STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TONY LEYRAUD,

Defendant-Appellant.

UNPUBLISHED
February 24, 1998

No. 198880
Oakland Circuit Court
LC No. 96-144178 FH

Before: Michael J. Kelly, P.J., and Fitzgerald and M.G. Harrison*, JJ.

MEMORANDUM.

Following a jury trial, defendant was convicted of possession with intent to deliver more than 50 but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). On this appeal of right, defendant contends that the trial court erred in ruling that his incriminating statement, made during custodial interrogation by the police, was admissible. We affirm; this appeal is being decided without oral argument pursuant to MCR 7.214(E).

At a *Walker*[1] hearing, defendant testified that at the outset of the interrogation, he was hooded, which made his breathing difficult, and handcuffed, and that the atmosphere was highly coercive; this testimony was contradicted by the two police officers involved, who testified how they made every effort to place defendant at his ease, offering him a soft drink and making certain that he was comfortable. The trial court concluded at the end of the hearing that, based on the credibility of the conflicting testimony, it saw no evidence of any violation of defendant's constitutional rights. In terms of findings of historical fact, this credibility finding, made by the judge who saw and heard the witnesses testify before him, is subject to appellate review under the clearly erroneous standard. *Thompson v Keohane*, 516 US ___; 116 S Ct 457; 133 L Ed 2d 383 (1995). Hence, defendant's claims about being hooded, uncomfortable, and coerced must be rejected.

Defendant further claims, however, that he was subjected to interrogation without the benefit of *Miranda*[2], warnings and, after making an initial incriminating statement, he was *Mirandized* and made the statement which was admitted into evidence at his trial. Although the prosecutor contends that

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

defendant made no incriminating statement before being given his *Miranda* warnings, the trial court's findings are insufficiently explicit on this point, and for present purposes defendant's version will be accepted.

Assuming, therefore, that defendant was interrogated for thirty minutes to an hour, made an incriminating statement, was given his *Miranda* warnings, and then repeated that incriminating statement or made another incriminating statement, only the latter being admitted into evidence at trial, no violation of defendant's Fifth Amendment rights has been established. The first statement, of course, would be inadmissible as the product of custodial interrogation without *Miranda* warnings. However, since that statement was not the product of coercive or otherwise improper police interrogation tactics, but rather voluntary in the constitutional sense, see *New York v Quarles*, 467 US 649, 654; 104 S Ct 2626; 81 L Ed 2d 550 (1983); *Michigan v Tucker*, 417 US 433, 444; 94 S Ct 2357; 41 L Ed 2d 182 (1974), defendant's subsequent statement, after receiving *Miranda* warnings, was properly deemed admissible, for the reasons elucidated in detail in *Oregon v Elstad*, 470 US 298, 311-318; 105 S Ct 1285; 84 L Ed 2d 222 (1985).

Affirmed.

/s/ Michael J. Kelly
/s/ E. Thomas Fitzgerald
/s/ Michael G. Harrison

[1] *People v Walker (On Reh)*, 374 Mich 331; 132 NW2d 87 (1965).

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