

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
**IN AND FOR THE COUNTY OF COCONINO**

**Danna D. Hendrix, Judge**  
**Division 1**

**Date: May 21, 2010**

**Kathy Sandstrom, Judicial Assistant**

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THE STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	Case No. CR 2009-810
	)	
v.	)	
	)	
DAVID LEVY GREENBERG	)	
	)	
Defendant.	)	

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The Court having considered the following:

January 8, 2010	Motion to Suppress Evidence
February 5, 2010	Response to Defendant's Motion to Suppress
March 2, 2010	Defendant's Reply to State's Response re: Motion to Suppress Evidence
April 10, 2010	Supplemental Response to Defendant's Motion to Suppress
April 6, 2010	Supplement on <i>Miranda</i> Violation Re: Motion to Suppress
April 7, 2010	Reply to State's Response re: Overly Broad and Lack of Particularity
April 9, 2010	Response to Defendant's Supplement on <i>Miranda</i> Issue- Motion to Suppress
April 22, 2010	Closing Argument - Motion to Suppress
April 22, 2010	Defendant's Summary of Arguments in Support of Suppression

**Did defendant freely accompany Officer Rominger to the police station or did he submit to a claim of lawful authority?**

A seizure of a person occurs when, "taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about this business.'" *Florida v. Bostick*,

*501 U.S. 429, 437 (1991)*. To determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter. *Id.*, at 439. A person does not consent to accompany an officer if he or she merely submits to a claim of lawful authority. The test for the existence of a 'show of authority' is an objective one: not whether the citizen perceived that he was being ordered to restrict his movements, but whether the officer's words and actions would have conveyed that to a reasonable person. *California v Hodari D.*, 499 U.S. 621, 628, (1991).

In this case, the relevant encounter occurred in the late evening at defendant's home, probably around 9:15 p.m., after the witnesses had done a drive-by identification. Defendant had previously been questioned by the police and denied involvement in the incident. Defendant had also been told the result of the drive-by identification. There is no evidence concerning whether the encounter occurred inside or outside of defendant's home.

Officer Rominger testified that he advised defendant he would like defendant to talk to a detective so he could close the case. Defendant replied that he did not really want to go to the police station that night. Officer Rominger said he felt that defendant was unsure what was going on, so he explained that if the facts defendant had told him earlier in the evening were true, the detective's interview would be over quickly. At that point, defendant said, "Okay, I guess I'll go with you." Defendant was permitted to smoke a cigarette before Officer Rominger transported him to the station in a police vehicle.

Officer Rominger did not tell defendant whether or not he was free to decline the officer's request. Officer Rominger did not threaten defendant. Defendant was not placed in to handcuffs or restrained in any way. Officer Rominger was unsure whether he told defendant he was not under arrest, but he was sure he did not tell defendant he was under arrest. Officer Rominger testified that he unquestionably believed defendant agreed to accompany him to the police station.

A few hours later, when Detective Holyfield asked defendant whether he had driven to the station or the officers had given him a ride, defendant replied, "They gave me a ride. Yes, sir." Later, when defendant was asked why he thought he was at the police station, he said, "And they came to my house and talked to me, and people came by to identify me and they didn't or they couldn't, but he told me that he was certain that it was my car. And then they left, and then they came back, and then they asked me to come down here to talk to you."

Considering all of the circumstances surrounding the encounter, the officer's actions would not have conveyed to a reasonable person that he was being ordered to go to the police station. While defendant's perception of the situation is not the test, defendant's initial statement that he didn't really want to go that night indicates defendant was aware he had been given a

choice and later voluntarily agreed to accompany the officer to clear up the matter. His response to the detective during the interrogation indicates he was asked, not ordered, to do so.

The Court finds that defendant agreed to accompany Officer Rominger to the police station. This was not a seizure.

