NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. DENNIS BLAND, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1174 EDA 2011

Appeal from the Order May 2, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0012459-2008

BEFORE: STEVENS, P.J., GANTMAN, J., and FITZGERALD, J.*

DISSENTING MEMORANDUM BY STEVENS, P.J. Filed: February 5, 2013

Taking the "interrogation" out of the recognized ***Miranda*** right-to-counsel triggering event of "custodial interrogation," the learned majority holds that one validly invokes a Fifth Amendment right to counsel so long as one is in custody, regardless of whether interrogation has begun or is imminent. I agree that being in custody is a *necessary* condition to the ***Miranda*** right to counsel, but it is not a *sufficient* condition. Interrogation or, at the very least, imminence of interrogation is the other necessary and distinct component of a "custodial interrogation," a two-part event that serves as the sufficient condition to such ***Miranda*** rights. Here, because

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* Former Justice specially assigned to the Superior Court.

Appellee attempted to invoke a right not yet implicated as he sat in a Florida detention center six days prior to when Philadelphia authorities would arrive, return him to their jurisdiction, and only then commence interrogation, his invocation by form letter was invalid and of no constitutional moment. Accordingly, I dissent.

When reviewing a suppression court's ruling in favor of the defendant, "we must consider only the evidence of the defendant's witnesses and so much of the evidence for the prosecution as read in the context of the record as a whole remains uncontradicted." ***Commonwealth v. Dewitt***, 530 Pa. 299, 302, 608 A.2d 1030, 1031 (1992). Further, we must determine "whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct." ***Commonwealth v. Eichinger***, 591 Pa. 1, 22, 915 A.2d 1122, 1134 (2007).

The Commonwealth raises the following issue on appeal: "Whether the lower court erred in suppressing statements that defendant chose to give after receiving ***Miranda*** warnings on the ground that the police violated his right to remain silent and right to counsel by questioning him days after he signed a statement anticipatorily declining to be interviewed?" Appellant's Brief at 3. One may not validly invoke Fifth Amendment rights in anticipation of a custodial interrogation that is not yet imminent, the Commonwealth argues. Because Appellee knowingly and voluntarily waived his rights after being read ***Miranda*** warnings immediately prior to his

custodial interrogation in Philadelphia, the Commonwealth argues for the admissibility of his subsequent confession.

The United States Supreme Court set out procedural safeguards for the protection of the Fifth Amendment privilege against self-incrimination in ***Miranda v. Arizona***, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966). ***Miranda*** held that "prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used in evidence against him and that he has the right to the presence of an attorney, either retained or appointed." ***Miranda***, 384 U.S. at 444. Several years later, the Supreme Court added another safeguard in conjunction with the ***Miranda*** decision. In ***Edwards v. Arizona***, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed. 2d 378 (1981), the Supreme Court held that "an accused… having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communications, exchanges, or conversations with the police." ***Edwards*** 451 U.S. at 484-485. The court further reasoned that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation, even if he has been advised of his rights." ***Id.*** at 484.

Miranda and ***Edwards*** establish safeguards that protect a defendant during or shortly before custodial interrogation. What these cases do not define, however, is precisely when custodial interrogation is "imminent" so as to make the invocation of one's Fifth Amendment rights valid. Indeed, it is well-settled that the term "custodial interrogation" is fact-specific and defies easy definition. ***See Alston v. Redman*** 34 F.3d 1237, 1251 (C.A.3 (Del.), 1994). The closest the United States Supreme Court has come to addressing the anticipatory invocation of one's Fifth Amendment right is in a footnote in ***McNeil v. Wisconsin***, 501 U.S. 171, 111 S.Ct. 2204, 115 L.Ed. 2d 158 (1991) in which the Court states:

> [The U.S. Supreme Court has] in fact never held that a person can invoke his ***Miranda*** rights anticipatorily, in a context other than "custodial interrogation" … Most rights must be asserted when the government seeks to take the action they protect against. The fact that we have allowed the ***Miranda*** right to counsel, once asserted, to be effective with respect to future custodial interrogation does not necessarily mean that they will allow it to be asserted initially outside the context of custodial interrogation with similar future effect.

McNeil 501 U.S. at 182.

This Court in ***Commonwealth v. Romine***, 682 A.2d 1296, 1302 (Pa. Super. 1996) (*en banc*), recognized ***McNeil*** and the proposition that the "Fifth Amendment right to counsel cannot be invoked anticipatorily outside of the context of custodial interrogation." ***Id***. at 1302. In ***Romine***, we addressed whether a form letter invoking a defendant's right to counsel on a particular case qualified as a valid invocation of his Fifth Amendment right to counsel applicable to a subsequent custodial interrogation on an unrelated

matter occurring three weeks later. We rejected the defendant's Fifth Amendment claim and held that, by its own offense-specific, limiting terms, the defendant's form letter "constituted [only] a reiteration of [his] Sixth Amendment, offense-specific right to counsel, and as such, did not render impermissible the subsequent interrogation of [the defendant] concerning a different offense." ***Id*** at 1301.

