

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SPENCER LAMONT LEWIS,

Defendant-Appellee.

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UNPUBLISHED

December 12, 2006

No. 270318

Isabella Circuit Court

LC Nos. 05-001745-FC;

05-001746-FC

Before: Meter, P.J., Whitbeck, C.J., and Davis, J.

PER CURIAM.

Defendant was charged in LC No. 05-001745-FC with second-degree murder, MCL 750.317, involuntary manslaughter, MCL 750.321, and assault with intent to do great bodily harm less than murder, MCL 750.84. He was charged in LC No. 05-001746-FC with perjury, MCL 750.422. The trial court granted defendant's motion to suppress his statement to the police and dismissed both cases. The prosecution appeals as of right. We reverse.

The charges arose from the 2004 beating death of Demarcus Graham and the police investigation of that matter. On August 23, 2005, defendant was scheduled to have a polygraph test. At the time, the police believed he was a witness to the incident. He was not a suspect. During a pretest interview, he admitted striking Graham on the legs with his foot no more than two or three times. He completed a written statement to that effect. The polygraph was then cancelled and defendant was subsequently arrested and charged.

Defendant filed a motion to suppress his statement and argued that his state and federal constitutional rights against self-incrimination and his right to counsel were violated. Following an evidentiary hearing, the trial court held that defendant "invoked the right against self-incrimination when his attorney stipulated with Detective Tuma that he, his attorney, must approve the questions before the polygraph test. . . . The failure to do so violated Defendant's right to remain silent." The court determined that defendant's waiver of his Fifth Amendment rights was not knowing and intelligent because he understood that he would not be asked any questions that had not been approved by his attorney. The trial court rejected defendant's claim that the right to counsel had attached at the time he gave his statement.

"This Court reviews a trial court's factual findings in a suppression hearing for clear error. But the '[a]pplication of constitutional standards by the trial court is not entitled to the

same deference as factual findings.’” *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005) (citations omitted).

The prosecution contends that defendant’s privilege against self-incrimination was not violated because he was not in custody when he was questioned.

The Fifth Amendment and Const 1963, art 1, § 17, provide that no person shall be compelled to be a witness against himself in a criminal trial. *People v Schollaert*, 194 Mich App 158, 164; 486 NW2d 312 (1992). The prohibition “not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also privileges him not to answer official questions put to him in any other proceedings, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.” *Minnesota v Murphy*, 465 US 420, 426; 104 S Ct 1136; 79 L Ed 2d 409 (1984) (citation and internal quotation marks omitted). In general, the privilege is not self-executing. *Id.*, p 434; *People v Watkins*, 468 Mich 233, 240; 661 NW2d 553 (2003). If an individual “desires the protection of the privilege, he must claim it or he will not be considered to have been ‘compelled’ within the meaning of the [Fifth] Amendment.” *Murphy, supra*, p 427 (citation and internal quotation marks omitted). The Supreme Court has abandoned the use of the term “waiver” in reference to witnesses who fail to claim the privilege, and the Court has “made clear that an individual may lose the benefit of the privilege without making a knowing and intelligent waiver.” *Id.*, pp 427-428.

In the present case, defendant did not claim the privilege at any time before he gave his statement. The trial court appears to have determined that regardless whether defendant was in custody, he “invoked the right against self-incrimination when his attorney stipulated with Detective Tuma that he, his attorney, must approve the questions before the polygraph test.” But such an agreement between defense counsel and the police is not an invocation of the privilege against self-incrimination.

One exception to the general rule that the privilege is not self-executing concerns confessions that are obtained while a person is in police custody. The custodial setting is thought to be so coercive that it may undermine the individual’s ability to resist and compel him to speak. *Murphy, supra*, pp 429-430. As the Court explained in *Murphy, supra*, p 430, “the *Miranda*”<sup>1</sup> Court required exclusion of incriminating statements obtained during custodial interrogation unless the suspect fails to claim the Fifth Amendment privilege after being suitably warned of his right to remain silent and of the consequences of his failure to assert it.” “[T]his extraordinary safeguard does not apply outside the context of the inherently coercive custodial interrogations for which it was designed.” *Id.* (citation and internal quotation marks omitted). The determination whether a person was in custody at the time of interrogation requires an examination of the totality of the circumstances, and the critical question is whether the individual could have reasonably believed that he was not free to leave. *People v Mayes (After Remand)*, 202 Mich App 181, 190; 508 NW2d 161 (1993).

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

In the present case, defendant was not under arrest and was not a suspect. He voluntarily rode with the police to the site of the examination. He was not handcuffed. The polygraph waiver form indicated that he had the right to stop the examination at any time. The polygraph examiner showed defendant that the doors were open and that he could leave at any time. Defendant could not have reasonably believed that he was not free to leave. His freedom of action was not curtailed in any significant way. Therefore, he cannot claim the additional protection under *Miranda* because the statements were not obtained during custodial interrogation.

Because defendant did not assert the privilege and was not in custody when he made the statements, the trial court erred in determining that the police violated defendant's privilege against self-incrimination.

Reversed.

/s/ Patrick M. Meter  
/s/ William C. Whitbeck  
/s/ Alton T. Davis