

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

NO. 2013 KA 0911

STATE OF LOUISIANA

VERSUS

VIRNELL IVAN JONES

Judgment Rendered: FEB 28 2014

On Appeal from the
22nd Judicial District Court,
In and for the Parish of St. Tammany,
State of Louisiana
No. 528256, "J"

The Honorable William J. Knight, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

RHP by [Signature]
[Signature]
JMG by [Signature]

DRAKE, J.,

Defendant, Virnell Ivan Jones, was charged by bill of information with simple burglary of an inhabited dwelling, a violation of La. R.S. 14:62.2. He pled not guilty and filed a motion to suppress his confession. After a hearing, the trial court denied defendant's motion to suppress. Defendant subsequently withdrew his earlier plea of not guilty and entered a plea of guilty as charged, reserving his right to appeal the trial court's denial of his motion to suppress under **State v. Crosby**, 338 So.2d 584 (La. 1976). The trial court sentenced defendant to serve ten years at hard labor, with the first year to be served without benefit of parole, probation, or suspension of sentence. Defendant now appeals, alleging only one assignment of error related to his motion to suppress his confession. For the following reasons, we affirm defendant's conviction and sentence.

FACTS

Because defendant pled guilty, the facts of his offense were not developed at trial. Defendant and the state stipulated at the time of his plea that the open file discovery, the pretrial discussions, and the testimony at his motion to suppress hearing established facts sufficient to support defendant's guilty plea.

From the testimony and evidence presented at the motion to suppress hearing, it appears that several days prior to August 20, 2012, defendant ran out of gas in front of the victim's house on East U.S. Highway 190 in Slidell.¹ The victim, who was familiar with defendant, went to her shed to retrieve a gas can to assist him. At that time, defendant noticed some lawn equipment inside the shed. On August 20, 2012, defendant entered the shed and removed a lawnmower and leaf blower. He later pawned both pieces of lawn equipment. Sometime thereafter, defendant reclaimed the leaf blower from the pawn shop and sold it to a third party.

¹ The victim's full name is not mentioned. However, she was identified during defendant's interviews as a "Ms. Jackson."

MOTION TO SUPPRESS

In his sole assignment of error, defendant argues that the trial court erred in denying his motion to suppress his confession. Specifically, defendant contends that his recorded confessions should have been suppressed because the interrogating officer failed to honor his request for an attorney.

A defendant adversely affected may move to suppress any evidence from use at the trial on the merits on the ground that it was unconstitutionally obtained. La. Code Crim. P. art. 703(A). The state bears the burden of proving that an accused who makes an inculpatory statement or confession while in custodial interrogation was first advised of his constitutional rights and made an intelligent waiver of those rights. See La. Code Crim. P. art. 703(D); **State v. Davis**, 94-2332 (La. App. 1st Cir. 12/15/95), 666 So.2d 400, 406, *writ denied*, 96-0127 (La. 4/19/96), 671 So.2d 925. In **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the Supreme Court promulgated a set of safeguards to protect the therein delineated constitutional rights of persons subject to custodial police interrogation. The warnings must inform the person in custody that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed. **Miranda**, 384 U.S. at 444, 86 S.Ct. at 1612. In addition to showing that the **Miranda** requirements were met, in order to introduce into evidence a defendant's statement or confession, the state must affirmatively show that the statement or confession was free and voluntary, and not made under the influence of fear, duress, intimidation, menaces, threats, inducements, or promises. La. R.S. 15:451.

As set forth in **Miranda**, if the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. **Miranda**, 384 U.S. at 473-74, 86 S.Ct. at 1627. When a

defendant exercises his privilege against self-incrimination, the validity of any subsequent waiver depends upon whether police have "scrupulously honored" his right to remain silent. **State v. Taylor**, 01-1638 (La. 1/14/03), 838 So.2d 729, 739, *cert. denied*, 540 U.S. 1103, 124 S.Ct. 1036, 157 L.Ed.2d 886 (2004) (citing **Michigan v. Mosley**, 423 U.S. 96, 104, 96 S.Ct. 321, 326, 46 L.Ed.2d 313 (1975)). The critical safeguard in the right to remain silent is the person's right to cut off questioning. Through the exercise of his option to terminate questioning, he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. **State v. Hebert**, 08-0003 (La. App. 1st Cir. 5/2/08), 991 So.2d 40, 45, *writs denied*, 08-1526 and 08-1687 (La. 4/13/09), 5 So.3d 157 and 161.

