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Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 30412-4-III

STATE OF WASHINGTON, Respondent,

v.

ENRIQUE GONZALEZ MARTINEZ, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Enrique Gonzalez Martinez was arrested at his home and advised of his *Miranda* rights. No questioning took place at that time. Instead, Martinez was transported to the hospital for a search of his person for genetic material. He was then transported to the jail for booking. Without re-advising him of his *Miranda* rights, the arresting officer asked Martinez if he knew why he was being arrested, and Martinez gave an incriminating response. Martinez then agreed to provide a recorded statement, at which time he was re-advised of his *Miranda* rights. Martinez was convicted after a trial in which both statements were introduced against him.

Because of the passage of time between the initial advisement of *Miranda* warnings and the initiation of questioning by law enforcement, Martinez was unable to give a knowing, intelligent and voluntary waiver of his rights at the time the officers resumed questioning him. The trial court erred in holding that Martinez's statements were admissible despite law enforcement's failure to re-advise him of his rights before initiating questioning. Consequently, Martinez's conviction should be reversed and the case remanded for a new trial.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in admitting statements made by Martinez after such a lapse in time between the initial *Miranda* advisement and the questioning that he could not have knowingly, intelligently and voluntarily waived his rights.

ASSIGNMENT OF ERROR 2: The trial court erred in concluding that Martinez knowingly, intelligently and voluntarily waived his *Miranda* rights.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Under the totality of the circumstances, did the lapse of at least forty-five minutes and intervening circumstances between the initial *Miranda* advisement and the initiation of questioning require an immediate re-advisement of *Miranda* rights? YES.

ISSUE 2: When officers failed to re-advise Martinez of his *Miranda* rights before initiating questioning, was Martinez able to give a knowing, intelligent and voluntary waiver of his rights? NO.

IV. STATEMENT OF THE CASE

On July 9, 2011, Detective Jeff Ward of the Wenatchee Police Department arrested Enrique Gonzalez Martinez at his home for third degree rape. RP[1] 22-24; CP 15-16. Before advising Martinez of his *Miranda* rights, Ward asked whether Martinez knew Melissa Gilliland, the complaining witness.[2] RP 25. While getting into the car, Martinez asked, "Is this because she said I raped her?" Ward did not respond. RP 26.

While in the car, Ward advised Martinez of his *Miranda* rights but did not ask any questions at that time. RP 26. Instead, Ward transported Martinez to the hospital where he was given a sexual assault examination and police took DNA and fingernail clippings from him. Again, no questioning occurred while Martinez was at the hospital. RP 27. The hospital stay lasted around forty-five minutes. RP 32.

Afterwards, Ward transported Martinez to the jail for booking. As Ward was collecting Martinez's property, he asked Martinez if he knew why he was being arrested. Martinez responded it was because he was stupid. Ward asked Martinez what he meant, and Martinez said, because he was kissing on Melissa's titties and touching her pussy. RP 27-28.

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[11] All citations to the verbatim report of proceedings are to the volume setting forth proceedings held on September 20-21, 2011, November 7, 2011, and November 30, 2011.

[2] Martinez's answer, if any, is not a matter of record.

After Martinez made the incriminating statement, Ward then asked if he wanted to give a recorded statement, and Martinez agreed. RP 28. At the beginning of the statement, Ward re-advised Martinez of his *Miranda* rights and Martinez went on to make a statement. RP 30.

The trial court held a hearing pursuant to CrR 3.5 and subsequently issued findings of fact and conclusions of law concluding that "the defendant's statements to Detective Ward on July 9, 2011, and the recording thereof, were the product of the defendant's knowing, voluntary, and intelligent waiver of rights." CP 70. The trial court further concluded that "the lapse of time between the initial advice of rights and questions at the jail did not require another advice of rights." CP 70. Accordingly, the trial court permitted all of the statements to be introduced at trial. CP 70.

Martinez was convicted of third degree rape after a jury trial and was sentenced to ten months' incarceration. CP 84, 86. He timely appeals. CP 82.

V. ARGUMENT

There is no dispute that Martinez was in custody from virtually the moment Ward arrived at his home. Thus, the issue in this case is whether police can obtain a voluntary waiver of *Miranda* rights from a defendant

when there is a substantial lapse of time and change in circumstances between the initial advisement and the initiation of questioning.

The standard for reviewing a waiver of *Miranda* rights is set forth fully in *U.S. v. Doe*, 155 F.3d 1070, 1074 (9th Cir. 1998):

> For a waiver of rights to be valid it must be voluntarily, knowingly, and intelligently given. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). "Whether there has been a valid waiver depends on the totality of the circumstances, including the background, experience, and conduct of defendant." *United States v. Bautista–Avila*, 6 F.3d 1360, 1365 (9th Cir.1993) (*quoting United States v. Bernard S.*, 795 F.2d 749, 751 (9th Cir.1986)).
>
> A waiver is voluntary if, under the totality of the circumstances, the confession was the product of a free and deliberate choice rather than coercion or improper inducement. *United States v. Pinion*, 800 F.2d 976, 980 (9th Cir.1986). A waiver is knowing and intelligent if, under the totality of the circumstances, it is made with a "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986).

