STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

LAWRENCE W. HARRINGTON, II,

Defendant-Appellant.

FOR PUBLICATION
October 2, 2003
9:10 a.m.

No. 239699
Allegan Circuit Court
LC No. 01-12001-FC

Updated Copy
November 21, 2003

Before: Cooper, P.J., and Fitzgerald and Kelly, JJ.

COOPER, P.J.

A jury convicted defendant Lawrence W. Harrington, II, of second-degree criminal sexual conduct, MCL 750.520c(1)(a). The trial court sentenced defendant to 57 to 180 months' imprisonment for the conviction. He appeals as of right. We reverse and remand for a new trial.

This appeal arises from claims that defendant sexually abused his stepson when his stepson was five years old. The allegations of abuse did not arise for nine years. The complainant made these charges when he was incarcerated as a juvenile for criminal sexual conduct.

On the day of defendant's arraignment, Trooper David Gutierrez visited defendant in jail and spoke with him regarding his *Miranda*[1] rights, the investigation, and the possibility of taking a polygraph examination. Trooper Gutierrez stated that defendant insisted on taking a polygraph to prove his innocence. Defendant was subsequently arraigned later that day and trial counsel was appointed. Almost two weeks after the arraignment, Trooper Gutierrez again visited defendant in jail to ask defendant if he still wanted to take the polygraph. Trooper Gutierrez testified that he asked defendant if he had contacted his attorney regarding the examination. When defendant explained that he had not discussed the examination with his attorney, Trooper Gutierrez claimed that he offered to arrange a meeting. According to Trooper Gutierrez, defendant declined this offer and stated that he did not want his attorney present. Defendant, however, testified that he would have liked the opportunity to discuss the polygraph examination with his trial counsel.

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

The following day, Trooper Gutierrez and two other officers returned to the jail and transported defendant to the polygraph examination. Before the examination, defendant was read his *Miranda* rights and he signed a standard waiver form. When defendant learned that he failed the examination, Trooper Gutierrez claimed that defendant asked to speak with him about the investigation and repeated this request upon their return to the jail. At this point, Trooper Gutierrez and two other officers agreed to discuss the investigation with defendant in an interview room. The troopers testified that defendant confessed and recanted twice during the interview. Defendant, however, denied asking to speak with the police officers. Rather, defendant testified that it was Trooper Gutierrez who asked him if he wanted to talk about the polygraph results when they returned to the jail. Defendant agreed to speak with the officers at the jail but claimed that he maintained his innocence throughout the interview.

On appeal, defendant argues that the trial court erroneously denied his motion to suppress the postpolygraph interview statements. He maintains that these statements were obtained in violation of his Sixth Amendment right to counsel because they were the result of police-initiated contact after his arraignment and appointment of trial counsel. We agree. A trial court's findings of fact on a motion to suppress are reviewed for clear error on appeal.[2] "To the extent that a trial court's ruling on a motion to suppress involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo."[3]

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." This amendment thus affords an accused the right to rely on counsel as an intermediary between him and the state.[4] When a defendant invokes the Sixth Amendment right to counsel, any subsequent waiver of this right in a *police-initiated custodial interview* is ineffective with respect to the charges filed against the defendant.[5] An exception to this rule exists where the defendant initiates the contact and makes a valid waiver of his rights.[6]

On the instant facts, we are convinced that defendant's statements were obtained in violation of his Sixth Amendment right to counsel. In *People v Anderson*, our Supreme Court suppressed statements that were given under similar circumstances.[7] While the police in *Anderson* initially contacted the defendant regarding a polygraph before his arraignment, they left a telephone message concerning the actual arrangements at the defendant's home after he had been arraigned and appointed counsel.[8] After the polygraph was administered, the police reminded the defendant of his *Miranda* rights and proceeded to obtain several damaging

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[2] *People v Oliver*, 464 Mich 184, 191; 627 NW2d 297 (2001).

[3] *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001).

[4] *Michigan v Jackson*, 475 US 625, 632; 106 S Ct 1404; 89 L Ed 2d 631 (1986).

[5] *People v McElhaney*, 215 Mich App 269, 273-274; 545 NW2d 18 (1996).

[6] *Id*. at 274.

[7] *People v Anderson (After Remand)*, 446 Mich 392; 521 NW2d 538 (1994).

[8] *Id.* at 401.

statements.[9] These statements were ultimately deemed inadmissible because the defendant did not initiate the postarraignment communication.[10] Similarly, in the instant case, it was the police that contacted defendant regarding the polygraph arrangements. And notably, this visit occurred while defendant was *in jail* and after his arraignment. It is further undisputed that the police knew defendant had been arraigned and appointed counsel at the time of this contact.

To the extent the prosecution claims that defendant reinitiated communication with the police by asking to speak with them after the examination, we disagree. The statements allegedly elicited from defendant were obtained during the course of ongoing contact that was originally initiated by the police. We note that the Supreme Court in *Anderson* did not give much credence to a similar argument when it dismissed the fact that the defendant voluntarily returned the phone call from the police as insufficient to remedy the initial contact problem.[11]

We note our colleague's dissent on the grounds that defendant initiated the conversation with the police. The record, however, clearly indicates that it was the police that first contacted defendant after an undisputed awareness that he had obtained trial counsel. These actions were particularly inappropriate, given the Michigan Rules of Professional Conduct that forbid attorneys and their agents from communicating about the subject of the representation with a party that is represented by opposing counsel.[12]

Given the limited evidence presented in this case of defendant's guilt and the highly inculpatory nature of his statements, we do not find that the admission of defendant's statements amounted to harmless error.[13] Because we find that this issue is dispositive, we need not address defendant's remaining claim that his counsel's failure to move for a directed verdict amounted to ineffective assistance of counsel.

We reverse and remand for a new trial. We do not retain jurisdiction.

Fitzgerald, J., concurred.

/s/ Jessica R. Cooper
/s/ E. Thomas Fitzgerald

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[9] *Id.*

[10] *Id.* at 404.

[11] *Id.*

[12] See MRPC 4.2.

[13] See *Anderson (After Remand), supra* at 404-407.