Whether the police have scrupulously honored a defendant's right to cut off questioning is a determination made on a case-by-case basis under the totality of the circumstances. See Mosley, 423 U.S. at 101-06, 96 S.Ct. at 325-27; **State v. Prosper**, 08-0839 (La. 5/14/08), 982 So.2d 764, 765. Factors going into the assessment include: (1) who initiates further questioning, although, significantly, the police are not barred from reinitiating contact; (2) whether there has been a substantial time delay between the original request and subsequent interrogation; (3) whether **Miranda** warnings are given before subsequent questioning; (4) whether signed **Miranda** waivers are obtained; (5) whether the later interrogation is directed at a crime that had not been the subject of the earlier questioning; and (6) whether or not pressures were asserted on the accused by the police between the time he invoked his right and the subsequent interrogation. **Hebert**, 991 So.2d at 46; **State v. Brooks**, 505 So.2d 714, 722 (La.), *cert. denied*, 484 U.S. 947, 108 S.Ct. 337, 98 L.Ed.2d 363 (1987).

The only witness to testify at defendant's motion to suppress hearing was Detective Charles Smith of the St. Tammany Parish Sheriff's Office. Detective

Smith had apparently developed defendant as a suspect in the instant matter, and when he located defendant at an area pawn shop on October 30, 2012, he asked defendant to accompany him to the police station for questioning. Defendant complied without incident. At the police station, Detective Smith advised defendant of his **Miranda** rights, and defendant signed a waiver of rights form at 1:27 p.m. After defendant signed this form, he and Detective Smith engaged in an unrecorded "preliminary interview." During this preliminary interview, defendant told Detective Smith that a man named "Jeffery" had asked defendant to drive him to the victim's house so that he could retrieve some of his own lawn equipment from the victim's shed.

Following the preliminary interview, Detective Smith attempted to engage defendant in a recorded interview ("first interview"). This first interview, conducted at 2:00 p.m., began in the following manner:

Detective Smith: Mr. Jones, if you would, in front of me here, I have a statement of **Miranda** rights and a waiver of rights form that I presented to you earlier that you signed. Is that in fact your signature in both spots?

Defendant: Yeah, but what does this really mean though, when I signed this?

Detective Smith: Basically, basically, this, this is a list of all of your rights. This is saying that you wish to talk to me. OK?

Defendant: Well, I should have never signed that one there then. The waiver of rights, you know. Because I rather for you to speak to my attorney.

Detective Smith: OK, so what you're telling me now is, you don't wish to give me a statement?

Defendant: I mean, the statement that I could tell you is that I had no...

Detective Smith: OK, listen, listen, listen. I'm asking you a simple question. We've already been through this for thirty minutes.

Defendant: Hmph

Detective Smith: Now, when I turn the recorder on, all of the sudden you don't want to give me a statement. Is that what you're trying to

tell me? Is this what you want me to present in court – that you tell me everything that happens, but when I put a recorder on, now, now it's changed?

Defendant: No, because you trying to get me to do...

Detective Smith: No, I'm trying to get you to tell me the same truth that you told me ten minutes ago...

Defendant: Like I, Like I explained to you, officer. You know what I'm saying to you?

That exchange lasted approximately two minutes. For approximately the next eight minutes, defendant retold his version of the events, with Detective Smith interjecting only occasionally to attempt to make defendant clarify certain details. When Detective Smith caught defendant in an inconsistency, defendant ended the interview, saying, "Man, you can turn your tape off and put me in jail But I'm going, I'm going to let my attorney know – speak to my attorney – as soon as I get wherever you gonna bring me at." Upon hearing this statement, Detective Smith immediately ended the first interview without any further questioning.

After concluding his first interview with defendant, Detective Smith left the interrogation room to prepare a probable cause affidavit so that he could transport defendant to the parish jail. After doing so, he reentered the interrogation room to inform defendant that he was being arrested and that he was about to be transported. According to Detective Smith, defendant advised that he wished to make a further statement. Detective Smith briefly exited the interrogation room, placed his recorder in his pocket, and reentered the interrogation room to begin another recorded interview ("second interview") with defendant. That second interview began:

Detective Smith: Before we talk to you, here's the problem I have. Earlier, when I was taking a statement from you, you said you wanted an attorney. Now that, that changes, but that has to be up to you.

