Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **3rd day of April, 2020** are as follows:

PER CURIAM:

2019-KK-01332 STATE OF LOUISIANA VS. TRE KING (Parish of Orleans Criminal)

We granted the application to determine whether the warning that "you have the right to an attorney, and if you can't afford one, one will be appointed to you" - without further qualification - is a sufficient advisement of the right to counsel under Miranda. We note that the federal circuits are split on this question, and that the United States Supreme Court has thus far not weighed in. After reviewing the jurisprudence, we find a general advisement like that given in this case suffices, and that a statement need not be suppressed because of the failure to qualify the warning with an additional advisement that the right to counsel exists both before and during questioning. Accordingly, we reverse the rulings of the lower courts, deny defendant's motion to exclude his statements, and remand to the district court for further proceedings.

REVERSED AND REMANDED.

Retired Judge James H. Boddie, Jr., appointed Justice ad hoc, sitting for Justice Marcus R. Clark.

Johnson, C.J., dissents and assigns reasons.
Genovese, J., dissents and assigns reasons.

04/03/20

SUPREME COURT OF LOUISIANA

No. 2019-KK-01332

STATE OF LOUISIANA

versus

TRE KING

ON SUPERVISORY WRIT TO THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS

PER CURIAM:*

Officers placed defendant Tre King in handcuffs during a traffic stop after they smelled marijuana in the vehicle and determined that he had outstanding warrants for his arrest. They advised him of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Specifically, the officer advised defendant, "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney and if you can't afford one, one will be appointed to you." Defendant indicated that he understood his rights. A search of the vehicle revealed marijuana in the passenger side door and a gun beneath a jacket. Defendant claimed that the marijuana, jacket, and gun all belonged to him. Defendant was arrested and charged with possession of a firearm by a person convicted of certain felonies, La.R.S. 14:95.1, and illegal carrying of a weapon while in possession of a controlled dangerous substance, La.R.S. 14:95(E).

After initially denying defendant's motion to suppress his statements, the district court ultimately granted defendant's motion to exclude his statements from trial. The State sought supervisory review from the court of appeal, which denied

* Retired Judge James Boddie Jr., appointed Justice ad hoc, sitting for Justice Marcus R. Clark.

writs because it found, consistent with prior rulings in that circuit,[1] that the *Miranda* warning was deficient because it did not advise defendant of the temporal aspects of his right to an attorney, i.e. that he had the right to an attorney both *before and during* any questioning. *State v. King*, 19-0680 (La. Ct. App. 4 Cir. 8/16/19) (unpub'd).

We granted the application to determine whether the warning that "you have the right to an attorney, and if you can't afford one, one will be appointed to you"—without further qualification—is a sufficient advisement of the right to counsel under *Miranda*. We note that the federal circuits are split on this question, and that the United States Supreme Court has thus far not weighed in. After reviewing the jurisprudence, we find a general advisement like that given in this case suffices, and that a statement need not be suppressed because of the failure to qualify the warning with an additional advisement that the right to counsel exists both before and during questioning. Accordingly, we reverse the rulings of the lower courts, deny defendant's motion to exclude his statements, and remand to the district court for further proceedings.

Article I, § 13 of the Louisiana Constitution incorporates the prophylactic rules of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), which require that a prosecutor, before using an accused's confession at trial, establish that the accused was informed of his or her rights against self-incrimination and to have an attorney present at any interrogation; that the accused fully understood the consequences of waiving those rights; and that the accused in

[1] *State v. Harris*, 11-0941 (La. App. 4 Cir. 8/2/12), 98 So.3d 903; *State v. Williams*, 13-1300 (La. App. 4 Cir. 6/4/14), 144 So.3d 56.

fact voluntarily waived those rights without coercion.[2] In *Miranda v. Arizona*, the Supreme Court outlined procedural safeguards that must be satisfied before a custodial interrogation takes place:

> Prior to any questioning, the person must be warned 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. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

Miranda, 384 U.S. at 444–45, 86 S.Ct. at 1612. A verbatim recitation of the warnings as set out in *Miranda* is not required, and the Supreme Court has "never insisted that *Miranda* warnings be given in the exact form described in that decision." *Duckworth v. Eagan*, 492 U.S. 195, 202, 109 S.Ct. 2875, 2880, 106 L.Ed.2d 166 (1989). "The inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by *Miranda*." *Id.*, 492 U.S. at 203, 109 S.Ct. at 2880.