Nevertheless, in the last paragraph of its opinion, the Majority expressed agreement with the Commonwealth's reliance on ***McNeil*** and its admonition against anticipatory invocations of Fifth Amendment rights. ***Id***. While the opinion provides no further exposition on this point, it implicitly agrees that ***McNeil*** applies to the facts before it.

Writing in concurrence, Judge Zoran Popovich, joined by two other judges, amplified this point. He disagreed with the Majority's conclusion that the defendant's form letter was but a Sixth Amendment assertion of counsel. The letter, he opined, also asserted defendant's non-offense-specific Fifth Amendment right to counsel, but did so *invalidly* as an anticipatory invocation occurring outside the context of custodial interrogation:

> In other words, ***McNeil***, ***supra***, teaches that a suspect, even one who has been arrested and incarcerated, may not invoke his non-offense-specific ***Miranda*** right to counsel *unless and until* the police have initiated a custodial interrogation. Presently, appellee was not subjected to a custodial interrogation during which he asserted his ***Miranda*** rights, rather he asserted his ***Miranda*** rights *by letter in anticipation* of future custodial interrogations. In ***McNeil***, ***supra***, the United States Supreme Court indicated such a letter would not be effective to assert one's non-offense-specific ***Miranda*** rights. Similarly, I conclude

> that appellee never validly asserted his ***Miranda*** rights in the unrelated drug and weapons case via his "anticipatory" letter. Consequently, there was no assertion of the non-offense-specific ***Miranda*** rights which would serve to prevent the police from subjecting appellee to a custodial interrogation in the case *sub judice,* and appellee's waiver of those rights on July 6, 1994, was effective.

Id. at 1304. (Popovich, J. concurring).

Our jurisprudence has provided no more definitive expression of law on the issue *sub judice*. Nevertheless, I find a decision of the Third Circuit Court of Appeals on this point to be most persuasive.[1]

The issue in ***Alston v. Redman***, ***supra***, was whether a defendant in pretrial detention validly invoked his Fifth Amendment right to counsel when he signed a form letter three days before police interrogated him on additional charges. ***Alston*** involved a defendant arrested for committing a string of robberies, ***Mirandized***, and interrogated on those charges after he waived ***Miranda*** rights. He confessed to those charges as well as to six additional robberies in exchange for a police interrogator's recommendation to the prosecutor that he face only one count of robbery.

Three days later (Day 3), the defendant remained in continuous custody at the local prison when he signed a form letter supplied by the Public Defender's Office stating he invoked his 5th Amendment right to

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[1] Though not binding on this Court, the Third Circuit Court opinion is instructive on the issue at bar.

counsel. Defense counsel never delivered the letter to the Warden, however, since it was the policy of the Warden's Office to call the Public Defender's Office whenever police sought to question a prisoner and ask if they had on file a 5th Amendment form letter signed by the prisoner. If the prisoner wished to waive the rights asserted in the letter, the prison would have the prisoner sign a waiver form.

Three more days passed (Day 6) when police transported the defendant from the prison to the stationhouse on charges related to the six additional robberies to which he had confessed on the day of his arrest. Despite its policy, however, the Warden's Office never contacted the Public Defender's Office to inquire about the existence of a 5th Amendement form letter. The defendant was ***Mirandized***, waived his ***Miranda*** rights, and confessed.

After conviction, the defendant lost all appeals based on Sixth Amendment issues. He then filed a *Habeas* suit in federal court based on the Fifth Amendment claim that his Day 6 confession was obtained in violation of his right to counsel, which he had validly invoked three days earlier through executing the form letter.

Both the district magistrate and the district court rejected the claim, finding defendant had executed his invocation form outside the context of custodial interrogation. On appeal, the Third Circuit agreed:

> Because the presence of *both* a custodial setting and official interrogation is required to trigger the ***Miranda*** right-to-counsel

prophylactic, absent one or the other, ***Miranda*** is not implicated.[] ***See Miranda***, 384 U.S. at 477–78, 86 S.Ct. at 1629–30; ***United States v. Mesa***, 638 F.2d 582, 584–85 (3d Cir.1980); *see also* ***Illinois v. Perkins***, 496 U.S. 292, 297, 110 S.Ct. 2394, 2397, 110 L.Ed.2d 243 (1990) ("It is the premise of ***Miranda*** that the danger of coercion results from the *interaction of custody and official interrogation*.").

