STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDERICK G. ATTEBURY, JR.,

Defendant-Appellant.

UNPUBLISHED
April 13, 1999

No. 197053
St. Clair Circuit Court
LC No. 96-000656 FH

Before: Kelly, P.J., and Holbrook, Jr., and Murphy, JJ.

MURPHY, J. (dissenting).

I respectfully dissent and would affirm defendant's conviction.

In *New York v Quarles*, 467 US 649; 104 S Ct 2626; 81 L Ed 2d 550 (1984), the United States Supreme Court recognized a "public safety" exception to the general rule that police officers must recite the familiar *Miranda*[1] warnings before questioning a defendant who has been placed under custodial arrest. In *Quarles*, a police officer, investigating a recent sexual assault, entered a supermarket and spotted the defendant, who matched a description given by the victim. The defendant, apparently upon seeing the officer, bolted toward the rear of the store where the officer eventually apprehended him, but not before the officer lost sight of the defendant for several seconds. Upon noticing that the defendant was wearing an empty shoulder holster, the officer asked the defendant where the gun was, and the defendant "nodded in the direction of some empty cartons and responded, 'the gun is over there.'" *Id*. at 652. The officer retrieved the gun, and only then did he instruct the defendant regarding his *Miranda* rights.

The Supreme Court declined to suppress the defendant's statement or the gun that was located as a result of the statement, reasoning that "[t]he need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *Id*. at 657. Although the Supreme Court recognized the public safety exception to the *Miranda* rule in the context of a case in which the public, generally, was presented with an immediate threat, e.g., that of a loaded gun somewhere in a supermarket, my understanding of *Quarles* is that an immediate threat to the officer's safety would also support the temporary suspension of the requirements of *Miranda*. In *Quarles*, the Supreme Court stated,

> The exception will not be difficult for police officers to apply because in each case it will be circumscribed by the exigency which justifies it. We think police officers can and will distinguish almost instinctively between *questions necessary to secure their own safety or that of the public* and questions designed solely to elicit testimonial evidence from a suspect. [*Id*. at 658-659; emphasis supplied.]

Recognizing that such an exception does exist, therefore, I conclude that, under the circumstances of this case, the arresting officer had an objectively reasonable justification to question defendant regarding the whereabouts of the gun before instructing defendant regarding his *Miranda* rights.

When the arresting officers entered defendant's home to execute the arrest warrant, defendant was in the shower. The officers permitted defendant to finish his shower and get dressed, but before allowing defendant access to his dresser drawers for clothing, and before administering the *Miranda* warnings, one of the officers inquired whether there were any weapons in the home. In my view, under the circumstances of this case, such an inquiry was entirely reasonable and justifiable in order to ensure the safety of the officers. Although one might question the wisdom of allowing the defendant to access to his dresser drawers to search for clothing, an exigency was nonetheless presented that justified the officer's question without necessitating that defendant first be instructed regarding his *Miranda* rights.

However, after defendant told the officer that there were no weapons in the apartment, the officer immediately asked defendant a follow-up question that went to the heart of the arrest warrant. The officer specifically questioned defendant regarding the whereabouts of the gun that was used in committing the crime that was the subject of the arrest warrant. Defendant responded that the gun was not in the home and that he had given it to his brother. Again, however, in my view, the officer's question was objectively reasonable under the circumstances in order to ensure the safety of the arresting officers. The officers knew that they were in defendant's home to execute a warrant to arrest defendant for the crime of assault with a dangerous weapon, namely, a gun. The officers were also aware that defendant had recently been diagnosed as having homicidal tendencies. It seems to me that a police officer, in the execution of such a warrant, should be permitted to specifically question a suspect regarding the whereabouts of the gun that was allegedly used to commit the crime named in the arrest warrant before allowing the suspect access to his dresser drawers. Again, while one might question the wisdom of the officer's decision to grant defendant the liberty to dress himself without restraint, the exigency justifying the officer's question, e.g., the safety of the arresting officers, was nonetheless present when the officer questioned defendant regarding the location of the gun that was used to commit the crime named in the warrant.

I understand that the record in this case supports that the police officer who questioned defendant regarding the whereabouts of the gun was probably not concerned for his own personal safety, or that of the other officer, when he asked defendant the follow-up question discussed above. However, the Supreme Court in *Quarles* stated,

> the application of the exception which we recognize today should not be made to depend on *post hoc* findings at a suppression hearing concerning the subjective motivation of the arresting officer. Undoubtedly most police officers, if placed in [the

> arresting officer's] position, would act out of a host of different, instinctive, and largely unverifiable motives – their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect.
>
> Whatever the motivation of individual officers in such a situation, we do not believe that the doctrinal underpinnings of *Miranda* require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety. [*Id*. at 656.]

Accordingly, I conclude that, under the circumstances of this case, the questions posed to defendant by the arresting officer were reasonably prompted by a concern for the safety of the officers, and therefore, the questions come within the exception to the *Miranda* rule recognized in *Quarles*.

Assuming, however, that the arresting officer should have instructed defendant regarding his *Miranda* rights before he questioned defendant about the whereabouts of the gun, my review of the entire record in this case reveals that, subsequent to this assumed *Miranda* violation, the arresting officer fully informed defendant of his *Miranda* rights, after which defendant again revealed the whereabouts of the gun. In my view, defendant's post-*Miranda* revelation of the gun's location sufficiently purged any taint associated with the pre-*Miranda* violation.

The record in this case reveals that defendant disclosed the whereabouts of the gun on two separate occasions. The majority focuses on the first of these occasions, which was the subject of the *Walker*[2] hearing in this case, in concluding that defendant's statement regarding the gun's location was obtained in violation of *Miranda*. However, at defendant's preliminary examination, the arresting officer testified that after he had properly Mirandized defendant, he again asked defendant regarding the whereabouts of the gun, and again defendant answered that he had given the gun to his brother. In my view, defendant's volunteered disclosure, after having been properly Mirandized, removed any taint arguably associated with his identical, pre-*Miranda* revelation.

In *Oregon v Elstad*, 470 US 298, 314; 105 S Ct 1285; 84 L Ed 2d 222 (1985), the United States Supreme Court stated:

> We must conclude that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive of invoke his rights.

Because in this case, there is no evidence that defendant's pre-*Miranda* statement was made under "deliberately coercive or improper" circumstances or that it was otherwise not voluntarily given, the subsequent administration of *Miranda* warnings to defendant, and defendant's voluntary answers

following those warnings, "removed the conditions that precluded admission of the earlier statement." *Id*.

I would affirm.

/s/ William B. Murphy

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

[2] *People v Walker (On Rehearing)*, 373 Mich 331; 132 NW2d 87 (1965).