

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID DENNARD MCKINNEY,

Defendant-Appellant.

UNPUBLISHED

September 27, 2007

No. 269823

Wayne Circuit Court

LC No. 05-000357-01

Before: Whitbeck, C.J., and Wilder and Borrello, JJ.

WHITBECK, C.J. (*concurring in part and dissenting in part*).

I write separately because I do not agree with the majority's conclusion that Inkster Detective Anthony Delgreco's statement regarding the death penalty constituted impermissible interrogation intended to elicit an incriminating response from defendant David McKinney.

Here, after McKinney was arrested, Detective Delgreco read him the *Miranda* warnings, and McKinney signed a constitutional rights form indicating that he understood his rights. McKinney then signed a statement indicating that he agreed to waive his right to have an attorney present and to talk to Detective Delgreco. After Detective Delgreco told McKinney what evidence they had against him, McKinney put his head down and said, "I planned it." McKinney then asked for his attorney. Detective Delgreco stopped the interview and walked McKinney back to his cell. While they were walking, Detective Delgreco told McKinney that the ATF was involved in the case because the gun shop was federally-licensed and that "we still did not know if we were going to take this case state or federally and at the federal level that there was the death penalty involved in this case possibly." McKinney did not respond to the comment, and Detective Delgreco placed McKinney in his cell.

The next morning, Detective Delgreco arrived at the police station for "lock-ups" duty, which involved counting the number of people in custody. According to Detective Delgreco, as he passed by McKinney's cell, McKinney called Detective Delgreco over to his cell window and said that he wanted to talk. Detective Delgreco repeatedly told McKinney that he could not talk to McKinney without McKinney's lawyer present, but McKinney persisted and finally said that he would talk without his lawyer present. Specifically, McKinney "wanted to hear what the ATF had against him." Detective Delgreco testified that he then contacted the ATF agent in charge, Ray Tomaszewski, and told him to come to the police station. Next, he drafted a letter stating that McKinney agreed to speak to Detective Delgreco and Agent Tomaszewski. McKinney signed the letter, and Detective Delgreco and Agent Tomaszewski witnessed it. Detective

Delgreco again read McKinney his *Miranda* rights, and again McKinney signed a constitutional rights form indicating he understood his rights. Agent Tomaszewski then told McKinney what evidence they had against him. McKinney then gave a written statement regarding the events of the robbery. Specifically, McKinney stated that he planned the larceny of the gun shop and served as the lookout during the larceny.

As stated by the majority, the issue here is whether Detective Delgreco's statement about the possibility of the death penalty being involved in McKinney's case qualifies as interrogation impermissible after McKinney invoked his right to counsel.¹ More specifically, the issue is whether Detective Delgreco intended that or should have known that his statement was reasonably likely to elicit an incriminating response from McKinney.²

In *People v McCuaig*, after the defendant indicated that he wished to remain silent and that he wanted to speak with an attorney, a police officer advised the defendant concerning the nature of the charge against him and described the circumstances that led the police to believe that the defendant was the culprit.³ The defendant responded by stating that he wished to make a statement. On appeal, the defendant argued that his statement should have been suppressed. This Court disagreed, concluding that the officer's statements could not be characterized as further interrogation or its functional equivalent, and further explaining that "[t]he nature of the statements were not such that it can be said that they were intended to elicit a response."⁴

I believe that this case falls in line with *McCuaig*. Here, Detective Delgreco was simply commenting on the nature of the charges against McKinney and the possible penalty associated with those charges. Aside from his single comment, he did not attempt to discuss anything further with McKinney or subject McKinney to any express questioning. Regardless of my disagreement with the majority on this point, I agree with the majority's conclusion to affirm the admission of McKinney's incriminating statements to the extent that they have concluded that McKinney's incriminating statements the next morning constituted communication initiated by the accused under *Edwards*.

I concur with the remainder of the majority's opinion.

/s/ William C. Whitbeck

¹ See *Minnick v Mississippi*, 498 US 146, 152; 111 S Ct 486; 112 L Ed 2d 489 (1990); *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880, 68 L Ed 2d 378 (1981); *People v Wright*, 441 Mich 140, 169; 490 NW2d 351 (1992).

² See *Rhode Island v Innis*, 446 US 291, 301; 100 S Ct 1682; 64 L Ed 2d 297 (1980); *People v Anderson*, 209 Mich App 527, 532-533; 531 NW2d 780 (1995).

³ *People v McCuaig*, 126 Mich App 754, 759; 338 NW2d 4 (1983).

⁴ *Id.* at 760.