The federal Fifth Circuit has required a more specific advisement of the right to counsel. In *Atwell v. United States*, 398 F.2d 507, 510 (5th Cir. 1968), the Fifth Circuit held that, to give *Miranda* a "meaningful application" in the atmosphere of custodial interrogation, the police must explain to the suspect that he is "entitled to

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[2] La. Const. art. 1, § 13 provides in part:

> When any person has been arrested or detained in connection with the investigation or commission of any offense, he shall be advised fully of the reason for his arrest or detention, his right to remain silent, his right against self incrimination, his right to the assistance of counsel and, if indigent, his right to court appointed counsel.

have the benefit of advice of counsel before, and counsel present during, the interrogation." *Id.* In determining that a warning that "you have the right to an attorney at anytime" was inadequate, the court explained:

> 'At anytime,' in its usually accepted connotation in ordinary everyday affairs, can be said to embrace the full span of any course of events. But dealing with the Constitutional rights of an accused at the preliminary stage of the in-custody interrogation process is not commonplaced. 'Anytime' could be interpreted by an accused, in an atmosphere of pressure from the glare of the law enforcer and his authority, to refer to an impending trial or some time or event other than the moment the advice was given and the interrogation following.
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> . . .
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> The advice that the accused was entitled to consult with an attorney, retained or appointed, 'at anytime' does not comply with *Miranda*'s directive '. . . that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation . . . .'

Id. In contrast, the Second, Fourth, Seventh, and Eighth Circuits under various circumstances have held that warnings are adequate that do not explicitly advise that the right to counsel includes having counsel present before and during the interrogation. *See United States v. Vanterpool*, 394 F.2d 697, 698–99 (2d Cir. 1968); *United States v. Frankson*, 83 F.3d 79, 81–82 (4th Cir. 1996); *see also United States v. Adams*, 484 F.2d 357, 361–62 (7th Cir. 1973) (finding warning adequate but stating that warnings provided to suspects on the street are not expected to be as precise as those given at the police station); *United States v. Caldwell*, 954 F.2d 496, 500–04 (8th Cir. 1992) (finding no plain error when warning omitted right to counsel during interrogation).

Decisions of the lower federal courts are not binding upon state courts. *See, e.g., State v. Selman*, 300 So.2d 467, 471 (La. 1974), *judgment vacated in part by Selman v. Louisiana*, 428 U.S. 906, 96 S.Ct. 3214, 49 L.Ed.2d 1212 (1976). While

we recognize that federal circuit court decisions can be of persuasive assistance, and while we are geographically within a portion of the territory in which the Fifth Circuit also acts, decisions of that circuit are no more persuasive than any other—particularly when the federal circuits are in conflict. *See Johnson v. Cain*, Civil Action No. 07-1235 (E.D. La. 2008), 2008 WL 11449312 *10 ("While the Louisiana courts acknowledge that federal decisions are persuasive in this area, the precise issue that must be resolved in this case falls smack in the middle of a confusing federal circuit split. Reference to federal Fifth Circuit law in particular is not much more helpful . . . . Thus there is no reason to believe Fifth Circuit case law is any more persuasive than federal opinions generally."). After reviewing the federal jurisprudence, we are persuaded by the reasoning of the circuits that have approved of unqualified warnings, like that given in the present case, because we find those rulings to be more consistent with the United States Supreme Court's own *Miranda* jurisprudence.

At least one commentator has attributed the circuit split to the different formulations of the advisement of the right to counsel that appear within *Miranda* itself. *See* Adam S. Bazelon, *Adding (or Reaffirming) A Temporal Element to the Miranda Warning "You Have the Right to an Attorney"*, 90 Marq. L. Rev. 1009, 1020 (2007). Thus, the court initially formulates the *Miranda* warnings as requiring only the following: "Prior to any questioning, the person must be warned 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." *Miranda*, 384 U.S. at 444, 86 S.Ct. at 1612. Subsequently, however, the court elaborates upon the *Miranda* warnings,

Accordingly we hold that an individual held for interrogation must be

> clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation.

Miranda, 384 U.S. at 471, 86 S.Ct. at 1626.