[Defendant inaudible.]

Detective Smith: But what I'm saying is, are we good with that? Are you willing to talk to me about this?

[Defendant inaudible.]

Detective Smith: And you, you have I mean...I advised you of your rights. You don't have any problem with that?

[Defendant inaudible.]

Detective Smith clarified at the motion to suppress hearing that defendant did in fact waive his earlier request for an attorney and said that he wished to submit himself to questioning. From that point, Detective Smith and another detective proceeded with their questioning of defendant, and defendant freely answered all of their questions. In doing so, defendant admitted to stealing the lawn equipment. Unlike defendant's first interview, he at no point made any reference to an attorney or vocalized any request to stop questioning during the second interview.

The state must specifically rebut a defendant's specific allegations of police misconduct in eliciting a confession. **State v. Thomas**, 461 So.2d 1253, 1256 (La. App. 1st Cir. 1984), *writ denied*, 464 So.2d 1375 (La. 1985). Whether a showing of voluntariness has been made is analyzed on a case-by-case basis with regard to the facts and circumstances of each case. **State v. Benoit**, 440 So.2d 129, 131 (La. 1983). The trial court must consider the totality of the circumstances in deciding whether a confession is admissible, and the testimony of the interviewing officer alone may be sufficient to prove a defendant's statements were freely and voluntarily given. *See State v. Hernandez*, 432 So.2d 350, 352-53 (La. App. 1st Cir. 1983); **State v. Maten**, 04-1718 (La. App. 1st Cir. 3/24/05), 899 So.2d 711, 721, *writ denied*, 05-1570 (La. 1/27/06), 922 So.2d 544.

When a trial court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion, i.e., unless such ruling is not supported by the evidence. *See State v. Green*, 94-0887 (La. 5/22/95), 655 So.2d 272, 280-81. However, a trial

court's legal findings are subject to a de novo standard of review. See **State v. Hunt**, 09-1589 (La. 12/1/09), 25 So.3d 746, 751.

In denying defendant's motion to suppress, the trial court found that defendant's initial statement in his first interview was not an invocation of his right to counsel that was asserted in such a fashion as to require a halting of the interrogation. The trial court noted specifically that defendant initiated the continued conversation between himself and Detective Smith, characterizing it as "diarrhea of the mouth," wherein he largely spoke without any additional prompting. The trial court also highlighted the fact that Detective Smith immediately stopped the first interview when the defendant unequivocally stated his desire to cease the interrogation. With respect to the second interview, the trial court found a clear colloquy representing defendant's desire to waive his right to counsel and to continue speaking with Detective Smith.

After a careful review of the record and the audio recordings of defendant's first and second interviews, we find that the trial court did not err or abuse its discretion in denying defendant's motion to suppress. As the trial court stated, defendant's initial statement regarding a lawyer in his first interview was not an unambiguous invocation of his right to counsel that required an immediate halting of his interrogation. If a suspect makes a reference to an attorney that is ambiguous or equivocal, such that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, the officer is not required to cease questioning. See **Davis v. U.S.**, 512 U.S. 452, 459, 114 S.Ct. 2350, 2355, 129 L.Ed.2d 362 (1994). As phrased, defendant's statement that he never should have signed the waiver of rights form appears on its face to be more of an expression of regret than it does a clear invocation of his right to counsel. A reasonable officer could have arrived at the same conclusion. When Detective Smith attempted to get defendant to clarify

whether he was invoking his right to counsel, defendant simply stormed into a version of events calculated to exculpate himself. Once defendant unequivocally told Detective Smith to end the interview, Detective Smith complied.

With respect to the second interview, Detective Smith did not enter the interrogation room with the initial purpose of resuming his questioning of defendant. In fact, he had already prepared the affidavit of probable cause for defendant's arrest, and he was merely informing defendant that he would be transported elsewhere. However, defendant apparently expressed his desire to resume talking. At that point, Detective Smith took care to get defendant to waive his previous exercise of his right to counsel. Only after defendant did so and reiterated his desire to continue talking did the second interview take place. Considering the above facts and circumstances, we agree with the trial court's finding that defendant's motion to suppress his confession should have been denied.

This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.