

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DAMIEN DRAPER,

Defendant-Appellee.

UNPUBLISHED

February 7, 1997

No. 188113

Oakland Circuit Court

LC No. 95-137977

Before: Young, P.J., and O'Connell and W.J. Nykamp,* JJ.

PER CURIAM.

Defendant is charged with first-degree felony murder, MCL 750.316; MSA 28.548 and first-degree child abuse, MCL 750.136b(2); MSA 28.331(2)(2) stemming from the death of a five year-old child who was under his care. During interrogation, defendant made incriminating statements to the police. Defendant moved to have the statements suppressed claiming that the police had violated his *Miranda*¹ rights by continuing to question defendant after he asserted his right to remain silent. After holding a *Walker*² hearing, the trial court suppressed defendant's statement, holding that defendant had unequivocally asserted his right to remain silent, and that the police, by continuing to question defendant, violated *Miranda's* procedural safeguards. Plaintiff now appeals by leave granted. We reverse.

The prosecution first claims that defendant's initial statement regarding his right to remain silent is ambiguous, and consequently, the police lawfully sought clarification of the statement. We agree.

This Court must give deference to the trial court's findings at a suppression hearing. *People v Cheatham*, 453 Mich 1, 29; 551 NW2d 355 (1996). Even when engaging in de novo review of the entire record, this Court will not disturb a trial court's factual findings regarding a voluntary, knowing and intelligent waiver of *Miranda* rights unless that ruling is found to be clearly erroneous. *Id.*, 30; *People v White*, 401 Mich 482; 257 NW2d 912 (1977). A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake has been made. *People v Kvam*, 160 Mich App 189, 196, 408 NW2d 71 (1987).

* Circuit judge, sitting on the Court of Appeals by assignment.

After reviewing the record, including the actual tape recording of the police questioning which is challenged here, this Court is persuaded that the trial court clearly erred in suppressing defendant's statement.

The Fifth Amendment to the United States Constitution prohibits the government from compelling a defendant to testify against himself. US Const, Am V. This protection has been applied to the States through the application of the Fourteenth Amendment. US Const, Am IV; *Malloy v Hogan*, 378 US 1; 84 S Ct 1489; 12 L Ed 2d 653 (1964). In addition, the Michigan Constitution affords defendants a corresponding state constitutional right to be free from compelled self-incrimination. Mich Const, art 1, § 17. Before admitting a confession in its case-in-chief, the state bears the burden of proving that the police properly informed the defendant of his *Miranda* rights and obtained a voluntary, knowing and intelligent waiver. *Colorado v Connely*, 479 US 157; 107 S Ct 515; 93 L Ed 2d 473 (1986); *Cheatham*, *supra*, 453 Mich 13.

Once the police inform a suspect of his rights, if the suspect indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. *Michigan v Mosely*, 423 US 96, 100-101; 96 S Ct 321; 46 L Ed 2d 313 (1975); *People v Catey*, 135 Mich App 714, 726; 356 NW2d 241 (1984). Also, if a defendant's exercise of his right to remain silent is *unequivocal*, the police are prohibited from initiating any new interrogation. *Catey*, *supra*, 135 Mich App 725. However, if a suspect *equivocally* invokes his right to remain silent, the police are permitted to continue questioning to seek clarification. *Id.*, 726.

When the police initiated interrogation of defendant, Sergeant Jehle advised defendant of his *Miranda* rights, and defendant stated that he understood them. Sergeant Jehle then inquired:

Jehle: Do you want to talk to a lawyer before any questions?

Draper: If I do, do I have to stay in here before they -- till one be appointed [sic] to me?

Jehle: Ah -- I -- I really don't know. It's a yes or no question.

Draper: Um -- do I --

Jehle: Like I say, what I want -- what I want out of this --

Draper: I don't think I need one.

Jehle: Okay, so are you answering that question no?

Draper: Ah -- no for now.

Jehle: Okay. Next question then is, will you waive your right to remain silent and answer any questions we may ask you?

Draper: No.

Jehle: No, you won't waive the right to remain silent?

Draper: Oh, oh, what you mean [sic] by that?

Jehle: Waive means to give up that right.

Draper: I don't want to give up that right.

Jehle: Like I told you, you have the right to remain silent. You don't have to talk with me. When I say waive it, it means --

Draper: That I have to answer all the questions?

Jehle: No, no, no. It means, will you talk to me?

Draper: Yeah, I'll talk to you.

Jehle: Okay.

The prosecution argues that defendant's preliminary answer of "no" regarding his right to remain silent was in response to a compound question, and, therefore, ambiguity existed as to whether defendant wished to waive his right to remain silent or whether he did not wish to answer all questions posed by the officer. We believe that the defendant's confusion concerning whether he wished to invoke his right to remain silent was apparent given the entire exchange.

Our construction of the above-referenced transcribed exchange is bolstered by our review of the actual taped recording of the interrogation wherein it is apparent that the interrogating officer took pains to apprise the defendant of his rights and to explain them to the defendant. The officer's tone is conversational and courteous. In context, it is clear that the defendant was uncertain what the term "waive" meant and whether he was being asked to waive his right to remain silent *and* whether he was being required to answer all of the officer's questions. There is no hint of any effort on the officer's part to overcome the defendant's unambiguously expressed intentions regarding the right to remain silent. As soon as the points of confusion were clarified, defendant unambiguously agreed to talk to the interrogating officer.

Accordingly, we reverse and remand for further proceedings in this matter. We do not retain jurisdiction.

/s/ Robert P. Young, Jr.

/s/ Peter D. O'Connell

/s/ Wesley J. Nykamp

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

² *People v Walker(On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).