**[Cite as *State v. Petruccelli*, 2011-Ohio-3292.]**

**IN THE COURT OF APPEALS**

**ELEVENTH APPELLATE DISTRICT**

**LAKE COUNTY, OHIO**

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| STATE OF OHIO, | : | **O P I N I O N** |
| Plaintiff-Appellee, | : | **CASE NO. 2010-L-054** |
| - vs - | : | |
| ANTHONY V. PETRUCCELLI, | : | |
| Defendant-Appellant. | : | |

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 09 CR 000334.

Judgment: Affirmed

*Charles E. Coulson*, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

*Neil R. Wilson*, Neil R. Wilson Co., L.P.A., FirstMerit Bank Building, 56 Liberty Street, Suite 205, Painesville, OH 44077 (For Defendant-Appellant).

MARY JANE TRAPP, J.

**{¶1}** Anthony V. Petruccelli appeals from a judgment of conviction entered by the Lake County Court of Common Pleas on three counts of burglary and one count of receiving stolen property after he pled no contest to these charges. He claims the trial court should have suppressed the incriminating statements he made to the police because those statements were elicited after he had refused to talk to the police without first speaking with an attorney. We affirm the trial court, because Mr. Petruccelli

renewed communication with the police after seemingly invoking his right to counsel in an earlier interview.

**{¶2}** **Substantive Facts and Procedural History**

**{¶3}** On May 5, 2009, a neighbor saw two men in their late teens walking up to the driveway of Loretta Radebaugh's residence. They then disappeared into the back of the house, and, after several minutes, emerged from the back of the house carrying a box. The men went into the backyard of Mr. Petruccelli's house across the street and were seen near the back of his house.

**{¶4}** Another witness, a 14-year-old boy, heard a noise coming from the victim's house and saw a man in a gray sweatshirt running from the victim's house.

**{¶5}** Patrolman Scozzie received a dispatch regarding the suspected burglary and went to Ms. Radebaugh's house to investigate. The sliding door at the rear of the house was closed but unlocked; a pot on the kitchen windowsill was knocked over. Ms. Radebaugh, after returning home, reported a lockbox containing personal documents was missing from her bedroom, and two flashlights were missing from her son's dresser.

**{¶6}** Patrolman Scozzie then went to Mr. Petruccelli's house, where he lived with his mother, sister, and a friend of his, Nicholas Farinacci. Mr. Farinacci, who appeared to have just woken up, came to the door first. When the officer asked him who else was present in the house, Mr. Farinacci went to get Mr. Petruccelli, who allowed the officer inside to verify that no one else was in the house. While walking around the house, Patrolman Scozzie saw a gray sweatshirt in the laundry room, matching the witness's description of what the man running from Ms. Radebaugh's

house was wearing. He also noted Mr. Petruccelli appeared to be nervous: "His hands were shaking and his voice was quivering."

**{¶7}** Later, Dets. Begovic and Bertone from the Willoughby Police Department also went to Mr. Petruccelli's house to investigate the burglary. Messrs. Petruccelli and Farinacci were gone, but Mr. Petruccelli's mother was home. She telephoned her son and asked that they return to the house. When they returned, Patrolman Scozzie asked them to sit in the back of his patrol car while the police continued to investigate the burglary. They were allowed to get out of the vehicle to stretch their legs or use the restroom, and also to use their cell phones. The patrol car was equipped with a dash cam, which the patrolman turned on to record the audio inside the car.

**{¶8}** The police then brought the 14-year-old witness to the patrol car for "show-up" identification. The boy could not identify either man as the individual he had seen earlier running through the victim's backyard.

**{¶9}** Based on the physical description given by the neighbor, Mr. Petruccelli's demeanor when the officer first encountered him, and the clothing found in the laundry room that matched the witness's description, Patrolman Scozzie eventually placed Mr. Petruccelli and Mr. Farinacci under arrest. They were read their Miranda rights and then transported to the Willoughby Police station, where they were held in jail pending the burglary investigation.

**{¶10}** Meanwhile, after obtaining a search warrant, the police searched Mr. Petruccelli's house. In the attic they discovered many items suspected to have been stolen in prior burglaries around the neighborhood, including an Xbox 360, a humidor

cigar box, and a Nintendo Wii Fit console. They also found in Mr. Petruccelli's bedroom a computer suspected to have been stolen in a prior buglary.

