IN THE COURT OF APPEALS OF IOWA

No. 8-466 / 07-1707
Filed November 13, 2008

STATE OF IOWA,
Plaintiff-Appellant,

vs.

LUIS FERNANDO ORTIZ,
Defendant-Appellee.

Appeal from the Iowa District Court for Woodbury County, Gary E. Wenell, Judge.

The State was granted discretionary review of the district court's grant of the defendant's motion to suppress statements he made during an interview with law enforcement officers. **REVERSED AND REMANDED.**

Thomas J. Miller, Attorney General, Jean C. Pettinger and Mary Tabor, Assistant Attorneys General, Patrick Jennings, County Attorney, and Jill Pitsenbarger, Assistant County Attorney, for appellant.

Shelley Goff, Ruston, Louisana, for appellee.

Heard by Vogel, P.J., and Mahan and Miller, JJ.

MILLER, J.

The State was granted discretionary review of the district court's grant of the defendant's motion to suppress statements he made during an interview with law enforcement officers. We reverse and remand.

I. BACKGROUND FACTS AND PROCEEDINGS.

In July 2006, the Sioux City Police Department received a report of improper touching between the defendant, Luis Fernando Ortiz, and a young girl. Because Ortiz's address was unknown, Detective Ryan Bertrand asked the child's mother to arrange for Ortiz to come to her home, allegedly for the purpose of performing additional home remodeling and repairs. On the date Ortiz was set to arrive at her house, Detective Bertrand and Special Agent Ricardo Rocha of the federal Immigration and Customs Enforcement Agency went to the location in an unmarked car to attempt to speak with Ortiz. Bertrand testified at the suppression hearing he had been aware Ortiz spoke little or no English and so had asked Rocha to a come with him to interpret. He further stated he believed he had attempted to contact a translation service, as well as a Sioux City police officer who spoke Spanish, prior to contacting Rocha, but neither was available to accompany him to the house.

Ortiz arrived at the house at approximately 10:20 a.m. and Bertrand spoke to him outside near the street. Bertrand identified himself as a police officer, asked Ortiz his name, and asked him for identification, which Ortiz presented to Bertrand. Detective Bertrand then asked Ortiz if he would be willing to accompany him to the police station for an interview. Special Agent Rocha, who

is fluent in Spanish, interpreted the conversation between Bertrand and Ortiz because Ortiz demonstrated he spoke only a small amount of English. Ortiz agreed without any reluctance to go with Bertrand, saying, "Okay, no problem." Rocha testified he told Ortiz in Spanish that he only needed to go if he was willing, he was not under arrest, and to his knowledge Ortiz never was told he was under arrest. Both officers were in plain clothes, they did not draw their weapons, although it is clear from the record that Bertrand's weapon and badge were visible during the discussion with Ortiz, and they did not handcuff Ortiz.

Agent Rocha was unable to accompany Detective Bertrand to the police station and was dropped off at his office. Rocha testified that while he was in the car there was no conversation regarding the alleged crime or the investigation. Bertrand agreed there was no conversation with Ortiz regarding the investigation or Ortiz's alleged criminal activities during the car ride to the station. Bertrand did testify he knows a little Spanish and Ortiz knew a little English and thus they may have engaged in some small talk during the car ride.

At the police station, Bertrand took Ortiz into the building through either the locked back door or the unlocked front door that is open to the public, he is uncertain which. He then took Ortiz up to a second-floor interview room by way of an elevator that requires a key card for access to go up unless the elevator arrives at the first floor at the time needed. However, no keys or key cards are required to go down on the elevator or to exit the building.

Ortiz was taken to the interview room, which is equipped for audio and video recording, and was given a can of soda. The entirety of the interview was recorded and received into evidence at the suppression hearing.

