NO. COA11-516
NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2012

STATE OF NORTH CAROLINA,
Plaintiff

v.

DWIGHT BRAXTON DOUGLAS,
Defendant

Guilford County
No. 08 CRS 106912-16,
08 CRS 106918-20,
08 CRS 106923-24

Appeal by defendant from order denying his motion to suppress entered 3 February 2010 by Judge Ronald Spivey in Guilford County Superior Court. Heard in the Court of Appeals 9 November 2011.

Eric A. Bach for defendant-appellant

Attorney General Roy Cooper, by Assistant Attorney General Stanley G. Abrams, for the State

STEELMAN, Judge.

Where defendant advised the officer that he wished to talk with the officer after invoking his right to counsel, and the officer did not expressly or implicitly initiate the dialogue with defendant, the trial court did not err in denying defendant's motion to suppress.

I. Factual and Procedural Background

On 5 January 2009, Dwight Braxton Douglas ("defendant") was indicted for five counts of robbery with a dangerous weapon, three counts of first-degree burglary, four counts of second-degree kidnapping, and three counts of conspiracy to commit robbery with a dangerous weapon. The factual background of these charges is irrelevant to defendant's appeal. Prior to trial, Defendant moved to suppress his statement made to Detective Kenneth Jones on 2 October 2008, contending that the statement was not voluntary and was obtained in violation of his right to have an attorney present during questioning.

On 3 February 2010, the trial court denied defendant's motion to suppress. On 25 February 2010, defendant plead guilty to four counts of robbery with a dangerous weapon, two counts of first-degree burglary, four counts of second-degree kidnapping, and three counts of conspiracy to commit robbery with a dangerous weapon, reserving his right to appeal the denial of his motion to suppress. The trial court sentenced defendant to an active term of imprisonment of sixty to eighty-one months.[1]

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[1] Defendant's brief asserts that Judge Doughton imposed four consecutive sentences of sixty to eighty-one months. However, the record presented to this Court contains only one judgment of sixty to eighty-one months. Defense counsel is admonished to take more care in the preparation of the record on appeal.

Defendant appeals.

III. Denial of Motion to Suppress

Defendant contends that the trial court erred in denying his motion to suppress his statements made after defendant invoked his right to counsel. We disagree.

A. Standard of Review

We review the denial of a motion to dismiss to determine whether the trial court's findings of fact are supported by competent evidence and whether those findings support the conclusions of law. *In re K.D.L.*, __ N.C. App. __, __, 700 S.E.2d 766, 769 (2010) (citing *State v. Roberson*, 163 N.C. App 129, 132, 592 S.E.2d 733, 735–36 (2004)), *disc. review denied*, __ N.C. __, 706 S.E.2d 478 (2011). Where, as in the instant case, neither party challenges the trial court's findings of fact, they are binding on appeal. *Id.* We review conclusions of law *de novo*. *Id.*

B. Analysis

Under *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), the Fifth Amendment's prohibition against compelled self-incrimination (which applies to the states through the Fourteenth Amendment) requires the police, prior to custodial interrogation, to advise a criminal suspect that he has the

right to remain silent and the right to have an attorney present during questioning. ***Edwards v. Arizona***, 451 U.S. 477, 481–82, 68 L. Ed. 2d 318, 384 (1981) (citing ***Miranda***, 384 U.S. at 479, 16 L. Ed. 2d at 726). "If [the accused] requests counsel, 'the interrogation must cease until an attorney is present.'" ***Id.*** at 482, 68 L. Ed. 2d at 384 (quoting ***Miranda***, 384 U.S. at 474, 16 L. Ed. 2d at 723). The suspect's waiver of his right to counsel must be (1) voluntary and (2) "knowing and intelligent." ***Id.*** at 482, 68 L. Ed. 2d at 385. Once a suspect has invoked his right to have counsel present, questioning may resume in the absence of counsel only if "the accused himself initiates further communication, exchanges, or conversations with the police." ***Id.*** at 484–85, 68 L. Ed. 2d at 386.

Not all inquiries and statements made by the police or the suspect "initiate" conversation or dialogue within the meaning of ***Edwards***.

> [T]here are undoubtedly situations where a bare inquiry by either a defendant or by a police officer should not be held to "initiate" any conversation or dialogue. There are some inquiries, such as a request for a drink of water or a request to use a telephone, that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation. Such inquiries or statements, by either an

> accused or a police officer, relating to routine incidents of the custodial relationship, will not generally "initiate" a conversation in the sense in which that word was used in Edwards.

Oregon v. Bradshaw, 462 U.S. 1039, 1045, 77 L. Ed. 2d 405, 412 (1983).

