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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. GILBERTO DOMINGUEZ MARTINEZ, Appellant.	)	2 CA-CR 2012-0057 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR201002277

Honorable Boyd T. Johnson, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz, and
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Tucson
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V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, appellant Gilberto Martinez was convicted of first-degree murder and sentenced to a term of natural life, to be served consecutively to the prison term he was serving when the offense was committed. On appeal, Martinez argues the trial court "improperly allowed" the state to introduce statements he had made to corrections officers after he had been given *Miranda* warnings[1] because, he contends, those statements had been "impermissibly tainted" by previous interrogation.[2] We affirm.

Background

¶2 In reviewing the denial of a motion to suppress, we consider only the evidence presented during the suppression hearing, *State v. Spears*, 184 Ariz. 277, 284, 908 P.2d 1062, 1069 (1996), and "defer to the trial court's factual findings that are supported by the record and not clearly erroneous," *State v. Rosengren*, 199 Ariz. 112, ¶ 9, 14 P.3d 303, 307 (App. 2000). We review the court's legal conclusions de novo. *Id.*

¶3 Viewing the facts in the light most favorable to the trial court's ruling, *State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007), evidence at the suppression hearing established the following. At about 7:30 p.m. on January 25, 2010, Arizona Department of Corrections (ADOC) Officer Joshua Dixon reported to Martinez's cell in response to an Incident Command System (ICS) alert and found A.U., Martinez's

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

[2]We assume Martinez is challenging the trial court's denial of his motion to suppress these statements, although his brief neither expresses this intent nor provides the applicable standards for our review of that ruling.

cellmate, lying on his back in a corner of the cell and Martinez at the sink washing his arms. Dixon testified he had asked Martinez what happened and "[h]e stated that he fell." Dixon and another officer directed Martinez to "cuff up"[3] and, after he had been handcuffed, removed him from the cell.

¶4 ADOC Sergeant Trent Condrey arrived while Martinez was being handcuffed, and Condrey "put him on his knees at the front of the cell where he could not see the crime scene." Condrey testified he had asked Martinez "what he had done," and Martinez said, "I don't know, that guy fell off the bunk." When Martinez's counsel asked Condrey why he had asked the question, Condrey responded, "[B]ecause it's easy to get them to tell me whether or not they've done something," and he acknowledged he had questioned Martinez "in the hopes of eliciting a confession." But Condrey also testified that, while Martinez was in his presence, neither he nor any other officer had threatened Martinez, promised him anything, or struck him.

¶5 Condrey and another officer took Martinez, then handcuffed behind his back and in leg irons, to the medical unit where they strapped him onto a gurney, face down, with "soft restraints . . . like seat belts." Officer Steve Chos was assigned to watch Martinez while he was in the medical unit. When Chos arrived, he asked Martinez what had happened. Martinez "told [Chos] he fell," and Chos replied, "Oh, really?" Martinez

[3]Dixon explained that Martinez was housed in a maximum security unit in which inmates are permitted to be outside their cells one hour per day providing they are restrained. Accordingly, a maximum security inmate must present his wrists, behind his back, to a "trap" near the cell door in order to be handcuffed before the cell door is opened.

then said, "Yep. It's a long way off the top bunk." Chos did not ask Martinez any other questions and testified he had neither threatened Martinez nor promised him anything, and had not struck him or seen any other ADOC employee strike him.

¶6 Officer Dominic Balistreri testified that he had spoken with Martinez, while he was on the gurney in an examination room, to ask him, "You guys were friends. Why did you do that?" In response, Martinez asked Balistreri "if [U.A.] was alive or if he was still okay," and, when Balistreri replied that he was not, Martinez "just . . . turned his head toward the wall and put his head back down to the gurney." Balistreri also testified he had not threatened Martinez or promised him anything and had not struck him or seen any other ADOC employee strike him.

¶7 Sometime before 8:20 p.m., Chos and other officers took Martinez off the gurney and walked him to a holding cell to be photographed. While there, Martinez complained to Chos that he had been unable to finish his dinner and asked if his property would be returned soon because "[t]he Superbowl is coming up." Martinez also asked Chos if "he would get another cellmate."

