STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1409

State of Minnesota,
Respondent,

vs.

Aaron Findley,
Appellant.

Filed November 4, 2008
Affirmed
Minge, Judge

Rice County District Court
File No. CR-07-210

Lori Swanson, Attorney General, Kimberly R. Parker, Assistant Attorney General, 445 Minnesota Street, 1800 Bremer Tower, St. Paul, MN 55101-2134; and

Paul Beaumaster, Rice County Attorney, Rice County Courthouse, 218 Northwest Third Street, Faribault, MN 55021 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Theodora Gaitas, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Connolly, Presiding Judge; Lansing, Judge; and Minge, Judge.

U N P U B L I S H E D O P I N I O N

MINGE, Judge

Appellant challenges his conviction of two counts of first-degree criminal sexual conduct, arguing that the police violated his *Miranda* rights by failing to honor his assertion of his right to remain silent and the district court erred in denying his motion to suppress. We affirm.

FACTS

On January 16, 2007, appellant Aaron Findley's estranged wife, D.M.F., called 911 to report that appellant had raped her and stolen her cell phone and car. The following day, upon learning that the police wanted to speak with him, appellant turned himself in. While in custody, appellant was interviewed by an investigator of the Rice County Sheriff's department.

At the outset of the interview, the investigator informed appellant of his *Miranda* rights. The investigator then stated, "Ok and having these rights in mind do you wish to talk to me now?" Appellant responded, "I was told not to." The investigator understood appellant's response as a decision to remain silent and proceeded to explain the booking process to appellant. Appellant asked questions of the investigator throughout the explanation of the booking process, including why he was under arrest and what would happen next. During this process, appellant stated, "I can tell you it was consensual" and "Well, I'll tell you my side of it." After each statement, the investigator reminded appellant of his invocation of his right to remain silent and returned to the explanation of the booking process and appellant's arrest.

As the explanation of the booking process continued, the investigator asked appellant to remove his shirt so the investigator could look for scratches. Appellant showed the investigator his torso and stated that he only had pimples on his torso. The investigator indicated that one of the markings appeared to be a scratch and not a pimple. Appellant stated that the marks were scratches. The investigator then asked if he could photograph the scratches and appellant stated he was told not to let the investigator take photos of his body. No photos were taken. Immediately after informing the investigator that he was told not to let the investigator take photos of his body, appellant stated "I was told that I need to keep this as quiet as I can and just tell you that . . ." and proceeded to give a brief statement saying that he and his wife had consensual sex and that he had permission to borrow her cell phone and car. The investigator then ended the recording by stating that there was not going to be any more discussion of the alleged incident.

Shortly after the recording equipment was turned off, it was turned back on at appellant's request. The investigator testified at the omnibus hearing that he did not ask any questions of appellant during the approximately minute and a half break in the recording. When the second recording began, appellant confirmed that he wanted the recording device turned on so that he could tell his side of the story and further confirmed that the investigator did not do anything to try to change his mind about his original desire to remain silent. Appellant then proceeded to give a 24-minute statement providing his version of what had happened on January 16, 2007. Throughout the statement, appellant indicated that he had sex with D.M.F but maintained that it was consensual. Appellant admitted to taking D.M.F.'s cell phone and car but stated that he

asked her for permission before taking the items. The investigator questioned appellant about the scratches that he had seen previously. Appellant stated that the scratches could have been from a number of things but stated that he would assume that they came from the sexual encounter with D.M.F.

At an omnibus hearing, appellant moved to suppress the entire recording. The district court heard testimony from the investigator, reviewed the audio recordings, denied appellant's motion to suppress, and admitted the entire recording into evidence at trial. A jury convicted appellant of two counts of first-degree criminal sexual conduct and appellant was sentenced. This appeal followed.

D E C I S I O N

Appellant argues the district court erred in determining that he voluntarily waived his right to remain silent and admitting the custodial statements given after appellant invoked his right to remain silent. An appellate court reviews the district court's findings of fact surrounding a purported *Miranda* waiver for clear error but reviews "legal conclusions based on those facts de novo to determine whether the state has shown by a fair preponderance of the evidence that the suspect's waiver was knowing, intelligent, and voluntary." *State v. Burrell*, 697 N.W.2d 579, 591 (Minn. 2005).

When police take a suspect into custody, the suspect must be advised of his Fifth and Fourteenth Amendment rights to remain silent. *State v. Ganpat*, 732 N.W.2d 232, 238 (Minn. 2007) (citing *Miranda v. Arizona*, 384 U.S. 436, 478-79, 86 S. Ct. 1602, 1603 (1966)). Once a defendant has unambiguously invoked his right to remain silent, the custodial interrogation must cease. *State v. Day*, 619 N.W.2d 745, 750 (Minn. 2000)

(citing *Michigan v. Mosley*, 423 U.S. 96, 101-03, 96 S. Ct. 321, 325-26 (1975)). However, a defendant may waive his *Miranda* rights if he "initiates further communication, exchanges, or converses with the police." *State v. Parker*, 585 N.W.2d 398, 405 (Minn. 1998) (citing *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 1884-85 (1981)). The admissibility of statements made after a defendant invoked his right to remain silent "depends on whether that right was 'scrupulously honored.'" *Day*, 619 N.W.2d at 750 (quoting *Mosley*, 423 U.S. at 104, 96 S. Ct. at 326).