That latter language notwithstanding, the United States Supreme Court subsequently stated that it has never required that *Miranda* warnings be given exactly as they appear in the *Miranda* decision. *See Duckworth v. Eagan*, cited above. In addition, that court has subsequently focused its analysis on whether anything in the warnings given "'suggested any limitation on the right to the presence of appointed counsel different from the clearly conveyed rights to a lawyer in general, including the right to a lawyer before [the subject] is questioned, … while [he is] being questioned, and all during the questioning.'" *Florida v. Powell*, 559 U.S. 50, 62 130 S.Ct. 1195, 1204 (2010), quoting *California v. Prysock*, 453 U.S. 355, 360–61, 101 S. Ct. 2806, 69 L.Ed. 2d 696 (1981).[3] The

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[3] While we are aware that the denial of certiorari lacks precedential value, we note that the United States Supreme Court has also, thus far, denied certiorari in cases with similar warnings to the one given here.

In *United States v. Warren*, 642 F.3d 182 (3rd Cir. 2011), *cert. denied*, 564 US. 1012 (2011), the issue was whether the lack of any express reference to the right to counsel during interrogation, coupled with the lack of a "catch all" statement like that used in *Powell*, undermined the validity of the warning. *See id.* at 186. The police officer testified at the suppression hearing that he gave the following warning:

> I told [Warren] that he had the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford to hire an attorney, one will be appointed to represent you without charge before any questioning if you wish. Should you decide to talk to me, you can stop the questioning any time.

Id. at 184. Warren argued that the warning could be reasonably interpreted only as limiting his right to counsel. Like in *Powell*, the court read the officer's words as indicating merely that Warren's right to pro bono counsel became effective before he answered any questions. *Id*. at 186. "[The warning] does not restrict the right to counsel, but rather addresses when the right to appointed counsel is triggered." *Id*. (citing *Duckworth*, 492 U.S. at 204, 109 S.Ct. 2875). Taken as a whole, the court found, the warning reasonably conveyed the substance of the rights

unelaborated upon warning given in the present case, which lacked any temporal aspect at all, implied no limitation on the right to counsel. We find it reasonably conveyed to defendant his rights as required by *Miranda*, particularly under the circumstances here in which it was given during the exigencies of a traffic stop rather than in the relative comfort of a police station interview room.

Accordingly, for the reasons above, we reverse the rulings of the courts below, deny defendant's motion to exclude his statements from trial, and remand to the district court for further proceedings.

REVERSED AND REMANDED

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expressed in *Miranda*. 642 F. 3d at 187.

Similarly, in *United States v. Caldwell*, 954 F.2d 496 (8th Cir.), *cert. denied*, 506 U.S. 819, 113 S.Ct. 65, 121 L.Ed. 2d 32 (1992), the Eighth Circuit upheld the instruction—"[y]ou have a right for an attorney"—when it was attacked for being too general. The court explained that "[w]hen the only claimed deficiency is that of generality … we cannot hold the warning … amounts to plain error." *Id.*, 954 F.2d at 502.

04/03/20

SUPREME COURT OF LOUISIANA

No. 2019-KK-01332

STATE OF LOUISIANA

VS.

TRE KING

ON SUPERVISORY WRIT TO THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS

Johnson, C.J., dissenting.

It has been more than 50 years since *Miranda* was decided. One would expect that, by now, every police officer in America could recite the *Miranda* warning. The Fifth Amendment privilege against forced self-incrimination requires that, 'prior to any questioning, [a suspect in custody] must be warned 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." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (emphasis added). The problem in this case is that the warning given by police simply did not convey to Mr. King that he had the right to the presence of an attorney at the time he was being questioned. Therefore, I would find it insufficient under *Miranda*. This court's opinion is inconsistent with the Supreme Court's clear instructions in *Miranda* and further erodes Louisiana's protection of the state and federal constitutional privilege against self-incrimination.

As the majority observes, *Miranda* does not require police intending to interrogate a suspect to use any particular form or order of words to inform them of their right to have counsel present before and during questioning. *Duckworth v. Eagan*, 492 U.S. 195, 202 (1989). However, *Miranda* does hold that, as "an absolute prerequisite to interrogation," "an individual held for interrogation must be clearly

informed that he has the right to consult with a lawyer *and to have the lawyer with him during interrogation*." *Miranda*, 384 U.S. at 471 (emphasis added). When the Supreme Court has approved of differently-worded warnings since its *Miranda* decision, they were all more specific than the one given here. In *Florida v. Powell*, 559 U.S. 50 (2010), the warning included this statement: "You have the right to talk to a lawyer *before answering any of our questions*. If you cannot afford to hire a lawyer, one will be appointed for you without cost and *before any questioning*." *Id.* at 54 (emphasis added). In *California v. Prysock*, 453 U.S. 355 (1981), the warning included this statement: "You have the *right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning*." *Id.* at. 356 (emphasis added). The majority implies that the Supreme Court's denial of certiorari in *United States v. Warren*, 642 F.3d 182 (3rd Cir. 2011), *cert. denied*, 564 U.S. 1012 (2011) endorses the warning given in that case. But even that warning was more specific than the one given to Mr. King. In *Warren*, the officer warned that an attorney "will be appointed to represent you without charge *before any questioning* if you wish." *Id.* at 184 (emphasis added).