¶8 Martinez later was returned to the medical unit and, at about 12:45 a.m., his handcuffs and leg irons were removed, and he was interviewed by ADOC Investigators Michael Glaser and Daniel Bourland. Both testified Glaser had advised Martinez of his

rights, pursuant to *Miranda*, and Martinez indicated that he understood those rights and agreed to speak with Glaser.[4]

¶9 During the interview, Martinez stated he had hit A.U. and "dropped him to the floor" because A.U. had "disrespected" him. He said the two had agreed to fight, but A.U. had not touched him. He also said he "knew [A.U.] was done on the first hit" and thought he "might as well make sure he was gone," so he "stomped" on A.U.'s face for fifteen or twenty minutes "until [A.U.] couldn't breathe anymore."

¶10 Martinez also testified at the evidentiary hearing and acknowledged ADOC policy required him to be handcuffed behind his back and in leg restraints whenever he was removed from his cell and also for the duration of any ICS. He also acknowledged there had been a guard posted with him while he was restrained on the gurney, but he said ADOC officers nonetheless had approached him and "talk[ed] s—t," saying things like "You like to play around mother f—er," which he characterized as threats. He said officers also had spit in his face, pushed his head down on the gurney, and hit the left part of his ear. He believed he could have identified these officers by sight, but not by name, and stated none of them was present at the hearing. He agreed, however, that no one had told him something bad would happen to him if he did not talk to investigators or promised him anything in exchange for a statement. He also agreed that none of those officers had been present during his interview with Glaser and Bourland and that no one

[4]In his motion to suppress, Martinez questioned whether *Miranda* warnings ever had been given. On appeal, he does not challenge the trial court's finding that he had been given *Miranda* warnings before his interview with Glaser and Bourland.

had made threats or promises during that interview. He said he did not remember being read his rights pursuant to *Miranda*, but "just remember[ed] saying [']I want a lawyer and I want to go home and go to sleep.[']"

¶11 In his motion to suppress, Martinez argued all of his statements were involuntary and obtained in violation of *Miranda*. At the close of the hearing, the trial court denied the motion, finding Martinez's statement to Dixon, made before he had been removed from his cell, had been voluntary, and his statement to Glaser and Bourland was "made knowingly, intelligently, and voluntarily after a waiver of his *Miranda* rights." The court ruled Martinez's statements to Condrey, Chos, and Balistreri—made after he had been removed from his cell and restrained but before he had been advised pursuant to *Miranda*—were admissible for impeachment only, and not "as part of the case-in-chief." This ruling was consistent with a determination that statements Martinez had made while on the gurney were obtained in violation of *Miranda* but nonetheless were voluntary. *See State v. Huerstel*, 206 Ariz. 93, ¶ 61, 75 P.3d 698, 712 (2003) (voluntary confession obtained in violation of *Miranda* may be used for impeachment); *State v. Zamora*, 220 Ariz. 63, ¶ 11, 202 P.3d 528, 533 (App. 2009) (non-spontaneous statement made by in-custody defendant before *Miranda* warnings "inadmissible during the State's case-in-chief regardless whether they were coerced by other means" or voluntary). At trial, the court admitted portions of Martinez's tape-recorded statement to Glaser and Bourland, and Martinez testified he had killed A.U. in self-defense.

Discussion

¶12 Martinez argues his "initial statements were the result of a custodial interrogation" and, "[a]s a result, [his] confession, which was obtained after the advisement of *Miranda* rights, was impermissibly tainted and should have been suppressed." He maintains his "confession was clearly the product of the broader [custodial] interrogation"; according to Martinez, "corrections officers basically engaged in a free-for-all of questioning [him] and demeaning him while he waited, helpless, for investigators to conduct their formal interrogation." He relies on *Missouri v. Seibert*, 542 U.S. 600, 616-17 (2004), for the proposition "that *Miranda* warnings given mid-interrogation, after an inculpatory statement had already been obtained" may be "ineffective to protect the purposes *Miranda* was designed to serve," rendering the post-warning statement inadmissible.

