IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE	:	
v.	:	I.D. No. 1505021915
MARK SMITH	:	
Defendant.	:	

ORDER

Upon Defendant's Motion to Suppress
Granted in Part and Denied in Part

AND NOW TO WIT, this 14th day of April, 2016, upon consideration of Defendant's Motion to Suppress and the record in this case, **IT APPEARS THAT:**

1. Defendant is charged with one count of Robbery in the First Degree, one count of Attempted Robbery in the First Degree, and two counts of Conspiracy in the Second Degree.

2. On October 12, 2015, Defendant filed a motion to suppress all the statements he made subsequent to his May 27, 2015 arrest. A two-part suppression hearing was held before this Court on December 8, 2015, and January 5, 2016. During the hearing, the Court heard testimony from Defendant and three Delaware State Police Officers: Detective Mark Doughty, Sergeant Gerald Windish, and Detective Bernard Gray. Although large parts of the testimony were conflicting, it is undisputed that on the day of his arrest, Defendant had three separate interactions with members of the Delaware State Police. Two of those interactions, the first and third, were recorded on video. The Court reviewed both recorded interactions as well as supplemental reports prepared by Detective Doughty and Sergeant Windish.

3. Due to the significance of the issues presented and the expansive record, both parties submitted post-hearing briefs based on the evidence presented at the suppression hearing. Defendant contends that because Detective Doughty did not scrupulously honor his request for counsel made during their first interaction, "the subsequent questioning of [Defendant] was improper and his ensuing statements are inadmissible."[1] The State argues that Defendant's second and third interactions "were both initiated by the [D]efendant, of his own free will and that each included a knowing, intelligent and voluntary waiver by the [D]efendant of his *Miranda* rights that was sufficient to overcome his initial request for counsel and satisfy the two-part test set forth in *Edwards v. Arizona*."[2]

4. With respect to Defendant's Fifth Amendment right to counsel, the United States Supreme Court held in *Edwards v. Arizona* that an accused person in custody who has "expressed his desire to deal with police only through counsel is not subject to further interrogation by authorities until counsel has been made available to him, unless the accused himself initiates further communication with the police."[3] This rule was further clarified in *Smith v. Illinois*.[4] In *Smith*, the United States Supreme Court articulated:

> First, courts must determine whether the accused actually invoked his right to counsel. Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police and (b) knowingly and intelligently waived the right he had invoked.[5]

[1] Def.'s Post-Hr'g Br. at 6.
[2] State's Post-Hr'g Br. at 14.
[3] 451 U.S. 477 (1981).
[4] 490 U.S. 91 (1984).
[5] *Id.* at 95.

The Delaware Supreme Court summarized this principle in *Wainwright v. State* and stated, "If the police initiate further questioning after an accused requests the presence of counsel, resulting statements are excludable apart from the issue of waiver."[6]

5. The record in this case shows that Defendant invoked his right to counsel. The following is an excerpt from Defendant's first interaction with Detective Doughty after Defendant was read his *Miranda* rights:

> Defendant: Yes so you said that a lawyer can be present as we're talking?
>
> Detective Doughty: Yea mm hmm (inflection in the affirmative). Yup.
>
> Defendant: See the only thing about it is that I won't need a lawyer if I'm not being charged.
>
> Detective Doughty: Ok.
>
> Defendant: That's what I'm trying to figure out if I'm being charged with anything then I would like to have a lawyer here; but if I'm not being charged then I'll answer any questions that I need to answer.
>
> * * *
>
> Detective Doughty: Ok, here it is man, we can sit here and talk for hours, but until we get past this (points to miranda sheet) it's kind of a moot point. Ok.
>
> Defendant: What you mean, [M]iranda?
>
> Detective Doughty: Yeah. Miranda. Yup. That's what kind of makes it one the record for us. Ok and it's not there to scare you it's just something we gotta do.
>
> Defendant: For my safety I would rather have a lawyer here if I'm not being held or anything.