Miranda enforces the right to counsel not as a right in itself, but to "protect an accused's Fifth Amendment privilege in the face of interrogation." *Miranda*, 384 U.S. at 471. It is this specific right which *Miranda* requires be overtly conveyed to a suspect. Therefore, a suspect needs basic temporal information to understand that the right to counsel applies before and during questioning, and not at some future point. The officer's words here simply did not convey to Mr. King that he had the right to a lawyer present at the time he was being questioned. The order (and certainty) of the officer's words made the statement about the "right to counsel" even more ambiguous. The officer informed Mr. King that anything he said "would" be used against him in a court of law and then told Mr. King that he had the right to an attorney. A reasonable person in Mr. King's position—being questioned in

handcuffs—would not necessarily understand from a general reference to "the right to an attorney" that it included a present, as well as future, right to consult an attorney and to have that attorney present during police questioning.

Of course, a reasonable person with knowledge of the right to counsel may *infer* that. But knowledge of the "[c]onstitutional rights of an accused at the preliminary stage of the in-custody interrogation process is not common placed," and unless told the right to counsel is immediate, it could be "interpreted by an accused, in an atmosphere of pressure from the glare of the law enforcer and his authority, to refer to an impending trial or some time or event other than the moment the advice was given and the interrogation following." *Atwell v. United States*, 398 F.2d 507, 510 (5th Cir. 1968). Because we do not assume people can infer their constitutional rights, *Miranda* provides specific, clear-cut warnings.

In this case, a reasonable person could understand the order and proximity of the officer's two statements as giving a future right to an attorney in a court of law. And—if that person was one of thousands of New Orleans citizens familiar with the city's criminal courts—they could reasonably understand that right to be temporally elusive, and unconnected to any immediate protection of their Fifth Amendment privilege against self-incrimination.

This defendant should have been informed that he had the right to speak to a lawyer *before* he answered a single question from police. But nothing the police officer said gave defendant this information. This court recently affirmed Louisiana's commitment to upholding the state and federal constitutional guarantee of counsel to protect a defendant's Fifth Amendment privilege against self-incrimination. In *State v. Alexander*, 2019-00645 (La. 1/29/20), we reaffirmed our 1982 holding that, "the constitutional and statutory policy of our state favors a person having the assistance of counsel during in-custody interrogation . . . ." *Id.* at 11 (citing *State v. Matthews*, 408 So.2d 1274, 1277 (La. 1982)). We reiterated that "[n]o

system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, his rights." *Alexander*, 2019-00645 at 12 (quoting *Matthews*, 408 So.2d at 1278. (La. 1982)).

Because we should not fear that citizens will exercise their rights, we should make those rights clear to them. I believe the Fifth Amendment requires it, yet the majority abandons its protections with its ruling today.

04/03/20

SUPREME COURT OF LOUISIANA

No. 2019-KK-01332

STATE OF LOUISIANA

versus

TRE KING

ON SUPERVISORY WRIT TO THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS

GENOVESE, J., dissents and assigns reasons.

I respectfully dissent and would affirm the ruling of the trial court granting defendant's motion to exclude his statements from trial. In this case, I find that the officer failed to provide defendant with the full and complete advisement of his right to counsel required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d (1966). In this case, it is uncontroverted that defendant was not apprised of his right to an attorney *before and during questioning*. As stated by the United States Supreme Court in *Miranda*:

> The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process.
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> **Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right** to consult with a lawyer and **to have the lawyer with him <u>during interrogation</u> under the system for protecting the privilege we delineate today.** As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, **<u>this warning is an absolute prerequisite to interrogation.</u>**

384 U.S. at 469–71, 86 S.Ct. at 1625–26 (emphasis added).

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When an interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his rights, including his right to have an attorney present during his interrogation. *Id.*, 384 U.S. at 475, 86 S.Ct. at 1628. As there is no evidence in this case that defendant was adequately apprised of his right to an attorney *before and during questioning*, the State cannot meet this burden. Thus, I would affirm the judgment of the trial court.