**{¶11}** **First Interview**

**{¶12}** After Patrolman Scozzie learned of the items found in Mr. Petruccelli's house, he and Patrolman Fitzgerald interviewed Mr. Petruccelli. Before the interview began, he read Mr. Petruccelli his Miranda rights. Mr. Petruccelli also signed a written form, which acknowledged the officer's warnings that anything he said may be used against him; that he had an absolute right to remain silent; that he had the right to the advice of a lawyer before the questioning and the right to the presence of a lawyer during the questioning, and that a lawyer would be appointed for him if he could not afford one.

**{¶13}** Mr. Petruccelli denied any knowledge of the stolen items or his involvement in any burglary. The officers ended the interview immediately, and he remained in jail.

**{¶14}** **Second Interview**

**{¶15}** The following day, Dets. Bertone and Deutsch interviewed Mr. Petruccelli again. He was again read the Miranda rights and signed another written form regarding his rights. Det. Bertone described the evidence they had against him in several burglary cases and asked him if he had anything to say. Getting no positive response, the detective went on to explain that this interview was Mr. Petruccelli's opportunity to speak for himself so that when the case went before the judge, the detective could tell the judge that Mr. Petruccelli was cooperative. Once again there was no positive response and the detective said that he had what he needed but he was giving Mr.

Petruccelli this opportunity. Mr. Petruccelli responded: "I don't know. Wait 'til my attorney, I will talk with him, see what he says… you obviously have what you think I did." Det. Bertone ended the interview immediately, informed Mr. Petruccelli that he would be charged with burglary, and advised that he would be given an opportunity to make some calls after he had been charged.

**{¶16}** **Third Interview**

**{¶17}** Later that day, Det. Knack, walked by the jail cells to take a cigarette break and Mr. Petruccelli called out to him and asked him if he could go out for a cigarette break. Det. Knack agreed and took him out to smoke a cigarette. While the two were smoking, the detective asked him why he was in jail. Mr. Petruccelli explained the circumstances and said that he "wanted to discuss the case but not put anything in writing." Det. Knack told Mr. Petruccelli he would get the officer handling his case, Det. Bertone.

**{¶18}** Det. Bertone then interviewed Mr. Petruccelli several hours after the second interview. Before the interview began, the detective reminded Mr. Petruccelli of the Miranda rights he read to him earlier, and said "you don't have to talk to me…let me know if you want to stop any time." Mr. Petruccelli indicated his understanding by nodding his head and saying "okay." He then told the officer about his involvement in the burglaries.

**{¶19}** **Charges Brought and Motion to Suppress Statements Denied**

**{¶20}** Mr. Petruccelli was held in Willoughby jail from May 5, 2009, to May 8, 2009. On May 8, 2009, charges of burglary were filed in the Willoughby Municipal Court and he made an initial appearance that day.

**{¶21}** On May 14, 2009, Mr. Petruccelli was bound over to the grand jury and, on November 9, 2009, he was indicted by the grand jury on seven counts of burglary, one count of receiving stolen property, and one count of tampering with evidence.

**{¶22}** Mr. Petruccelli filed a motion to suppress all evidence obtained under the search warrant; the videotape from the patrol car; and his statements made during the third interview with Det. Bertone. It is the statements made during the third interview which statement are at issue in this appeal.

**{¶23}** After hearing, the trial court denied the motion to suppress. Regarding his statements during the third interview, the court found Mr. Petruccelli himself renewed communication with the police when he told Det. Knack he would like to speak with the detectives again.

**{¶24}** Mr. Petruccelli subsequently pled no contest to three counts of burglary, one of which carried a firearm specification, and one count of receiving stolen property. The state dismissed the remaining charges. The court found him guilty of three counts of burglary and one count of receiving stolen property, and sentenced him to four years of imprisonment.

**{¶25}** Mr. Petruccelli now appeals, assigning one error for our review:

**{¶26}** "The trial court erred in denying defendant-appellant's motion to suppress evidence of statements made by the appellant."

**{¶27}** **Standard of Review**

**{¶28}** "At a hearing on a motion to suppress, the trial court functions as the trier of fact, and, therefore, is in the best position to weigh the evidence by resolving factual questions and evaluating the credibility of any witnesses." *State v. Molek*, 11th Dist. No.

2001-P-0147, 2002-Ohio-7159, ¶24. Therefore, the appellate court must accept the trial court's factual findings, provided they are supported by competent, credible evidence. *State v. Wilson*, 11th Dist. No. 2007-A-0044, 2007-Ohio-6557, ¶12. Thereafter, the appellate court reviews the trial court's application of the law de novo. Id.

