

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHARLES H. UPSHUR,)
) No. 225, 2003
 Defendant Below,)
 Appellant,) Court Below: Superior Court
 v.) of the State of Delaware in
) and for Sussex County
)
 STATE OF DELAWARE,) Cr. ID. No. 02070094701
)
 Plaintiff Below,)
 Appellee.)

Submitted: February 24, 2004
Decided: March 15, 2004

Before **HOLLAND, BERGER** and **STEELE**, Justices.

ORDER

This 15th day of March 2004, upon consideration of the briefs of the parties, it appears to the Court as follows:

1. A Sussex County Superior Court jury convicted Charles H. Upshur of Trafficking in Cocaine, Possession with Intent to Deliver Cocaine, Possession of Marijuana, Conspiracy in the Second Degree, three counts of Possession of Drug Paraphernalia, and three counts of Endangering the Welfare of a Child.

2. Upshur now appeals contending that the trial judge erroneously denied his pretrial motion to suppress statements made during a police interrogation. For the reasons set forth below, we conclude that the trial judge did not err and we **AFFIRM** the judgment of the Superior Court.

3. Upshur claims that the police interrogation violated his Fifth Amendment Right to Counsel. Specifically, he claims that the police continued to interrogate him after he asked for an attorney. The relevant portion of an audiotape admitted at the suppression hearing is as follows:

- D (Defendant): I'd like an attorney.
O (Officer): Okay.
D: The only reason I want an attorney is some of these charges.
O: Well, I'm gonna... (Then there is an inaudible answer)
O: Well, I have to explain the charges. I haven't even had a chance to tell you. What I'm saying is, if you want an attorney, we'll stop right now, I'll get up and I'll leave, and we're done. I can't question you any further. If you want to answer some of the questions and not answer one, that's entirely up to you.
D: Can I ask you a question?
O: Well, if you need to, I can answer you.
D: Regardless of what I do, will I still have to be locked up today? That's what I need to know.
O: You'll be charged today.
D: Will I have to be locked up because I'm concerned about my kids and everything else?
O: I understand that. Let me explain something to you one more time, Mr. Upshur. You're asking me to answer questions, and we're gonna go back and forth. What I'm trying to say is, I'm more than willing to do that. Like your rights say, you don't have to answer all the questions. You can stop during the questions, but you're saying that you want a lawyer.
D: Well, I'll answer your questions.

4. The trial judge ruled that Upshur reinitiated interrogation by the police officer when he stated, "Well, I'll answer your questions."¹ Further, although not

¹ See *Wainwright v. State*, 504 A.2d 1096 (Del. 1986) (Holding that a court may admit responses to further interrogation only after a court determines that the accused has actually

disputed on appeal, the trial judge ruled that Upshur knowingly, intelligently, and voluntarily waived his *Miranda* rights.

5. We review a trial judge's ruling on a motion to suppress *de novo* because it involves mixed questions of law and fact.²

6. After Upshur invoked his Fifth Amendment right to counsel he reinitiated the interrogation following a non-coercive intervening conversation about the nature of the charges and his custodial status.³ The routine statements made during the intervening conversation were not designed to make Upshur second-guess his decision to invoke his right to counsel.⁴ Further, the intervening conversation did not constitute continued interrogation or its functional equivalent.⁵ The police did not impermissibly continue to interrogate Upshur in

invoked his right to counsel, but later (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked).

² *Banther v. State*, 823 A.2d 467, 486 (Del. 2003).

³ The trial court properly determined that the police officer merely responded to Upshur's questions.

⁴ See *Wyrick v. Fields*, 459 U.S. 42, 46 (1982) (holding that before a suspect in custody can be subjected to further interrogation after he requests an attorney there must be a showing that the "suspect himself initiates dialogue with the authorities."). See also *Edwards v Arizona*, 451 U.S., at 485. (1981) (establishing that where an accused, after invoking his right to counsel, initiates subsequent dialogue with the authorities, the question whether there was a valid waiver of the right to counsel as to any interrogation that occurs during such dialogue is controlled by the "totality of the circumstances," including the fact that the accused initiated the dialogue.) See also *Wainwright v. State*, 504 A.2d 1096 (citing *Smith v. Illinois*, 469 U.S. 91 (1984)) ("The purpose of the *Edwards* rule is to prevent police badgering or overreaching in an effort to wear down the accused despite his request for counsel.").

⁵ See *Rhode Island v. Innis*, 446 U.S. 291, 302 (1980), (holding that "interrogation" under *Miranda* need not amount to actual questioning. The "functional equivalent" of questioning was defined to include "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.").

violation of his Fifth amendment right to counsel. The trial judge properly ruled that Upshur's statements were admissible at his jury trial.

NOW, THEREFORE IT IS HEREBY ORDERED that the judgment of the Superior Court is hereby AFFIRMED.

/s/ Myron T. Steele
Justice