**Did the police have probable cause to arrest defendant?**

A.R.S. §13-3883(A)(4) states, "A peace officer may, without a warrant, arrest a person if he has probable cause to believe: . . . . A misdemeanor or petty offense has been committed and probable cause to believe the person to be arrested has committed the offense. . . ." However, the courts have never "sustained against Fourth Amendment challenge the involuntary removal of a suspect from his home to a police station and his detention there for investigative purposes . . . absent probable cause or judicial authorization." *Hayes v Florida*, 470 U.S. 811, 815 (1980).

In this case, the police had been told by a citizen that prior to going on a walk, he saw a person smoking a cigarette across the street from his home. Upon his return, he saw that same person standing on the window sill looking into his daughter's room. When he yelled at the person, the person ran away and jumped into a white Toyota. The citizen gave the officer the license plate number, and a general description of the person and his clothing, which included black shorts, a white T-shirt, flip-flops and a baseball cap.

The license plate number came back to a 1992 white Toyota owned by defendant. Defendant's home was approximately 200 yards from the victim's home. When Officer Rominger went to defendant's home, a white Toyota with the same license plate was parked outside. The engine was warm, indicating to Officer Rominger that it had recently been driven, probably within the hour. When the officer knocked at the door, defendant answered.

Defendant matched the suspect's general description. He was wearing black shorts and a white T-shirt. He was not wearing flip-flops or a hat. Defendant was nervous, sweating and had a strong odor of alcohol on his breath. Defendant told the officer that he had brought his dogs back from a walk earlier in the day. He said he then went to work at an NAU laboratory, and returned home about 30 minutes prior to the officer's arrival. Defendant's roommate stated that defendant had returned home about 10 minutes prior to the officer's arrival, not 30 minutes earlier.

When Officer Schormann drove the victims by defendant's home, they identified the vehicle as the one they had seen earlier. Defendant's clothing matched, except the suspect had been wearing a hat. The victims stated that without the hat, they could not be 100 percent positive defendant was the suspect. In addition, they said that defendant appeared to be older than the person they had seen earlier.

Although the witnesses were not 100 per cent positive that defendant was the person they had seen at their home earlier, the other factors, including the license plate, the make of defendant's car, the warm engine, defendant's similar clothing, defendant's nervousness and sweating, and the inconsistencies between defendant's statements and those of his roommate were sufficient to support a finding of probable cause. The Court finds the officers had probable cause to arrest defendant.

**Was defendant subjected to a custodial interrogation requiring the *Miranda* warnings?**

As found above, defendant voluntarily accompanied Officer Rominger to the station in a police vehicle. The Court must now determine whether, considering all the circumstances, the resulting interview turned into a custodial interrogation.

A person is in custody when, objectively "a reasonable person [would] feel deprived of his freedom of action." *State v Rodriguez*, 186 Ariz. 240 (1991). *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." *Oregon v Mathiason*, 429 US 492, 495 (1977). Prior to custodial questioning, a suspect must be informed of his constitutional rights to remain silent and to consult an attorney. *Miranda v Arizona*, 384 U.S. 436, 444(1966).

Defendant was placed in an interrogation room as soon as he was brought to the police station. Officer Rominger briefed Detective Holyfield for a few minutes before the detective began questioning defendant. Detective Holyfield was the only officer who questioned defendant. Defendant was the only suspect. The interview began at 9:50 p.m. (approximately) and ended at 11:00 p.m. (approximately). Defendant was not threatened or compelled to go to the police station. The officers did not draw their weapons. Defendant was not handcuffed or searched. He was not photographed, fingerprinted or booked. Detective Holyfield left defendant alone in the interview room while he got water for defendant, but made no offer to allow him to leave the room for his requested cigarette break.

Although a police interrogation room may be inherently intimidating, it does not follow that a reasonable person would feel deprived of his freedom simply because he or she is interviewed in a police interrogation room. In this case, defendant was voluntarily transported to the police station in a police vehicle. The interrogation lasted about one hour. Defendant was not treated as if he was in custody. By the end of the interrogation defendant understood that he would be arrested if he confessed, but that understanding, in and of itself, does not turn the encounter into a custodial interrogation.