At the start of the interview Detective Bertrand gave Ortiz a "Waiver of Rights" form written in Spanish and asked him to read it. Officer Salvador Sanchez of the Sioux City Police Department, who is fluent in Spanish, became involved in order to interpret during the interview. When Sanchez first entered the interview room he asked Ortiz if he could read "them," clearly referring to the waiver of rights form Bertrand had given him. Ortiz responded in the affirmative. Sanchez then left the room for a brief period. While he was gone Ortiz read and signed the waiver of rights form. After he signed, Bertrand asked Ortiz "Do you understand your rights?" Ortiz replied, "But what are my rights?" Based on Ortiz's question, Bertrand waited for Sanchez to return to further assist by translating. When Sanchez returned he asked Ortiz, "Do you understand what you read?" Ortiz responded, "He is telling me the rights, but what are they, what are they?"

Officer Sanchez then began to read the waiver of rights form to Ortiz in Spanish. However, he stopped after only reading a short portion and instead read Ortiz the *Miranda* advisory card used by the federal Drug Enforcement Administration. Sanchez is deputized with that agency and works on a joint drug task force. Sanchez testified he used the advisory card because he is more comfortable with the way the federal form sets forth the *Miranda* warnings. Officer Sanchez then asked Ortiz if he understood these rights and wanted to

answer questions. Ortiz responded that he understood and was willing to answer questions.

During the interview that followed, Detective Bertrand and Ortiz conversed in a relaxed manner for about forty-five minutes to an hour. At several points Ortiz answered Bertrand's questions before Sanchez had a chance to interpret the question into Spanish. The officers made no promises or threats to Ortiz. Ortiz was allowed to keep his cell phone, and in fact received a call and conversed on his phone while alone in the interview room. Later in the interview Ortiz stated that the victim touched his penis once or twice for about a second or two, and once he initiated the touching by grabbing her hand and placing it on his penis. The interview concluded with Ortiz writing a statement regarding the events, the officers taking a saliva swab from Ortiz, and Ortiz's subsequent arrest.

On August 4, 2006, the State charged Ortiz, by trial information, with lascivious acts with a child, in violation of Iowa Code section 709.8(2) (2005). He was arraigned on August 16, 2006. After a number of continuances, trial was set for May 16, 2007. On the morning of May 16 Ortiz expressed a desire to dismiss his court-appointed counsel and hire his own attorney. The district court allowed him to do so and continued trial until June 26, 2007. On June 21, 2007, ten months after entering his written arraignment, Ortiz filed a motion to suppress the statements he made during the interview with law enforcement officers. Following a hearing, the district court granted Ortiz's motion to suppress. In granting the motion the court concluded there was good cause for the

untimeliness of the motion, that Ortiz was in custody from the time he entered the police car, and that "This record is deficient and fails to show by a preponderance of the evidence that the defendant knowing and intelligently waived his *Miranda* rights."

The State filed an application for discretionary review of the district court's suppression ruling and our supreme court granted the State's application. The State contends on appeal that the district court erred in suppressing the statements Ortiz made during the interview because (1) good cause did not exist for Ortiz's untimely filing of his motion to suppress, (2) Ortiz was not in custody at the time of the interview, (3) Ortiz knowingly, voluntarily, and intelligently waived his *Miranda* rights, and (4) Ortiz's statements were made voluntarily.

Assuming, without so deciding, that the district court did not abuse its discretion in determining there was good cause for Ortiz's untimely filing of his motion to suppress, *see State v. Ball*, 600 N.W.2d 602, 604-05 (Iowa 1999) (finding review of district court's good cause determination with regard to timeliness of motion to suppress is for abuse of discretion), we turn directly to the substantive issues of the State's appeal.

II. SCOPE AND STANDARDS OF REVIEW.

We review de novo the ultimate conclusion reached by the district court in ruling on a motion to suppress. *State v. Heminover*, 619 N.W.2d 353, 356 (Iowa 2000), *abrogated on other grounds by State v. Turner,* 630 N.W.2d 601 (Iowa 2001). In doing so, we independently evaluate the totality of the circumstances shown by the entire record. *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001).

"We give deference to the district court's fact findings due to its opportunity to assess the credibility of witnesses, but we are not bound by those findings." *Id*. The State preserved error by resisting Ortiz's motion to suppress, obtaining a ruling on the issues presented, and seeking and securing discretionary review of that ruling.

