

NO. 78528-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

JUSTIN B. BURKE,

Petitioner.

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SUPPLEMENTAL BRIEF OF RESPONDENT

JANICE E. ELLIS
Prosecuting Attorney

THOMAS M. CURTIS
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. ISSUES

1. Did the Court of Appeals err when it found petitioner did not invoke his right to remain silent because he continued to talk to the police?

2. Did the Court of Appeals err when it found that since petitioner voluntarily talked to the police in a non-custodial interview, the State did not infringe on petitioner's invocation of his right to remain silent by commenting on what he did not say to the police?

3. Did the Court of Appeals err when it found there could be no impermissible comment on petitioner's invocation of his right to counsel since there is no right to counsel before arrest or the initiation of adversarial proceedings?

II.

III. STATEMENT OF THE CASE

The statement of the case is adequately set out in the briefing to the Court of Appeals and its decision.¹

¹ The decision of the Court of Appeals is attached to the Petition for Review.

IV. ARGUMENT

A. INTRODUCTION

Petitioner misreads the decision of The Court of Appeals. The Court found that petitioner did not invoke his right to remain silent during a non-custodial interview because he continued to talk to the police even though they had terminated their interview. Petitioner reads this holding to permit the police to ignore the invocation of a suspect's right to remain silent and terminate such an interview.

The Court of Appeals held that the State was permitted to comment on what petitioner did and did not say during his non-custodial interview. Petitioner reads this holding to permit the State to ask the jury to infer guilt from petitioner's exercise of his right to remain silent.

The Court of Appeals held that petitioner had no right to counsel during a non-custodial, pre-charging interview. Petitioner reads this holding as prohibiting a suspect from terminating such an interview.

In each instance, the holding of the Court of Appeals is supported by the record of proceedings and case law. This Court should affirm the Court of Appeals.

B. DEFENDANT DID NOT INVOKE HIS RIGHT TO REMAIN SILENT.

To invoke one's right to remain silent during police questioning, one must remain silent in a way that is "clear and unequivocal." State v. Hodges, 118 Wn. App. 668, 671, 77 P.3d 375 (2003), review denied, 151 Wn.2d 1031 (2004); see State v. Cross, 156 Wn.2d 580, 620, 132 P.3d 80, cert. denied, 127 S.Ct. 559 (2006) (selective responses to police questioning waives right to remain silent). The right may be invoked by silence or an unequivocal articulation of invocation. State v. Walker, 129 Wn. App. 258, 276, 118 P.3d 935 (2005), review denied sub nom. State v. Garrison, 157 Wn.2d 1014 (2006).

Here, petitioner agreed to talk to the police about the events that resulted in his being charged with rape of a child. Petitioner freely answered the officer's questions until his father advised him to talk to an attorney before answering further questions. Petitioner asked "if that was possible." The officers interpreted petitioner's question as an indication he wished to terminate the interview. The officers honored that implied termination and asked petitioner no further questions. Defendant then elected to make an unsolicited statement to the police – "This was a bunch of shit, that the girls at

Edmonds Woodway [High School] were always trying to get guys into trouble.” 10/13 RP 214.

A person who voluntarily talks to police waives his right to remain silent. State v. McWatters, 63 Wn. App. 911, 915, 822 P.2d 787, review denied, 119 Wn.2d 1012 (1992). To the extent defendant’s question about the possibility of talking to an attorney was an invocation of defendant’s right to remain silent, his voluntary statement immediately after being told that he could talk to an attorney waived that right. See Anderson v. Terhune, 467 F.3d 1208, 1213 (9th Cir. 2006) (a suspect’s unilateral decision to continue to talk after requesting counsel waives the right to remain silent and to counsel).

The Court of Appeals found that petitioner “never asserted his right to remain silent . . . [He] continued to speak voluntarily[.]” Slip Op. at 7.

Petitioner argues that he invoked his right to remain silent because the officers decided to end the interview when he asked about counsel. He claims that his spontaneous “parting shot” was not a waiver of his right to remain silent. Petition for Review 11. Petitioner cites no authority for the proposition that once a suspect asks a police officer about counsel, continuing to talk to the police

is not a waiver of the right to remain silent. In fact, continuing to talk waives that right. See State v. Grieb, 52 Wn. App. 573, 575, 761 P.2d 970 (1988) (quoting Edwards v. Arizona, 451 U.S. 477, 485, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981)).

Petitioner also argues that the Court of Appeals opinion allows the police to “ignore the invocation of the right to terminate an interview . . . and continue questioning without a waiver[.]” Petition for Review 11. This is a total mischaracterization of the actions of the officers and the holding of the Court of Appeals. When petitioner asked about counsel, the officers asked him no further questions.² Nothing in the opinion of the Court of Appeals can fairly be read to countenance the police ignoring an actual invocation of the right to silence.

² Petitioner cites State v. Robtoy, 98 Wn.2d 30, 653 P.2d 284 (1982), for the proposition that after his question about counsel, the police could only have asked questions to clarify if he was actually requesting counsel. Petition for Review 11. The continuing vitality of Robtoy is in question in light of the United States Supreme Court’s rejection of that rule. Davis v. United States, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994).

C. THE STATE DID NOT IMPERMISSIBLY COMMENT ON PETITIONER'S INVOCATION OF HIS RIGHT TO REMAIN SILENT.

Where there is no invocation of the right to remain silent, it is not logically possible to impermissibly comment on the invocation of that right.