The Court finds defendant was not in custody. Because defendant was not in custody, the *Miranda* warnings were not required.

**If defendant had been in custody, did the manner in which the Miranda warnings were given render them ineffective?**

Although the Court has found that defendant was not in custody and the *Miranda* warnings were not required, the Court will address the issue of whether the *Miranda* warnings were rendered ineffective by Detective Holyfield's statements.

"[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v Arizona*, 384 U.S. 436, 444(1966). "*Miranda* addressed interrogation practices likely to disable an individual from making a free and rational choice about speaking, and held that a suspect must be adequately and effectively advised of the choice the Constitution guarantees. . . . The relevant inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by *Miranda*." *Doody v Schiro*, 596 F.3d 620, 635 (9<sup>th</sup> Cir. 2010)(citations, alterations, and internal quotation marks omitted).

Defendant argues that the facts of *Doody* control this case. The State disagrees.

In *Doody*, the defendant was approached at a high school football game and voluntarily accompanied the officer to the station for questioning. His interrogation began at 9:25 p.m. and lasted approximately 13 hours, or until 10:00 a.m. the following morning. The interrogating officer, Detective Riley, advised Doody of his constitutional rights in a recitation that consumed 12 pages of transcript. Detective Riley emphasized that Doody should not take the *Miranda* warnings out of context, and implied to Doody, a juvenile who had never heard of *Miranda*, that the warnings were just formalities. He made repeated assurances that the detectives did not necessarily suspect Doody of any wrongdoing, and stated three times that the warnings were really mutually beneficial. Most significantly, when informing Doody of his right to counsel, Detective Riley deviated from the standard juvenile *Miranda* warnings and adlibbed that Doody had the right to counsel "if [he was] involved in it . . . but if [he was], then that's what that would apply to." The Court found that the detective's explanations actually meant that Doody had the right to counsel only if he was involved in a crime, and that by asking for counsel, he would be admitting his involvement.

Based on the facts of that case, the 9<sup>th</sup> Circuit found, "The *Miranda* warnings provided to Doody were defective because Detective Riley downplayed the warnings' significance, deviated from an accurate reading of the *Miranda* waiver form, and expressly misinformed Doody regarding his right to counsel." *Id.*, at 635.

In this case, the following exchange took place between Detective Holyfield and defendant when Detective Holyfield read defendant the *Miranda* warnings:<sup>1</sup>

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<sup>1</sup> Transcript, p.2, ln. 21 to p.4, ln. 6

Q Okay. Well, I'd like to talk to you a little bit about tonight's - events of tonight, but since you were brought down here in a police car and since you're at the police station and I want to talk to you, you're not under arrest, but because you came in a police car, it kind of fits the fact that someone could say you were in custody although you're not. But that could be said. Make sense? Since you came in a police car.

A I guess I don't know why they would be . . .

Q Well, the reason I'm telling you all this is that you've heard the term *Miranda* Before. Have you heard that?

A Yes, sir.

Q It's like on TV when they give Miranda rights and stuff, well the test for that, when that has to be done when we have to tell somebody what their rights are is by law is if in they are in custody and they're being talked to, they're being questioned. Okay? About something? Well, you're not in custody, you're not under arrest, but it's close enough for me to think that, you know, you came in a police car and I want to ask you some questions so I'm going to tell you what those rights are just because of that. That make sense?

A Yes, it does.

Q It's pretty much like on TV and the movies, you know? You do have the right to remain silent. Do you understand that?

A I do understand that.

Q Okay. Is that a yes?

A That's a yes,

Q Okay. Anything you say can and will be used against you in a court of law. Do you understand that?

A Yes, I do.

Q Okay. You have the right to talk to a lawyer and have him or her present with you while you're being questioned. Do you understand that?

A Yes.

