STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

KADEEM DENNIS WHITE,

Defendant-Appellee.

FOR PUBLICATION
November 15, 2011

No. 303228
Jackson Circuit Court
LC No. 10-005949-FC

Before: SHAPIRO, P.J., and WILDER and MURRAY, JJ.

SHAPIRO, P.J. (*dissenting*).

Because the detective's actions constituted express questioning, or at the very least, the functional equivalent thereof, I would affirm the trial court's suppression of defendant's statements. Therefore, I respectfully dissent.

After defendant was arrested he was transported to the police station and placed in an interrogation room.[1] After several minutes, a detective entered the room. He advised defendant of his *Miranda*[2] rights and defendant unequivocally asserted his right to remain silent. Defendant declined to sign the acknowledgement and waiver form, stating: "No thank you sir. I'm not going to sign it. . . . I don't even want to speak." Rather than terminating the interview at that time, the interviewing detective then said:

"Okay then. The only thing I can tell you Kadeem, is good luck man. Okay. Don't take this personal between me and you. I think I may have had one contact with you on the street. Okay. I've got to do my job. And I understand you've got to do what you've got to do to protect your best interests. Okay. The only think I can tell you is this, and I'm not asking you questions, I'm just telling you. I hope that the gun is in a place where nobody can get a hold of it and nobody can get hurt by it, okay?."

[1] The interrogation room was equipped with a video camera. The recording of the interaction between the investigating officer and defendant is part of the record and was reviewed by the trial court and by this Court.

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

These remarks were followed by a pause of several seconds during which the detective remained at the table, opposite defendant. The officer then said "all right?" and at that point, defendant made an inculpatory statement.

The parties do not dispute the facts and as noted, the events were recorded.[3] The facts being uncontested, the matter is purely one of law, i.e., the application of a constitutional standard to uncontested facts and so our review is de novo. *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001).[4]

The dispositive case in this matter is *Rhode Island v Innis*, 446 US 291; 100 S Ct 1682; 64 L Ed 2d 297 (1980). In *Innis*, three police officers were transporting the defendant to a police station following his arrest. While en route, one of the officers commented to another officer that "there's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves," and that it would be "too bad" if a girl picked up the gun used in the armed robbery of which the defendant was suspected and killed herself. *Id*. at 294-295. A second officer also expressed his concern about the location of the weapon. *Id*. at 295. The defendant, having been previously advised of his *Miranda* rights on three separate occasions, "interrupted the conversation, stating that the officers should turn the car around so he could show them where the gun was located." He then directed the officers to the gun, which he had hidden in a field near the location of his arrest. *Id*. at 294-295.

The United States Supreme Court concluded that the defendant was not subjected to interrogation, within the meaning of *Miranda*, by virtue of the conversation between the officers. *Id*. at 302-303. Such is not the case here. While the detective's comments to defendant were similar in content to comments made during the conversation between the officers in *Innis*, unlike in that case, here they were expressly and unequivocally directed to defendant. Further, in *Innis*, the Court found that "[t]he record in no way suggest[ed] that the officers' remarks were *designed* to elicit a response" from the defendant. *Id.* at 303 n 9. By contrast here, the detective expressly invited a response from defendant, by speaking directly to him, looking directly at him,

[3] While both we and the trial court have reviewed the videotape, a transcript was also provided by defense counsel and no objection to the transcript was made by the prosecution.

[4] The majority appears to apply differing standards of review to the trial court's conclusions whether express questioning occurred and whether the functional equivalence of questioning occurred. On the issue of express questioning the majority opines that the standard of review of that conclusion is clearly erroneous, while it applies a de novo standard on the issue of the functional equivalence of questioning. What we are to review is the trial court's conclusion that the officer violated the defendant's explicitly asserted right to remain silent and the facts are wholly undisputed. Thus, there is no basis to apply different standards of review as to the trial court's conclusions regarding what constitutes explicit questioning as opposed to what constitutes the functional equivalence of questioning.

by adding the question "okay?" at the end of his comment regarding the location of the gun and then pausing for several seconds as if waiting for a response. The detective's preface that he was "not asking questions" is belied by the fact that he asked defendant a question. To permit officers to ask direct questions of defendants so long as they preface it with "I'm not asking you any questions, but . . ." is to make a mockery of *Miranda*. The detective and the defendant were the only persons present in the room at the time of the interview; the detective looked directly at, and spoke directly to, defendant; the detective concluded his remarks regarding the location of the gun with the question "okay?" These undisputed facts all support the conclusion that the detective's remarks constituted express questioning.[5]

Moreover, even if the detective's remarks could, somehow, be construed as not asking defendant a question, the detective's remarks certainly constituted the functional equivalent of express questioning. In *Innis*, the Supreme Court instructed that the intent of the police is relevant to the extent that "it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response." *Innis*, 446 US at 301 n 7. Indeed, the conclusion that the defendant had not been interrogated in *Innis* was based, in part, on the policy decision that "the police surely cannot be held accountable for the unforeseeable results of their words or actions." *Id.* at 301-302. Rather, "the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." *Id*. at 302.

The content of the detective's comments, including the word of inquisition added at the end, followed by the pause of several seconds, together with the fact that the comments were made directly to defendant and in the presence only of defendant, demonstrate that the detective knew or should have known that his comments and actions were reasonably likely to elicit a response from defendant. Indeed, it is difficult to conceive of another reason and notably, no other reason has been proffered by the prosecution. "A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim." *Nat'l Waterworks, Inc v Int'l Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007).

[5] The majority notes that in two cases we have held it permissible, after the right to remain silent has been asserted, for an officer to "provide a defendant with information about the charges against him, about inclupatory evidence located by the police or about statements made by witnesses which allow defendant to make an informed and intelligent reassessment of his decision whether to speak to the police." (Majority slip op, p6). However, the officer's comments in this case did not provide defendant with information about the charges against him or about inclupatory evidence the police possessed or about witness statements. The officer's comments did not offer any new information that could provide a basis for an intelligent reassessment of the defendant's decision to remain silent. Moreover, unlike in this case, in *Kowalski* it was only after more than an hour had passed and defendant had spoken to a friend on the phone that the police gave defendant an opportunity to "reassess" whether he wanted to speak with the officers.

The detective engaged in either explicit questioning or the functional equivalence of questioning and the trial court properly suppressed the defendant's statements. I would affirm.

/s/Douglas B. Shapiro