STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2132

State of Minnesota,
Respondent,

vs.

Abdi Mohamed Faraha,
Appellant.

Filed March 23, 2010
Affirmed
Crippen, Judge*

Hennepin County District Court
File No. 27-CR-07-03598

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, David C. Brown, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Craig E. Cascarano, Minneapolis, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Connolly, Judge; and Crippen, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

CRIPPEN, Judge

Appellant Abdi Faraha was arrested in possession of a loaded semi-automatic weapon. After appellant was advised of his constitutional rights, he indicated he would talk to the police if a tape recorder were turned off. The officer turned off the recorder, but he surreptitiously recorded the statement on a second device. After appellant moved to suppress his inculpatory statement, the district court denied his motion and appellant was convicted. Because the record sustains the district court's determination that appellant voluntarily confessed, we affirm.

FACTS

In June 2007, after appellant was arrested for being in possession of a semi-automatic weapon, he was interviewed by a police sergeant. The officer advised appellant of his constitutional rights, which appellant stated he understood. Appellant asked for an attorney, but when the officer turned to leave the room, appellant stopped him, asked him to turn off the tape recorder, and indicated he might talk. The officer confirmed that appellant did not want an attorney and turned off the tape recorder that was on the table. But without informing appellant, the officer continued to record the conversation on a digital recorder. Appellant then stated that he had been in the area to purchase crack cocaine when a man gave him a gun, which he took and handled.

Appellant was charged with being a prohibited person in possession of a firearm in violation of Minn. Stat. § 624.713, subds. 1(b), 2(b) (2006). Appellant evidently moved to suppress his statement to police, although the content of the motion is not part of the

record on appeal. The district court denied the motion, and appellant was subsequently found guilty in a bench trial. The record does not reflect appellant's sentence, but according to appellant, he was sentenced to 60 months in prison, which the district court stayed pending this appeal.

D E C I S I O N

Scales Violation

In *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994), the supreme court held that the police must record any custodial interrogation during questioning that occurs at a place of detention. The purpose of the requirement is "to prevent factual disputes about the existence and context of *Miranda* warnings and any ensuing waiver of rights." *State v. Miller*, 573 N.W.2d 661, 674 (Minn. 1998). "If a violation of *Scales* is 'substantial,' any statements obtained from the interrogation must be suppressed." *State v. Buckingham*, 772 N.W.2d 64, 69 (Minn. 2009) (citing *Scales*, 518 N.W.2d at 592).

Appellant argues that the *Scales* requirement also means that police, who must normally record a statement, must refrain from recording when the accused makes such a request. It follows, he asserts, that his statement, surreptitiously recorded, was involuntary because it violated *Scales*. We are mindful that giving heed to a request to turn off the recorder would defeat the purpose of *Scales*. And as appellant conceded at oral argument, his proposition does not have present support in law; as a result, we will not further address it.

Voluntariness of Statement

Appellant also argues that the recording of his statement in these circumstances otherwise renders his statement involuntary. A suspect facing interrogation in a criminal investigation must be informed of certain constitutional rights, including, among others, the Sixth Amendment right against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 444, 467-73, 86 S. Ct. 1602, 1612 (1966). The suspect may waive his *Miranda* rights so long as the waiver is knowing, intelligent, and voluntary. *State v. Camacho*, 561 N.W.2d 160, 168 (Minn. 1997). "Findings of fact surrounding a purported *Miranda* waiver are reviewed for clear error, and legal conclusions based on those facts are reviewed de novo to determine whether the state has proven by a preponderance of the evidence that the defendant waived his *Miranda* rights voluntarily." *State v. Clark*, 738 N.W.2d 316, 332 (Minn. 2007).

A reviewing court looks at the totality of the circumstances to determine whether a confession was voluntary. *State v. Farnsworth*, 738 N.W.2d 364, 373 (Minn. 2007). *Farnsworth* lists factors that relate to voluntariness, including the "adequacy of warnings" and the "nature of the interrogation." *Id*. "[T]he use of trickery and deception is to be considered along with all the other relevant factors in determining if a confession was involuntary." *State v. Thaggard*, 527 N.W.2d 804, 810 (Minn. 1995). "'[T]he question in each case is whether the defendant's will was overborne at the time he confessed.'" *Farnsworth*, 738 N.W.2d at 373 (quoting *Lynumn v. Illinois*, 372 U.S. 528, 534, 83 S. Ct. 917, 920 (1963)).

Appellant argues that he would not have spoken to officers if he believed his comments were being recorded. He relies on *Thaggard* to support his argument that the method used here was the type of "trickery and deception" that renders a confession involuntary. In *Thaggard*, the police were investigating a sexual-assault complaint. 527 N.W.2d at 806. Thaggard and another man had been accused by a woman of rape. *Id.* As an officer interviewed Thaggard, he lied to Thaggard and told him that the other man had confessed to participating in the sexual assault. *Id.* Examining whether Thaggard's will was overborne, his capacity for choice "critically impaired by *coercive* police conduct," the court concluded that Thaggard's confession was voluntary. *Id*. at 810-11. Nevertheless, the *Thaggard* court warned that "police invite suppression" when using trickery or promises to induce a confession. *Id*. at 811.

Appellant has not established that the trickery employed here, even if inappropriate, overcame his will to maintain his innocence. This is especially true because appellant was fully advised of his rights and voluntarily indicated that he wanted to speak to police. Significant to the lack of compulsion, even now appellant's proposition is not one of innocence, as in *Thaggard*, but simply that he would not have confessed had he known his statement was being recorded. Thus, appellant's confession was voluntary.

Right to Silence

We observe that the trickery in this context, an implied promise not to record the conversation, may go less to the question of inducing a confession of guilt and more to the question of waiving one's right to remain silent. Appellant indicated he understood

the *Miranda* warning, which advised him of his right to remain silent and that anything he said would be used against him, but the warning was given when the tape recorder was openly used. No doubt the choice to turn off the machine might be understood to rescind the warning that anything appellant said would be used against him. Insofar as this constitutional issue is inferred by statements in appellant's brief, it nevertheless is not directly addressed nor briefed and the state did not address the issue in its brief. Therefore, we have no occasion to fully review the potential issue. *State v. Hurd*, 763 N.W.2d 17, 32 (Minn. 2009).

As in *Thaggard*, the circumstances here beg for expression of judicial disapproval of trickery, including the tactic that unfolded here. *Thaggard*, 527 N.W.2d at 811. The record shows an evident relationship between the display of the recording device, the agreement to turn it off, and a warning to appellant that was necessarily given that anything he said would be used against him. *See id.* at 812 ("The key fact, however, is the fact that there is no indication that defendant was led to believe that he would not be prosecuted for the rape if he confessed."). Also, as noted in *Thaggard*, *id*. at 809, *Miranda* itself requires that no trickery be used in advising a defendant of his or her rights. *Miranda*, 384 U.S. at 476, 86 S. Ct. at 1629 ("[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege.").

Finally, at oral argument, the state indicated that this occurrence is a natural product of the *Scales* recording requirement. That argument is unconvincing because it

tends to suggest that *Scales* may be used as a license to set up the occasion for trickery, which could violate a defendant's constitutional rights.

Affirmed.