[6] 504 A.2d 1096 (Del. 1986).

* * *

Detective Doughty: Mark, I'd love to hear about it but I can't until we get past that (points to [M]iranda sheet).

Defendant: If you can get me a lawyer then get me a lawyer so then I can explain what's up.[7]

Shortly after this exchange, Detective Gray knocked on the door of the interview room and advised Detective Doughty to end the interview because Defendant had invoked his right to counsel. At that time, Defendant's first interaction with the police concluded.

6. Once it is clear that that an accused has invoked his right to counsel, the State "must establish that the accused initiated further contact with the police, and validly waived his previously invoked right to counsel."[8] Furthermore, "[t]he first part of the *Edwards* test—the initiation of further communication by the accused—must be considered before proceeding to decide whether there was a valid waiver."[9]

7. At the suppression hearing, both sides offered different versions as to what precipitated Defendant's second interaction with the police. Detective Doughty testified that after the first interaction with Defendant ended, he and Detective Gray were walking Defendant back to the detention area when Defendant stated he wished to talk further. According to Detective Doughty, he walked Defendant back to the interview room, read him his *Miranda* rights, and Defendant knowingly and intelligently waived his rights. By contrast, Defendant testified that after his first interaction with Detective Doughty, he was returned to the detention center. After waiting approximately forty-five minutes, Defendant testified that he was brought back to the interview room, and Sergeant Windish was already inside. According to Defendant,

[7] State's Exhibit #5 at 1-3.
[8] *Wainwright v. State*, 504 A.2d 1096, 1100.
[9] *Id.*

Sergeant Windish did not read him his *Miranda* rights and proceeded to question him about a piece of paper found in Defendant's wallet. Although it was standard procedure to record interviews, Detective Doughty testified that he forgot to record the second interaction with Defendant.

8. "Whether the defendant initiated further communication such that he waived his rights is based on the totality of the circumstances."[10] Based on the totality of the circumstances, the Court finds the State has not met its burden of showing that Defendant initiated further communication with the police before his second interaction with Detective Doughty. Preliminarily, Detective Gray could not corroborate Detective Doughty's testimony that Defendant requested to speak with Detective Doughty when they were in the hallway. Defendant had just asserted his right to counsel and such an immediate change of direction would not be reasonably expected. Also, Detective Doughty's initial report not only failed to mention that Defendant invoked his right to counsel but also that the second interaction was not recorded. Therefore, Defendant's Motion to Suppress the statements he made during his second interaction with Detective Doughty and Sergeant Windish is **GRANTED.**

9. Like the first interaction, the third interaction between Defendant and Detective Doughty was recorded. Before the Court considers whether Defendant voluntarily waived his *Miranda* rights, the Court must determine if Defendant initiated further communication. The following is an excerpt from Defendant's third interaction with Detective Doughty:

Detective Doughty: Alright Mark, you asked to speak with me right?

Defendant: Yes.

After carefully reviewing the record, the Court is satisfied that Defendant initiated further communication with Detective Doughty.

[10] *State v. Bezarez*, 2008 WL 4174756, at *1 (Del. Super. Sept. 11, 2008) (internal quotations omitted).

10. The two-part test to determine whether a suspect has effectively waived his or her Fifth Amendment *Miranda* rights, set forth in *Moran v. Burbine,* is stated as follows:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.[11]

"When the admission of a custodial interrogation statement is challenged, the burden is on the State to demonstrate by a preponderance of the evidence that the suspect's *Miranda* rights have been waived."[12] The following is an excerpt from Defendant's third interaction with Detective Doughty:

> Detective Doughty: Alright because we were apart from each other for a while I'm going to go through your [M]iranda rights again ok?
>
> Defendant: Alright.

At that time, Detective Doughty read the standard *Miranda* warnings to Defendant.