**{¶29}** **Custodial Investigation**

**{¶30}** *Miranda v. Arizona* (1966), 384 U.S. 436, set forth the principle that statements made under custodial interrogation are inadmissible unless the suspect is specifically informed of his rights and freely decides to forego those rights. In *State v. Knuckles* (1992), 65 Ohio St.3d 494, the Supreme Court of Ohio explained the rule regarding custodial interrogation adopted by the United State Supreme Court in *Edwards v. Arizona* (1981), 451 U.S. 477 and its progeny. In the bright-line test established for dealing with defendants who invoke their right to counsel, if a defendant requests counsel, the police must stop all questioning and interrogation immediately. *Knuckles* at 495. The use of statements made by the defendant after his request for an attorney violated his right, under the Fifth and Fourteenth Amendments, to have counsel present during custodial interrogation. Id.

**{¶31}** After a defendant invokes his right to counsel, the police may talk to him only if the defendant himself "initiates further communications." *Knuckles* at 496, citing *Edwards, supra.*

**{¶32}** This rigid "prophylactic" rule involves two distinct inquires. First, the court must determine whether the accused actually invoked his right to counsel. Second, if the accused invoked his right to counsel, the court may admit his responses to further questioning only after finding that he (1) "initiated further discussions" with the police,

and (2) knowingly and intelligently waived the right he had invoked. *Knuckles* at 496, citing *Smith v. Illinois* (1984), 469 U.S. 91, 95.

**{¶33}** Upon its review of the case law, the Supreme Court of Ohio set forth the following rule regarding custodial interrogation: "Once an accused invokes his right to counsel, all further custodial interrogation must cease and may not be resumed in the absence of counsel unless the accused thereafter effects a valid waiver or himself renews communication with the police." *Knuckles* at paragraph one of syllabus, citing *State v. Williams* (1983), 6 Ohio St.3d 281.

**{¶34}** **Was There an Unambiguous and Unequivocal Request for Counsel?**

**{¶35}** Regarding the first inquiry, case law requires a suspect's request for counsel to be unambiguous and unequivocal. If a suspect "makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning." *State v. Foster* (Dec. 21, 2001), 11th Dist. No. 2000-T-0033, 2001 Ohio App. LEXIS 5840, *24, citing *Davis v. U.S.* (1994), 512 U.S. 452, 459.

**{¶36}** Here, Det. Bertone answered negatively when asked at the suppression hearing whether he felt Mr. Petruccelli's reference to a lawyer at the second interview constituted a request for an attorney. However, our review of the videotaped interview reveals that, when Mr. Petruccelli was asked if he wanted to talk about the case, he responded: "I don't know. Wait 'til my attorney, I will talk with him, see what he says … you obviously have what you think I did." A reasonable officer, in light of the circumstances, including the fact that the suspect was 18 years of age and relatively

unfamiliar with the criminal system, would have understood Mr. Petruccelli to be unambiguously requesting an attorney. Indeed, Det. Bertone's immediate cessation of any further questioning reflects that he apparently understood Mr. Petruccelli to have exercised his right to counsel.

**{¶37}** **Did Mr. Petruccelli Initiate Further Discussions and Waive the Right Earlier Invoked?**

**{¶38}** We are then left with two questions: Did Mr. Petruccelli renew or initiate further communication with the police? And, did he knowingly and intelligently waive the right to counsel before making any statements? Evidence presented at the suppression hearing demonstrates Mr. Petruccelli himself initiated further communication with the detectives in charge of the burglary investigation several hours after he initially invoked his right to counsel and refused to talk with the police. Thus, these facts bring the case squarely within the well-established exception where a suspect renews communication with the police after invoking his right to counsel.

**{¶39}** Furthermore, our review of the videotape of the third interview, during which Mr. Petruccelli made inculpating statements, shows that before the interview began Det. Bertone reminded Mr. Petruccelli of the Miranda rights he read him hours earlier and specifically told Mr. Petruccelli that he did not have to talk with him. The detective further advised him that if he changed his mind and wanted to stop to let him know. Mr. Petruccelli acknowledged his understanding of his rights by nodding his head and saying "okay," before he talked to Det. Bertone about his involvement in the burglaries.

**{¶40}** To determine whether a suspect knowingly, intelligently, and voluntarily waived his Miranda rights, "the court looks to the totality of the circumstances, including

'the age, mentality, and, prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.'" *State v. Smith*, 6th Dist. No. L-05-1350, 2007-Ohio-5592, ¶37, quoting *In re Watson* (1989), 47 Ohio St.3d 86, 90. "Absent evidence that a defendant's will was overborne and his capacity of self-determination was critically impaired because of coercive police conduct, the decision of a suspect to waive his Fifth Amendment privilege is made voluntarily." Id., citing *State v. Dailey* (1990), 53 Ohio St.3d 88, 91-92.

