged or intoxicated, injured, or in ill health when he gave the confession; whether the accused was deprived of medical attention, food, or sleep; and finally, whether the accused was abused or threatened with abuse. *People v Cipriano,* 431 Mich 315, 334; 429 NW2d 781 (1988). "The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *Id.*

Upon an independent examination of the lower court record, we do not conclude that the trial court's determination at the *Walker* hearing was clearly erroneous. *Id.* at 339. Giving deference to the trial court's findings, especially where the credibility of witnesses is a factor, *id.*, we conclude that, under the totality of the circumstances in this case, defendant's statements were given voluntarily. Although defendant was held for a long period of time without a bed, he was a high school graduate who had also attended college, he was not intoxicated or under the influence of any drugs when he gave the statements, and he was read his constitutional rights before he gave each statement. Although defendant asserts that his arraignment was delayed, thereby making his statements involuntary, this is only one factor to be considered in determining the voluntariness of a confession. *Id.* at 334-335. Also, the police officers who took his statements denied making any promises of leniency, and they testified that defendant never requested an attorney. Therefore, the trial court did not err when it determined that defendant's statements were given voluntarily.

We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Richard A. Bandstra
/s/ Michael R. Smolenski

[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[2] We note that even if we had decided not to review this issue because it was unpreserved, we nevertheless could have reviewed the issue as an ineffective assistance of counsel claim as it is clear from the record that defense counsel did not want the trial court to consider the issue of probable cause to arrest even though the issue may have had merit.