On the other hand, an officer's conduct may run afoul of *Miranda* even in the absence of explicit questioning. "[T]he term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 308 (1980) (footnotes omitted). The following factors are relevant to this inquiry: "(1) 'the intent of the police'; (2) whether the 'practice is designed to elicit an incriminating response from the accused'; and (3) '[a]ny knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion.'" *State v. Fisher*, 158 N.C. App. 133, 143, 580 S.E.2d 405, 413 (2003) (alteration in original) (quoting *Innis*, 446 U.S. at 302 nn.7, 8, 64 L. Ed. 2d at 308 nn.7, 8), *aff'd per curiam*, 358 N.C. 215, 593 S.E.2d 583 (2004).

The trial court's unchallenged findings of fact establish the following. On 21 October 2008, Detective Kenneth Jones interviewed defendant at the Greensboro Police Department. The police made an audio recording of the entire interview. After about six minutes of general discussion about defendant's family background and other matters, Detective Jones went over defendant's *Miranda* rights with him. Detective Jones then asked defendant whether he wanted "to talk with [him] about what's going on." Defendant stated that he should ask for a lawyer, stating, "That would be the smart thing to do." At the hearing on defendant's motion to suppress, the State conceded that defendant had invoked his right to counsel at this point, and the trial court so found. Detective Jones then made the following statement:

> Okay. All right. I understand that. Now, when you get a lawyer, I would highly recommend that you get in touch with me, discuss it with your lawyer. You know, he's going to have his input, of course, and—you know—but you'll make the final decision one way or the other. And obviously I've already talked to some people and there are some other people that I will probably end up talking to some more. And I would like to hear your side of everything. Everybody has their own side and everybody likes to put their own spin on what's going on. And I like to try to get to the truth, find out exactly what's going on and all that kind of stuff. So, I'd like to hear your side of it.

> I really would. I'm not BSing you or whatever. . . . That's why I would like for you to talk with me even after you get a lawyer. If you try to set something up, we all set [sic] down and talk, yeah, I'd like to do that.

Defendant then inquired as to the nature of the charges against him. Detective Jones replied, "[T]his is a very serious, very serious situation. . . . So that's the reason I wanted to try to talk to you." He also stated that he had "quite a bit of information," which is why he had charged defendant. Detective Jones then said that he would get the papers and get them served on defendant. At this point, defendant asked, and was permitted, to use the restroom.

When defendant returned, he inquired about a "promissory note" so that he would not have to go to jail.[2] Detective Jones stated, "[W]e don't do that," and that he could not promise that defendant would not go to jail. Defendant inquired as to when he would get a lawyer. In response to this inquiry, Detective Jones explained:

> [O]nce you get over there at the jail you have to request one. That would be——I think it would be like it's your first appearance tomorrow morning. You can request one and then they would get one assigned to you. And then that, basically, that lawyer would have

[2] It appears defendant wanted to be released upon a written promise to appear.

> to come around and talk to you and that might be a couple days or something, I'm not sure [sic]. I'm not exactly certain on the procedure.

Defendant then stated, "Well, you know what, I really do, I want to go ahead and talk with you, I really would [sic], because I'm just ready to get all of this over with anyway and I'm done listening to people talking . . . ." Detective Jones then asked, "So, you're saying you want to talk now?" Defendant replied that he would tell the detective what he knew. Detective Jones then went back over defendant's rights with him. Defendant signed a form indicating he waived his right to have an attorney present during questioning after having previously asserted that right.

In this case, Detective Jones' comments did not amount to an explicit reinitiation of questioning. He clearly stated that he wanted to hear defendant's version of the events surrounding the case *after defendant secured counsel*. After defendant indicated he wanted to speak to Detective Jones, Detective Jones required defendant to confirm explicitly that this was the case. Then, only after going over defendant's rights with him again and obtaining a written waiver, did Detective Jones discuss the case with defendant.

Defendant incorrectly contends that Detective Jones engaged in conduct that he reasonably should have known was likely to elicit an incriminating response from him. Nothing in the trial court's findings of fact suggests that Detective Jones' discussion with defendant was designed to elicit incriminating responses. Detective Jones' statement that it might take several days before defendant could speak with a lawyer was merely an explanation of the custodial intake process. Under *Innis*, conduct "normally attendant to arrest and custody" does not amount to interrogation. 446 U.S. at 301, 64 L. Ed. 2d at 308. Notably, his remarks came in response to defendant's question about obtaining a court-appointed lawyer. Detective Jones' conduct did not amount to a non-explicit reinitiation of custodial interrogation.

Defendant initiated further conversation by telling Detective Jones that he wanted to discuss the case without an attorney present. At that point, after once again reviewing defendant's rights with him and obtaining a written waiver of those rights after defendant invoked his right to counsel, Detective Jones was permitted to resume questioning defendant. *See Edwards*, 451 U.S. at 484–85, 68 L. Ed. 2d at 386. The trial court properly denied defendant's motion to suppress.

AFFIRMED.

Judges GEER and BEASLEY concur.

Report per Rule 30(e).