Here, petitioner willingly talked to the police. He freely admitted that he did not know how old the victim was, that he had sexual intercourse with her, and his age. Petitioner then made the comment that girls who went to the victim's high school were "always trying to get guys in trouble." 10/13 RP 214.

At trial, petitioner testified that the victim told him she was 16. He had no explanation of why he didn't tell either the victim's sister or the police that the victim told him she was 16. 10/14 RP 58, 63. Petitioner did acknowledge that if the victim had told him she was 16, it was "the sort of thing you would naturally want to tell the police[.]" 10/14 RP 61. Petitioner also testified that he made the comment about certain girls trying to get guys in trouble because he was "angry at the whole situation." 8/14 RP 78.

The State started closing argument by saying, "It is simply unlikely that [the victim] really told the defendant that she was old enough to have sex with him." 10/14 RP 88. The State went on to

argue that petitioner's testimony that the victim told him she was 16 was not credible because he did not tell that to the police. 10/14 RP 109-112.

"When a defendant does not remain silent and instead talks to police, the state may comment on what he does not say. . . False information given to the police is considered admissible as evidence relevant to defendant's consciousness of guilt." State v. Clark, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001) (citations omitted). "It was entirely proper . . . for the State to impeach [petitioner's] testimony by pointing out that petitioner had failed to tell anyone before the time he received his Miranda warnings at arraignment about [his affirmative defense]." Brecht v. Abrahamson, 507 U.S. 619, 628, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). "The State may question a defendant's failure to incorporate the events related at trial into the statement given [to] police or it may challenge inconsistent assertions. State v. Belgarde, 110 Wn.2d 504, 511, 755 P.2d 174 (1988). That is precisely what happened in this case.

Petitioner argues that the State "comment[ed] on [petitioner's] decision to terminate his interview . . . and ask[ed] the jury to find him guilty for this reason." Petition for Review 14.

Petitioner characterizes this as a direct comment on his exercise of his right to remain silent. Petition for Review 15.

Petitioner misstates the State's argument. First, petitioner did not exercise his right to remain silent. Thus, the State could not have improperly commented on the exercise of that right.

Second, the State argued that the jury should find petitioner guilty because petitioner admitted the truth of the elements of the crime and failed to carry his burden to prove his affirmative defense. Specifically, the State argued that petitioner's testimony concerning his knowledge of the victim's age was not credible because he did not tell the victim's sister, the police, or anyone else that the victim told him she was 16, even when he acknowledged he was given the opportunity to tell the police his side of the events.

Commenting on what petitioner failed to tell the police during his non-custodial interview is simply not a comment on his exercise of his right to remain silent. Clark, 143 Wn.2d at 765.

D. PETITIONER DID NOT INVOKE HIS RIGHT TO COUNSEL.

The trial court found that petitioner did not invoke his right to counsel. The State's argument, accepted by the Court of Appeals, that petitioner had no right to consult with an attorney at that time is adequately set out in the State's Response Brief to the Court of

Appeals 5-7. See Davis, 512 U.S. at 457 (there is no constitutional right to counsel before criminal proceedings are initiated); State v. Copeland, 89 Wn. App. 492, 499, 949 P.2d 458 (1998) (Sixth amendment right to counsel attaches at the initiation of adversarial criminal proceedings. CrR 3.1(b) right to counsel attaches at arrest).

Petitioner asserts that the import of the Court of Appeals decision is that “suspects who have not been charged will be unable to terminate interviews to consult with attorneys.” Petition for Review 14. Petitioner misstates the holding of the Court of Appeals.

Nowhere in the opinion of the Court of Appeals will this Court find any indication that a suspect may not terminate a non-custodial interview with police for any reason. The Court of Appeals determined that petitioner did not invoke his right to terminate the interview. His question concerning counsel was not an unequivocal exercise of his right to terminate the interview because petitioner continued to talk to the police, even though they stopped asking him questions. Slip Op. at 8.

Even if there is some right to consult with counsel that is not coextensive with the right to terminate a non-custodial interview,

any exercise of that right must be clear and unequivocal. As the United States Supreme Court held, if “a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require cessation of questioning.” Davis 512 U.S. at 459 (emphasis in the original).

In Davis the suspect said during a custodial, post-Miranda interrogation, “Maybe I should talk to a lawyer.” 512 U.S. at 455. This was not an unequivocal invocation of the right to counsel. Davis, 512 U.S. at 462. Petitioner only asked if it was “possible” to speak to an attorney. 10/13 RP 214. This was not an unequivocal request for counsel.

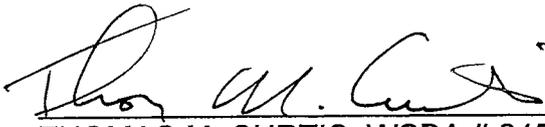
Petitioner had no right to counsel during his non-custodial interview. Even if he had that right, he did not unequivocally invoke it. The Court of Appeals was not in error.

V. CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted on January 5, 2007.

JANICE E. ELLIS
Snohomish County Prosecuting Attorney

By: 
THOMAS M. CURTIS, WSBA # 24549
Deputy Prosecuting Attorney
Attorney for Respondent