Q Okay. And if you couldn't afford to hire a lawyer, one would be appointed to represent you before any questioning if you wish. Do you understand that?

A Yes.

Q Okay. And you understand that you can decide to exercise your rights at any time and not make statements or talk or to answer questions or anything else. Do you understand that?

A I do. I don't know what the consequences of that means, though.

Q Okay. Well, those are the five things I needed to tell you because you were brought down here in a police car, you're sitting in an interview room at a police station and I just felt it was prudent that you know.

A I understand. I'm personally very confused. I don't know what's really happening.

Q Okay. Well, I'd like to talk to you about the events of tonight. Are you willing to talk to me?

A I think I should. I don't know -

Q Okay. Can you just put your name there that you're willing to talk to me? And I'm going to put my name there too. You can read this. It's just saying that you're going to talk to me or willing to talk to me.

- A Well, I mean, part of me feels like I didn't – I don't know what's going on and I feel like I should have somebody with me, you know? I don't know.
- Q I don't understand.
- A I didn't - I didn't --Well, I came home and then the police are at my house telling me that I've been - my car was seen doing something somewhere.
- Q Okay. Well, tell me about that. What's that all about?
- A I don't know. I don't know.

Later, the following exchange occurred<sup>2</sup>:

- A What happens if I don't say anything again? Again?
- Q You know, it's your right not to talk to me at all if you don't want to.
- A And then what would happen in that situation? Would I go home? Or what?
- Q I'm not sure what's going to happen right now because right now I'm talking to you. And that's what I want to focus on right now is your conversation with me.
- A And I understand that. I'm focused on what the future is --
- Q Because you're worried. And I understand you're worried.
- A I'm sitting in a police station.
- Q But here's the thing. What happens from the time you walk out of this room is irrelevant to the fact that we're still sitting here talking and it's irrelevant to the fact of what's happened has happened. Okay? And it's also, like I said, not the end of the world. You didn't rob any banks or hurt anybody, stab anybody, kill anybody. This is a stupid little thing that wouldn't even show up on entertainment TV if you were a celebrity. So far in anybody's radar. It's just an inconvenience right now for you and everybody else at the moment.
- A I agree.

Still later, the following conversation took place<sup>3</sup>:

- A Well, part of me doesn't want to sit in jail, right? But, I don't know. And what's -- What if I don't say anything again? I don't understand. I mean, shouldn't I have a lawyer or something here?
- Q Do you want a lawyer? I read you your rights. If you want a lawyer then that's up to you.
- A Does it make a difference? Like do you guys --
- Q I can't advise you on that. If you want a lawyer, that's your right.
- A I don't really know any lawyers. Would I be able to smoke a cigarette?
- Q I'll talk to the officers that brought you in here and we'll see.
- A Hum.
- Q That's not a condition of whether you're going to talk to me or not.
- A No, no, no. I'm just asking. If I say something and then I go to jail, then you can't smoke in jail, can you?
- Q I don't make the rules in jail but I don't think so, that's true.

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<sup>2</sup> Transcript, p. 21, ln. 5-19.

<sup>3</sup> Transcript, p. 24, ln. 27 through p. 25, ln. 23.

- A Then I won't be able to get a cigarette.
- Q Did you bring cigarettes with you?
- A I did.
- Q Okay. It's not a condition of you talking to me.
- A What do you mean by that? I'm not asking - I'm not trying to (inaudible- talk over) or anything.
- Q I'm just saying it's not a condition of you talking to me and I'll see if I can get you to have a cigarette before you go to jail if that's what happens. But it's not a condition of you talking to me. Okay? I mean, I'm not saying, if you talk to me, I'll let you have a cigarette. I'm not saying that.

Just prior to this last exchange, defendant said, "Most of my instincts are telling me not to say – not to talk, but I mean, I should just say, I didn't do nothing. I didn't do nothing."<sup>4</sup>

The facts here can be distinguished from *Doody* for three reasons: Defendant is not a juvenile who had never heard of *Miranda*; Detective Holyfield did not misstate defendant's rights; and Detective Holyfield did not imply that the *Miranda* warnings were a mere formality.