The courts have repeatedly eschewed a *per se* rule to establish when a new advisement of rights is necessary, instead applying the "totality of the circumstances" test to determine whether, in light of the defendant's background and conduct as well as the police conduct, a waiver is knowing, intelligent and voluntary. *U.S. v. Rodriguez-Preciado*, 399 F.3d 1118, 1128 (9th Cir. 2005).

It is established that a lapse of time and/or circumstances between the advisement of *Miranda* warnings and an interrogation can render the resulting statements involuntary. In *U.S. v. Gillyard*, the Ninth Circuit Court upheld the suppression of a confession obtained after the defendant was advised of his *Miranda* rights, agreed to waive them to submit to a polygraph examination, and was then questioned by several different individuals about the results of the examination without a new advisement of rights. 726 F.2d 1426 (9th Cir. 1984). In that case, the court found that under the totality of the circumstances, the waiver was not voluntary. *Gillyard*, 726 F.2d at 1428.

Certainly, in a number of cases, a lapse of time between warnings and interrogation has not resulted in a finding of involuntariness. *See, e.g., U.S. v. Andaverde*, 64 F.3d 1305, 1312 (1995), and cases cited therein. However, what these cases establish is that the passage of time *alone* does not render a statement involuntary; the circumstances as a whole must be examined. *See U.S. ex rel. Patton v. Thieret*, 791 F.2d 547, 547-48 (1986) ("The lapse of time between administration of the Miranda warnings and the suspect's statement is one of the factors to consider in determining the validity of a waiver of Miranda rights.").

The totality of the circumstances presented in Martinez's case present a far clearer picture of coercion. By advising Martinez of his rights at his home prior to initiating any questioning, by subjecting him to arrest and control over his person and genetic material at the hospital, and by re-initiating questioning at the point Martinez was being jailed without further advisements, Ward created a circumstance under which Martinez was unlikely to even remember the warnings, let alone connect the warnings he received at least forty-five minutes earlier with his right to have counsel present before engaging in any conversation about the accusations against him. Ward did not obtain any signed acknowledgment and waiver of Martinez's rights at that time. As noted by trial counsel during argument on the CrR 3.5 hearing, the situation was comparable to "police reopening or starting formal interrogation," at which point warnings should have been given to ensure Martinez understood that he did not have to speak to police if he did not want to.

Moreover, it is impossible to separate the recorded statement that Martinez gave to police, after he was re-advised of his *Miranda* warnings, from the statements he made to Ward while being booked into jail in which he confessed to engaging in sexual conduct with the complaining witness. Although the "fruit of the poisonous tree" doctrine does not apply to *Miranda* issues, such that the taint of an unadvised statement does

not automatically flow to subsequent statements made after advisements, nevertheless, the circumstances as a whole must be examined in considering whether the subsequent statement was truly voluntary. *See Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285, 84 L.Ed.2d 222 (1985). In this case, Martinez had effectively already confessed to Ward when Ward questioned him at the booking window. Having already given the police incriminating information, and having already agreed to give a recorded statement, *before* being re-advised of his rights, how was Martinez to understand *after* being re-advised, with recorder running, that he was free to terminate the process until he spoke with his attorney?

Moreover, the error in admitting Martinez's statements cannot be found to be harmless. Although admission of statements contrary to *Miranda* can be harmless error, *State v. Reuben*, 62 Wn. App. 620, 626, 814 P.2d 1177, *review denied*, 118 Wn.2d 1006, 822 P.2d 288 (1991), in this case, there was no physical or tangible evidence connecting Martinez with the claim of assault and no witnesses to the assault besides the complaining witness. The evidence was not so overwhelming as to necessarily lead to a guilty verdict, and therefore cannot be regarded as harmless. *State v. France*, 121 Wn. App. 394, 400-01, 88 P.3d 1003 (2004).

VI. CONCLUSION

The problem presented by this case is the attenuation and remoteness of the advisement of *Miranda* rights from the interrogation and elicitation of incriminating responses. Under the totality of the circumstances, the trial court could not properly have concluded that Martinez gave a knowing, intelligent and voluntary waiver of his *Miranda* rights prior to answering questions and providing a recorded statement. Because the admission of the statements was not harmless, the conviction should be reversed and the case remanded for a new trial.

RESPECTFULLY SUBMITTED this 20th day of March, 2012.

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DECLARATION OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 26th day of March, 2012 in Walla Walla, Washington.

Andrea Burkhart