¶13 As an initial matter, we agree with the state that the trial court could have found Martinez's testimony—that corrections officers had demeaned him, struck him, or ignored his request for counsel—lacked credibility, and Martinez conceded that no one had made threats or promises related to his cooperation with the interrogation. *See State v. Ellison*, 213 Ariz. 116, ¶¶ 31-32, 140 P.3d 899, 910-11 (2006) (prima facie case for voluntariness of confession made when "'officer testifies that the confession was obtained without threat, coercion or promises of immunity or a lesser penalty'";

reviewing court defers to trial court's resolution of conflicting testimony absent abuse of discretion), *quoting State v. Jerousek*, 121 Ariz. 420, 424, 590 P.2d 1366, 1370 (1979).[5]

¶14 Moreover, we find *Seibert* inapplicable. In *Siebert*, the Court considered "a police protocol for custodial interrogation that calls for giving no warnings of the rights to silence and counsel until interrogation has produced a confession," followed by *Miranda* warnings and further interrogation that "leads the suspect to cover the same ground a second time." 542 U.S. at 604. A plurality of the Court concluded the defendant's second, post-warning statement was inadmissible, based on the following reasoning:

> [I]t is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content . . . . Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again.

Id. at 613.

[5]Martinez has not challenged the trial court's determination that his statement to Glaser and Bourland was voluntary, based on "the totality of the circumstances." *State v. Davolt*, 207 Ariz. 191, ¶ 29, 84 P.3d 456, 468 (2004); *see also State v. Tapia*, 159 Ariz. 284, 286, 767 P.2d 5, 7 (1988) ("Voluntariness and *Miranda* violations are two separate inquiries.") We therefore limit our discussion to his argument that his *Miranda* warnings were ineffective and his confession tainted by pre-warning questioning.

¶15 But in *Bobby v. Dixon*, the Court explained that the reasoning in *Siebert* did not apply to a case in which a defendant did not confess until after he had received *Miranda* warnings, stating,

> In *Seibert*, the suspect's first, unwarned interrogation left "little, if anything, of incriminating potential left unsaid," making it "unnatural" not to "repeat at the second stage what had been said before." But in this case Dixon steadfastly maintained during his first, unwarned interrogation that he had "[n]othing whatsoever" to do with Hammer's disappearance. Thus, unlike in Seibert, there is no concern here that police gave Dixon *Miranda* warnings and then led him to repeat an earlier murder confession, because there was no earlier confession to repeat. Indeed, Dixon *contradicted* his prior unwarned statements when he confessed to Hammer's murder.

____ U.S. ____, ____, 132 S. Ct. 26, 31 (2011) (citations omitted). Here, as in that case, there was no pre-warning confession to repeat, and Martinez contradicted his earlier, pre-warning statements to various officers when he confessed during his formal, post-warning interview with Glaser and Bourland.

¶16 Similarly, as in *Bobby*, the facts here do not implicate the Court's concern in *Seibert* "that the *Miranda* warnings did not 'effectively advise the suspect that he had a real choice about giving an admissible statement' because the unwarned and warned interrogations blended into one 'continuum.'" *Id.* at ____, 132 S. Ct. at 31-32, *quoting Siebert*, 542 U.S. at 612, 617. As in *Bobby*, four hours had passed between Martinez's "unwarned interrogation and his receipt of *Miranda* rights." *Id.* at ____, 132 S. Ct. at 32. And, unlike the defendant in *Siebert*, whose second statement was taken twenty minutes after her unwarned confession, by the same investigator, Martinez's interview with

Glaser and Bourland, after he had been relocated and released from his restraints, clearly represented "a new and distinct experience" from the few, isolated questions he had been asked much earlier by different corrections officers during his initial detention. *Siebert*, 542 U.S. at 604, 615-16.

Disposition

¶17 For the foregoing reasons, we find no merit in Martinez's claim that his statement to Glaser and Bourland, made after he was given *Miranda* warnings, was subject to suppression pursuant to the rule announced in *Siebert* and find no error in the trial court's denial of his motion to suppress. Accordingly, his conviction and sentence are affirmed.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed August 15, 2012.