In the instant case, the magistrate judge found, and the district court agreed, that petitioner's execution of the invocation form was insufficient to trigger his ***Miranda*** right to counsel. The magistrate found that the attempt to invoke the right to counsel was made outside of the context of custodial interrogation, and was thus ineffective. Petitioner argues that this case satisfies both prongs of ***Miranda***, pointing out that he was already in custody, he was a suspect in a number of robberies, and he had already been interrogated at the time that he made his request for counsel. All of these circumstances taken together, concludes petitioner, created the "atmosphere of coercion," Br. at 18, that ***Miranda*** and progeny seek to protect against, and mandates a finding that his invocation of his right to counsel was proper. We disagree.

As evidenced by the Supreme Court's repeated rehearsal of the issue, the term "custodial interrogation" defies easy definition. We have recognized that such a determination requires individualized analysis on a case-by-case basis. ***See United States v. Mesa***, 638 F.2d 582, 584 (3d Cir.1980)**. Assuming, *arguendo,* that petitioner was in custody for purposes of *Miranda* analysis,[] we disagree that at the time petitioner requested counsel he was being interrogated, or that interrogation was imminent.** Petitioner was questioned on August 23rd and again on August 29th. There is no evidence in the record to suggest that he had been questioned on the 26th, the date on which he made his request for counsel, or that there was a continuous interrogation during the period from August 23rd to August 29th. His putative invocation of his right to counsel on August 26th was made while he was sitting in his jail cell speaking with a representative of the Public Defender's office, far removed from the strictures of custodial interrogation feared by the ***Miranda*** Court. *See id.* at 590 n. 1 (Adams, J., concurring) ("In ***Innis*** the Court indicated that "interrogation," as conceptualized in the ***Miranda*** opinion, must reflect a measure of compulsion above and beyond that inherent in

> custody itself."). Absent the "interaction of custody and official interrogation," ***Perkins***, 496 U.S. at 297, 110 S.Ct. at 2397, the petitioner's ***Miranda*** right to counsel had simply not attached when petitioner signed the invocation form in his cell.
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> We decline to extend the reach of ***Miranda–Edwards*** to encompass a suspect sitting in his cell, free of any interrogation, impending or otherwise. As the Supreme Court stated in rejecting the ***McNeil*** petitioner's proposal to expand ***Miranda***, "[i]f a suspect does not wish to communicate with the police except through an attorney, he can simply tell them that when they give him the ***Miranda*** warnings." ***McNeil***, 501 U.S. at 180, 111 S.Ct. at 2210. We add no more."

Alston v. Redman 34 F.3d 1237, 1244, 1245, 1251 (C.A.3 (Del.),1994) (emphasis added).

I would apply the same rationale to conclude that Appellee made his form letter invocation outside the context of custodial interrogation, as interrogation neither had commenced nor was imminent. Appellee signed a form letter faxed to him while he sat in a Florida facility free from any questioning or conduct reasonably expected to elicit an incriminating statement. Indeed, the record demonstrates that Philadelphia detectives would not come for Appellee for another six days. During his time at the Florida detention center, moreover, Appellee's parents and a Florida attorney had access to him.

I deem these facts dispositive, as they establish the absence of interaction between custody and interrogation at the time Appellee signed the form letter. Without the compelling pressures of interrogation imminent, Appellee's invocation of Fifth Amendment rights was merely anticipatory of

custodial interrogation and, accordingly, not a valid exercise of constitutional rights. Consequently, I would reverse the order suppressing Appellant's statement.[2]

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[2] I further note an attorney/client relationship between Appellee and Attorney Conway/the Defender's Association did not exist when Attorney Conway faxed the signed "non-waiver of rights" form letter to Philadelphia police. Therefore, detectives did not accept a waiver of rights from, and interrogate, a juvenile who was represented by counsel.

There is no dispute that the defender's office *did not* formally represent the juvenile at this time. Indeed, before ruling in favor of Appellee, the trial court made a finding of fact that juvenile had no formal representation at the time he arrived in Philadelphia.

Facts establishing the absence of an attorney/client relationship in this case are:

1) nowhere on the form does it say the defender represents or may represent Appellee;
2) the boilerplate form refers to the possibility that the defendant may have "retained counsel"—which would rule out representation by the defender association altogether;
3) Appellee signed the form a day before the defender also signed it—so the juvenile signed a blank, boilerplate form bearing neither an attorney's name nor a place of signature specifically designated for an attorney; and
4) Appellant never communicated in any way with the defender, only his father did.

Under these facts, the form letter simply failed to create an attorney/client relationship requiring authorities to direct questions to counsel. Instead, the most Appellee may be said to have attempted through the form was to invoke a generic right to counsel—whoever that counsel may turn out to be. The form did not purport to serve notice that the defender's association actually represented Appellee or would represent him imminently.