> Detective Doughty: Do you understand each of those rights I explained to you?
>
> Defendant: Yes sir.
>
> Detective Doughty: Having those rights in mind do you wish to talk to me now?
>
> Defendant: Yes.[13]

Applying the *Moran* framework to the third interaction, the Court finds that Defendant knowingly, intelligently, and voluntarily waived the right to counsel he had previously invoked. Defendant voluntarily shared information without coercion or circumstances that overcame his

[11] *Moran v. Burbine*, 475 U.S. 412, 421 (1986).
[12] *Hubbard v. State*, 16 A.3d 912, 917 (Del. 2011).
[13] State's Exhibit #5 at 4-5.

freedom of choice. Defendant was not handcuffed during the third interaction. Detective Doughty treated Defendant in a professional manner. The overall detention only lasted a little over four hours. Defendant was afforded the opportunity for a cigarette break and to make a phone call. Also, Defendant made statements during his third interaction with Detective Doughty that suggest a motive for his willingness to talk. After Detective Doughty asked Defendant if he understood his rights, Defendant responded, "Yes. Umm also there's several other individuals out there that he had talked about robbing the bank."[14] If the Defendant believed—which it appears he did—that his codefendant was "talking," it is logical that he may revoke his previously asserted right to counsel so he could tell his side of the story. Furthermore, Defendant is familiar with the criminal justice system; he has been in this situation before. At all times, Defendant was alert, responsive, and exhibited no impairment. No promises or inducements were made nor was the use of physical force or threats. Lastly, "[t]he best evidence of a valid *Miranda* waiver is a videotaped recording."[15] In light of this, the Court is satisfied the State demonstrated Defendant's *Miranda* waiver by a preponderance of the evidence.

10. Defendant also raises a Sixth Amendment right to counsel claim. Specifically, he argues that since his statements "were made while he was under arrest, in custody, and during his initial confrontation with the police, Sixth Amendment waiver standards, which are more stringent than the standards applicable to Fifth Amendment right-to-counsel waivers, govern here."[16] Defendant relies on *Lovett v. State*[17] in support of his argument; however, this reliance is misguided. The Sixth Amendment right to counsel entitles a defendant to legal representation "at or after the time that adversary judicial proceedings have been initiated against him. This

[14] States Exhibit #5 at 5.
[15] *Hubbard*, 16 A.3d at 918.
[16] Def.'s Post-Hr'g Br. at 7.
[17] 516 A.2d 455 (Del. 1986).

principle applies whether proceedings are commenced by way of a formal charge, preliminary hearing, indictment, information, or arraignment."[18] In *Lovett*, the defendant's Sixth Amendment right to counsel attached when he was indicted.[19] At the time of Defendant's interactions with the police, no formal charges had been filed. Contrary to Defendant's assertion, custodial interrogation—without more—does not activate the Sixth Amendment right to counsel.[20] Nor does the mentioning of the charges transform an interrogation into a formal adversary judicial proceeding.[21] Accordingly, Defendant's Motion to Suppress the statements he made during his third interaction with Detective Doughty is **DENIED.**

Considering the foregoing, Defendant's Motion to Suppress is **GRANTED** with respect to statements made during his second interaction with the police and **DENIED** with respect to statements made during his third interaction with the police. Any references in the third interaction to the earlier interactions must be redacted.

IT IS SO ORDERED.

/s/ Richard F. Stokes

The Honorable Richard F. Stokes

cc: Prothonotary
Casey L. Ewart, Esquire
Gary F. Traynor, Esquire

[18] *Id.* at 462 (citing *Deputy v. State*, 500 A.2d 581, 589-90 (Del. 1985)).
[19] *Id.*
[20] For cases stating the proposition that the Sixth Amendment right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant, see generally, 33 A.L.R. Fed 2d 1.
[21] *See Rothgery v. Gillepsie County, Tex.*, 554 U.S. 191, 194 (2008) (holding that the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer, at which a defendant is told of the formal accusation against him or her and restrictions are imposed on the defendant's liberty).