III. MERITS.

The Fifth Amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." It is well settled that this provision governs state as well as federal criminal proceedings. *Malloy v. Hogan*, 378 U.S. 1, 8, 84 S. Ct. 1489, 1493, 12 L. Ed. 2d 653, 659 (1964).

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), established the principle that

> if the police take a suspect into custody and then ask him questions without informing him [that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed], his responses cannot be introduced into evidence to establish his guilt.

Berkemer v. McCarty, 468 U.S. 420, 429, 104 S. Ct. 3138, 3144, 82 L. Ed. 2d 317, 328 (1984). However, the requirements of *Miranda* are not triggered unless there is both custody and interrogation. *Turner*, 630 N.W.2d at 607.

From the record it is clear that interrogation occurred. Assuming, without so deciding, that Ortiz was in custody and thus the requirements of *Miranda* were triggered, we turn to the issue of the validity of Ortiz's waiver of his *Miranda* rights. The district court ultimately concluded: "[T]he State has failed to make the showing that the defendant intelligently and knowingly waived his *Miranda* rights

and that he made the statements voluntarily." For the reasons set forth below, we respectfully disagree.

In *Miranda*, the Court held that a suspect's waiver of his or her Fifth Amendment privilege against self-incrimination is valid only if it is made voluntarily, knowingly, and intelligently. *Miranda*, 384 U.S. at 444, 86 S. Ct. at 1612, 16 L. Ed. 2d at 706-07. "In assessing the validity of a defendant's *Miranda* waiver, the State bears the burden of proving these factors by a preponderance of the evidence." *State v. Hajtic*, 724 N.W.2d 449, 453 (Iowa 2006). The inquiry into whether a waiver is valid "has two distinct dimensions." *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 1141, 89 L. Ed. 2d 410, 420-21 (1986).

> 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 both of 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.

Id. (quoting *Fare v. Michael C*., 442 U.S. 707, 725, 99 S. Ct. 2560, 2572, 61 L. Ed. 2d 197, 212 (1979)).

> Courts use an objective standard to determine whether a defendant's waiver is voluntary, knowing, and intelligent. Factors bearing on voluntariness include the defendant's age, experience, prior record, level of education, and intelligence; the length of time the defendant is detained or interrogated; whether physical punishment was used, including deprivation of food or sleep; the defendant's ability to understand the questions; the defendant's physical and emotional condition and his reaction to the interrogation; whether any deceit or improper promises were used in gaining the admissions; and any mental weakness the defendant may possess. Obviously, a defendant's alienage and unfamiliarity with the American legal system should be included among these

> objective factors, given that the ultimate determination of whether a waiver is knowing, intelligent, and voluntary must rest on the totality of the circumstances.

Hajtic, 724 N.W.2d at 453-54 (citations omitted). We are aided in our de novo review of this case by a complete videotape and audiotape of the *Miranda* proceedings and the interrogation that followed. See *id.* at 454 (noting helpfulness of electronically recorded custodial interrogations to the reviewing court in assessing the validity of a *Miranda* waiver).

Having examined these factors in the record before us, we conclude Ortiz's waiver was knowing, intelligent, and voluntary. At the time of the interview Ortiz was forty-three years of age. The conversation between Ortiz and Bertrand was relaxed and lasted only forty-five minutes to an hour, not a lengthy time. Ortiz did not show any signs of intoxication or any type of mental weakness. The officers did not employ any intimidation, physical punishment, deceit, threats, or promises to induce Ortiz to waive his rights. They in fact provided him with a beverage and allowed him to keep and use his cell phone.

Of the factors set forth above, the one of most concern here is whether Ortiz was able to understand his rights as given to him and the questions posed to him by Detective Bertrand due to a partial but not complete language barrier. It appears the written waiver of rights form that was initially given to Ortiz to sign was an inadequate explanation of his rights. However, Officer Sanchez read an additional advisory to Ortiz in Spanish from a DEA form Sanchez had used and with which he was comfortable. The DEA form advises, and thus Ortiz was advised by Sanchez in Spanish, that he had the right to remain silent, anything

he said could be used against him in court, he had the right to consult with an attorney before answering[1] any questions and have the attorney present during the questioning, and that if he could not pay for the services of an attorney one would be appointed for him. We conclude this additional advisory adequately conveyed to Ortiz all of the *Miranda* rights. After Sanchez read Ortiz his rights from this additional advisory, Ortiz acknowledged that he understood those rights and agreed to answer questions.