Defendant is not a juvenile who had never heard of *Miranda*. Defendant is a Research Specialist working toward his Ph.D. at NAU. He had heard of the *Miranda* warnings and he had personal knowledge about the importance of the warnings. When discussing a prior bicycle incident with which defendant had been involved, for example, defendant stated that if he hadn't said anything about that incident, there would have been nothing the police could have done.<sup>5</sup>

The detective's statements did not misstate the law. Detective Holyfield said, correctly, that because defendant was not in custody or under arrest, *Miranda* may not apply. He went on to explain, however, that because defendant had been brought in a police car and because defendant was going to be questioned, it was "close enough" that he was going to tell defendant his rights "just because of that" and because he "felt that it was prudent."

Detective Holyfield did not minimize the importance of the *Miranda* warnings. Detective Holyfield gave the *Miranda* warnings from the standard card. Although the warning was preceded by a statement that the *Miranda* warnings were just like they were on the television and in the movies, this did not minimize their significance. In addition, defendant affirmed that he understood each of his rights.

Significantly, at least twice prior to admitting, defendant voiced an understanding that he could assert his rights, and Detective Holyfield confirmed that the *Miranda* warnings applied. A close

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<sup>4</sup> Transcript, p. 24, lns. 14-15.

<sup>5</sup> Transcript, p. 7, lns. 18-27, and page 22, lns. 14-16. When defendant was 20, he purchased a bicycle with a stolen credit card. Although Defendant stated the incident had been removed from his record, he also believed a warrant had been issued for his arrest because he left the state and was unable to return.

reading of the transcript shows that defendant's questions addressed the consequences of either asserting or waiving his rights, not whether the warnings applied to him.

During the first exchange, defendant asked, "What happens if I don't say anything again - again?" Detective Holyfield responded, "You know, it's your right not to talk to me at all if you don't want to." Defendant then asked, "And then what would happen in that situation? Would I go home? Or what?" During the second exchange, defendant asked, "What if I don't say anything again? I don't understand. I mean, shouldn't I have a lawyer or something here?" Detective Holyfield again confirmed that the *Miranda* warnings applied to defendant by responding, "Do you want a lawyer? I read you your rights. If you want a lawyer, then, that's up to you. . . . I can't advise you on that. If you want a lawyer, that's your right." Defendant responded, "If I say something and then I go to jail, then you can't smoke in jail, can you?"

The *Miranda* warnings were not defective.

#### **Did the State violate defendant's Sixth Amendment right to counsel?**

A defendant "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect." *Davis v United States*, 512 U.S. 452, 459 (1994). In *Davis*, the Supreme Court held that defendant's statement, "Maybe I should talk to a lawyer," did not meet this level. Similarly, in *State v Eastlack*, 180 Ariz. 243 (1994), the Arizona Supreme Court affirmed the trial court's finding that defendant's statement, "I think I better talk to a lawyer first," was not a clear request for counsel.

Defendant argues that the State violated his Sixth Amendment right to counsel when defendant asked for counsel and Detective Holyfield did not clarify his request. The Court disagrees.

Defendant's statement was more ambiguous than the statements in either *Davis* or *Eastlack*. Defendant said, "I wish I could talk to somebody. . . who might know what the future would hold depending on what I say. I mean, I don't want to say anything without knowing -" Defendant did not articulate his desire to have counsel present sufficiently clearly that Detective Holyfield would understand the statement to be a request for an attorney. The law does not require the police to clarify defendant's meaning. The State did not violate defendant's right to counsel.

#### **Was the confession voluntary?**

Confessions are prima facie involuntary. The burden is on the State to show by preponderance of the evidence that the confession was voluntary and not the product of physical or psychological coercion. *State v Amaya-Ruiz*, 166 Ariz. 152, 164 (1990). A confession is