**{¶41}** Mr. Petruccelli's first interview lasted seven minutes -- the officers concluded it right after Mr. Petruccelli refused to provide any information. The second interview lasted twelve minutes -- the officers stopped any further questioning immediately after Mr. Petruccelli invoked his right to an attorney. In the third interview, he was reminded of his Miranda rights, which he acknowledged before voluntarily providing information about his involvement in the burglaries.

**{¶42}** Looking at the totality of the circumstances and our own review of the videotaped interviews, we fail to discern any evidence suggesting that Mr. Petruccelli was physically deprived, mistreated, or improperly coerced. Instead, the record supports the trial court's finding that Mr. Petruccelli initiated communication with the detectives after the second interview had ended, when he said that he was going to wait to talk with his attorney before saying anything to the police. By renewing communication with the police and voluntarily making statements, after being first reminded of his Miranda rights and specifically advised that he did not have to talk with the detectives, we agree with the trial court that he voluntarily, knowingly, and

intelligently waived the right to counsel before making the incriminating statements. Consequently, the trial court properly denied Mr. Petruccelli's motion to suppress and admitted the incriminating statements he made in the third interview.

**{¶43}** **Alleged Violation of Crim.R. 4(E)(2)**

**{¶44}** Under the assignment of error, Mr. Petruccelli also claims he was arrested without a warrant and held for four days, from May 5, 2009, to May 8, 2009, before being charged with burglary. He claims the delay constituted a violation of Crim.R. 4 (E)(2) and therefore any statements or evidence obtained as a result of the violation must be suppressed.

**{¶45}** First, we note that Mr. Petruccelli did not raise the issue at the trial court, and therefore, he has waived the claim. However, even if he had properly raised the issue at the proceedings below and preserved the issue, we find his claim to be without merit.

**{¶46}** Crim.R. 4(E)(2) states:

**{¶47}** "(2) Arrest without warrant.

**{¶48}** "Where a person is arrested without a warrant the arresting officer shall, except as provided in division (F), bring the arrested person without unnecessary delay before a court having jurisdiction of the offense, and shall file or cause to be filed a complaint describing the offense for which the person was arrested. Thereafter the court shall proceed in accordance with Crim.R. 5."

**{¶49}** Here, we recognize there was a delay by the state in charging Mr. Petruccelli and in bringing him before the trial court for his initial apperance. However, even if we were to find that the delay was unnecessary and in violation of Crim.R. 4, Mr.

Petruccelli's incriminating statements would not be suppressed based on that reason alone. This is because the rights of an accused under Crim.R. 4(E) are merely statutory, and not of fundamental constitutional dimensions. *State v. Worley*, 11th Dist. No. 2001-T-0048, 2002-Ohio-4516, ¶180, citing *State v. Wright* (Feb. 22, 1988), 2d Dist. No. 1189, 1988 Ohio App. LEXIS 589, *5. A failure to comply with Crim.R. 4(E) does not automatically invalidate a confession. *Worley* at ¶179; *State v. Torres* (Aug. 22, 1986), 6th Dist. No. WD-85-64, 1986 Ohio App. LEXIS 7948, *10.

**{¶50}** As this court explained in *Worley*, Ohio has never held that a failure to comply with Crim.R. 4(E), by itself, is grounds for exclusion of statements made during the delay. Id. at ¶182. To the contrary, "a confession, which is otherwise voluntary, is admissible despite the fact that defendant was not taken before a court for arraignment without unnecessary delay." Id. "[T]he only basis on which [pre-initial appearance] restraint during delay could affect the validity of the conviction would be if a coerced confession occurred during the delay." *State v. Sauceman* (Aug. 22, 2000), 7th Dist. No. 99 CA 137, 2000 Ohio App. LEXIS 4002, *4, citing *Henderson v. Maxwell* (1964), 176 Ohio St. 187, 188. "Had law enforcement used the delay to conduct an improperly coercive interrogation, a court would be justified in suppressing the confession." *Worley* at ¶183.

**{¶51}** As we have concluded, Mr. Petruccelli renewed communication with the police and thereafter voluntarily made the incriminating statements, one day after his arrest. This is not a case where the police used the delay to improperly coerce a suspect into a confession. Consequently, the alleged violation of Crim.R. 4(E) would

not warrant a suppression of his incriminating statements, even if Mr. Petruccelli had properly preserved the issue for appellate review.

**{¶52}** The assignment of error is without merit. Judgment of the Lake County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.