We further find that Ortiz clearly demonstrated an ability to understand the questions asked by Detective Bertrand. First, Officer Sanchez was present for the entire interview and translated the questions into Spanish. Second, Ortiz asked Sanchez about his rights, showing his ability and willingness to ask questions if he did not understand something. Finally, Ortiz did state to Bertrand that he knew some English and demonstrated that he did so by answering some of Bertrand's questions before they were translated into Spanish and at various times speaking in English.

Accordingly, we conclude Ortiz's rights under *Miranda* were adequately conveyed to him and that after being so advised he knowingly, intelligently, and voluntarily waived those rights. We believe he had a full awareness of both the nature of the rights being waived as well as the consequences of such waiver, and his relinquishment of these rights was a product of a free and deliberate

[1] There does appear to have been one error in the rights form or its translation by Officer Sanchez. As read by Office Sanchez, Ortiz was informed in part that he had the right to consult with an attorney "before *asking* questions," rather than being informed he had the right to consult with an attorney before *being asked* questions, or *answering* questions. We do not believe this small error was of such a significance as to affect Ortiz's understanding of his rights, as the record otherwise appears to show he in fact understood them.

choice. *See Moran*, 475 U.S. at 421, 106 S. Ct. at 1141, 89 L. Ed. 2d at 420-21. The district court erred in determining Ortiz's waiver was not valid.

Ortiz further contends his inculpatory statements to the police were not admissible because they were not made voluntarily.

The Fifth Amendment protection against self incrimination applies not just to criminal trials, but also allows a person "not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Minnesota v. Murphy,* 465 U.S. 420, 426, 104 S. Ct. 1136, 1141, 79 L. Ed. 2d 409, 418 (1984) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S. Ct. 316, 322, 38 L. Ed. 2d 274, 281 (1973)). On this issue the State must show by a preponderance of the evidence that the statements were voluntarily made. *State v. Payton*, 481 N.W.2d 325, 328 (Iowa 1992). We employ a totality-of-circumstances test in determining voluntariness: it must appear the statements were the product of "an essentially free and unconstrained choice, made by the defendant whose will was not overborne or whose capacity for self-determination was not critically impaired." *Id*. "The question of voluntariness is a matter of sorting out the impetus for the inculpatory statement. To be admissible the statement must freely emanate from the mind of the speaker." *State v. Hodges*, 326 N.W.2d 345, 348 (Iowa 1982).

> Many factors bear on the issue of voluntariness. These include the defendant's knowledge and waiver of his *Miranda* rights; the defendant's age, experience, prior record, level of education and intelligence; the length of time defendant is detained and interrogated; whether physical punishment was used, including the deprivation of food or sleep; defendant's ability to understand the

> questions; the defendant's physical and emotional condition and his reaction to the interrogation; whether any deceit or improper promises were used in gaining the admissions; [and] any mental weakness the defendant may possess.

Id. at 348 (internal citations omitted).

For all of the reasons set forth above, including our determination Ortiz was adequately advised of his rights under *Miranda* and his waiver of such rights was valid, we conclude the record shows that Ortiz's inculpatory statements were made of an essentially free and unconstrained choice. Ortiz's will was not overborne and his capacity for self-determination was not critically impaired when making these statements. Thus, we conclude the State has demonstrated by a preponderance of the evidence that Ortiz's inculpatory statements were voluntary. The district court erred in determining Ortiz did not make the challenged statements voluntarily.

IV. CONCLUSION.

Based on our de novo review, and for the reasons set forth above, we conclude the district court erred in suppressing the statements Ortiz made during the interview with law enforcement officers. We conclude Ortiz was adequately advised of his rights under *Miranda* and he knowingly, voluntarily, and intelligently waived those rights. We further conclude Ortiz's inculpatory statements to law enforcement were voluntary. We therefore reverse the district court's suppression order and remand the case for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.