Police fail to honor an invocation of the right to remain silent if they "'refus[e] to discontinue the interrogation upon request or by persisting in repeated efforts to wear down [a suspect's] resistance[,] . . . mak[ing] him change his mind.'" *Id*. (quoting *Mosley*, 423 U.S. at 105-06, 96 S. Ct. at 321). Interrogation encompasses not only express questioning, but also questioning's functional equivalent. *State v. Paul*, 716 N.W.2d 329, 336 (Minn. 2006). Questioning's functional equivalent includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id*. at 336-37 (citing *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 1689 (1980)). In determining whether a suspect waived his right to remain silent by initiating further discussion or whether an officer continued interrogation, the focus of the inquiry is on the perceptions of the suspect and "whether the evidence in the record shows that the officers should have known that their conversation was reasonably likely to elicit an incriminating response from [the suspect] . . . ." *Id*. at 337 (citing *State v. Munson*, 594 N.W.2d 128, 142 (Minn. 1999)).

The Minnesota Supreme Court in *State v. Paul* upheld the admission of a statement given after the defendant invoked his right to counsel, finding that the defendant reinitiated the conversation with the investigating officer. *Id.* In *Paul*, after the defendant invoked his right to counsel, the officer stated "we're gonna take you to jail right now, then, Leroy. You have a warrant for the terroristic threats and the . . ." *Id*. at 335. The defendant then immediately asked "who put the warrant out?" *Id*. The officer then stated "Okay. You have a warrant right now—a felony warrant for terroristic threats and then we're gonna go over to the county attorney's office and we'll, we're probably gonna charge you for two murders . . ." *Id*. The defendant then responded "I know I don't have nothing to do with that." *Id*. The officer then stated, "That's your story. This is your last, that's your [[officer] *Keefe stands up*] that, you had the opportunity so your . . ." *Id*. at 336. The court in *Paul* concluded that by asking "who put the warrant out" and stating that he did not have anything to do with the murders, the defendant initiated a further discussion, that incident to that discussion, the defendant waived his right to remain silent, and that during the discussion in which the waiver occurred, the officer did not engage in the functional equivalent of questioning. *Id*. at 337.

Here, the district court characterized appellant's conduct during the initial portion of the recording as "actively asking questions and impulsively making statements" and the investigator's comments during that initial part as "informing the defendant of the booking process." Appellant challenges the district court's characterization, citing four series of statements by the investigator and arguing that these statements were the "functional equivalent" of direct questioning.

First, appellant points to the investigator's statements during the initial part of the recording that the investigator would be "basing my stuff off of what I learned [from the victim]" and that appellant was going to get booked for multiple counts of criminal sexual conduct. Following these statements, appellant asked the investigator to explain what he meant and, without giving the investigator time to respond, appellant immediately stated "I can tell you it was consensual." The district court concluded that this statement was voluntary. As in *Paul*, the investigator was informing appellant of what was going to happen and what he was going to be booked for. The district court also emphasized that, immediately following appellant's volunteered statement, the investigator reminded appellant that "we're not gonna talk" and returned to an explanation of the arrest and booking.

Second, appellant challenges the investigator's statement that the county attorney's office has the option of adding charges saying, "who knows maybe kidnapping or more . . . counts of criminal sexual conduct." Following this statement by the investigator, appellant did not make any inculpatory or exculpatory statements but rather proceeded to ask multiple questions about his arrest status. This statement by the investigator is analogous to the permissible statement in *Paul* where the investigator told the defendant that they would go over to the county attorney's office and "probably" charge the defendant with two murders.

Third, appellant challenges the investigator's statements during a conversation about appellant's arrest status. The context for this needs to be carefully explained. Although appellant knew he was going to be arrested on a warrant when he turned

himself in, he stated "You told me I wasn't under arrest on the phone." The investigator responded by reminding appellant that they had been on the phone at the time and pointing out that: "Obviously you're not, you know you can't place someone under arrest over the phone." Returning to the previous phone conversation, appellant inquired, "I asked you if I'd be under arrest." The investigator responded, "[a]nd I said we were gonna talk about it. I wanted to get your side of the version. I wanted to get your side and stuff like that." The investigator then reminded the appellant that they were not going to talk about the incident.

In deciding the significance of that "arrest" exchange, the district court held and the record supports the finding that the investigator's statements were in direct response to appellant's question. We note that in *Paul*, the officer's response to a statement by the defendant was permissible. 716 N.W.2d at 336. Here, the investigator was responding directly to appellant's inquiry. Although appellant was apparently confused about the meaning of his previous phone conversation, appellant knew that he was going to be arrested. We conclude that the investigator's response to appellant's direct question was, in context, not one which a reasonable person would expect to illicit an incriminating response. The district court further noted that after the investigator responded, the investigator deliberately directed the conversation back to the explanation of booking and arrest.

Finally, appellant challenges the investigator's request to view appellant's body and his statement to appellant that some marks appeared to be scratches. Appellant, after the investigator asked if he could take a photo of appellant, gave a brief statement saying

that he had sex with D.M.F. but it was consensual and he had permission to borrow her car and cell phone. The district court found that appellant made the concluding statement about the consensual nature of their sexual encounter "without any prompting from the investigator."

Appellant contends that the investigator's course of conduct constituted a "blatant" attempt to keep appellant discussing the case. The test for reviewing the investigator's conduct is whether he should have known that his statement would illicit an incriminating response. A review of the recording supports the district court's finding that appellant was impulsively and spontaneously making statements and actively asking questions of the investigator. The district court also found that the investigator was honoring appellant's right to remain silent as he explained the booking process, why appellant was under arrest, and what would happen next. The district court determined that none of the statements made by the investigator were designed to illicit incriminating responses. Further, the record reflects that the investigator made deliberate attempts to ensure that appellant did not make any incriminating statements and repeatedly reminded appellant that they were not going to talk about the alleged assault.

Based on the record, we conclude that the district court did not clearly err in finding that appellant reinitiated conversation with the investigator and that the investigator honored appellant's right to remain silent. Accordingly, we affirm the district court's determination that the full statement was admissible.

Affirmed.

Dated: