NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellant v. DENNIS BLAND, Appellee	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.*

MEMORANDUM BY FITZGERALD, J.: Filed: February 5, 2013

The Commonwealth of Pennsylvania appeals from the order entered in the Philadelphia County Court of Common Pleas granting the motion of Appellee, Dennis Bland, to suppress a statement given to police.[1] The Commonwealth avers the court erred in finding that Appellee's invocation of his right to counsel, while a juvenile and in custody in Florida, was no longer valid six days later when he was questioned, after ***Miranda***[2] warnings, in custody in Philadelphia, Pennsylvania. We affirm.

The trial court summarized the facts as follows. ***See*** Trial Ct. Op.,

---

* Former Justice specially assigned to the Superior Court.

[1] Pursuant to Pa.R.A.P. 311(d), the Commonwealth certified in its notice of appeal that the court's order will terminate or substantially handicap the prosecution.

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1964).

8/22/11, at 2-3, 5. On July 9, 2008, an arrest warrant was issued for Appellee, who was then approximately seventeen years and eleven months old, for murder and firearms offenses. Philadelphia Detective James Burke learned that Appellee was at his mother's house in Florida, and Florida authorities took Appellee into custody. He waived extradition.

On the following day, July 10, 2008, Philadelphia assistant public defender, Paul Conway, Esq., learned that Appellee's father had contacted his office. At this time, the public defender's "office did not formally represent" Appellee. ***Id.*** at 5. Attorney Conway spoke with Appellee's Florida attorney and faxed him a nonwaiver of rights form at 2:11 p.m. Appellee signed the form at 4:10 p.m., and the form was returned to Attorney Conway *via* fax at 4:36 p.m. Attorney Conway also signed the form. The form stated in pertinent part:

> PLEASE BE ADVISED THAT I DO NOT WISH TO WAIVE MY RIGHT TO REMAIN SILENT. I ALSO DO NOT WISH TO SPEAK WITHOUT AN ATTORNEY PRESENT.
>
> I WISH TO BE REPRESENTED BY A LAWYER. UNTIL SUCH TIME AS I HAVE AN OPPORTUNITY TO FULLY DISCUSS THE DETAILS OF MY CASE WITH MY LAWYER, EITHER APPOINTED OR RETAINED, I STATED THE FOLLOWING TO YOU:
>
> I DO NOT WISH TO BE QUESTIONED OR HAVE ANY DISCUSSION WITH THE POLICE.
>
> I DO NOT WISH TO SPEAK WITH YOU WITHOUT MY ATTORNEY PRESENT.
>
> * * *

> I WILL NOT WAIVE OR GIVE UP ANY OF MY RIGHTS UNDER MIRANDA V. ARIZONA, NOR WILL I GIVE UP ANY OF MY PENNSYLVANIA OR FEDERAL CONSTITUTIONAL RIGHTS EITHER ORALLY OR IN WRITING WITHOUT THE PRESENCE OF MY LAWYER.

Facsimile Transmission Sheet, 7/10/08, at 2 (emphasis in original).

At 10:15 a.m. on the following day, July 11, 2008, the Public Defender's Association faxed the executed form to the Homicide Unit of the Philadelphia Police Department, as well as to the Chief of the Philadelphia District Attorney's Homicide Unit. At 3:29 p.m. that day, the Police Department replied to Attorney Conway, "Ha-ha-ha." Trial Ct. Op. at 5.

"Because [Appellee] was a juvenile, the usual transport service could not transport him back to Philadelphia." ***Id.*** at 2. Four days later, on July 15, 2008, Detective Burke and another detective flew to Florida, and on the 16th, transported Appellee to Philadelphia. ***Id.*** Detective Burke later testified at the suppression hearing that during the five to six hours that he was with Appellee, Appellee "said on approximately ten occasions that he wanted to tell Detective Burke what had happened, and that the detective told him he could not discuss the case with him." ***Id.*** at 3. The trial court specifically discredited this testimony. ***Id.*** Appellee was handcuffed throughout his transport, and "[a]t no time did Detective Burke read" Appellee his ***Miranda*** rights. ***Id.***

"Once at the Police Administration Building, [Appellee] was taken through the sally port and" to an interview room. ***Id.*** Philadelphia Police

Detective Donald Marano, who investigated this case and prepared the affidavit of probable cause, arrived at the station, "although he was not scheduled to be working that day." ***Id.*** "Detective Marano did not have a conversation with Detective Burke regarding [Appellee's] mental state[,]" and made contact with Appellee at approximately 5:00 p.m.

> Although [Detective Marano] knew that [Appellee] was a juvenile and although [Appellee's] father had been cooperative with him, he did not speak with [Appellee's] father prior to going in to speak with [Appellee]. He did give oral ***Miranda*** rights to [Appellee,] verbally telling him his rights and why he was there. He asked [Appellee] what happened.

Id. Appellee first gave a "self-serving spin." ***Id.*** "Detective Marano told him it was not going to help to tell a lie because comparisons would be made with other witnesses' statements, [Appellee] told him what had happened. None of this was reduced to writing." ***Id.***

Appellee's father arrived at the police station at 7:00 p.m. "Detective Marano told him that [Appellee] had confessed to him. He never conveyed or explained any of [Appellee's] ***Miranda*** rights to [Appellee's] father. He did allow [Appellee's] father to meet with [Appellee] alone, for approximately five minutes[.]" ***Id.*** at 3-4. Appellee then gave a formal statement at 7:28 p.m., which began "with the giving of the ***Miranda*** rights." ***Id.*** at 4. Appellee's "father was not present for the taking of the formal statement." ***Id.*** Both Appellee and his father, however, signed the formal written statement. Appellee "was formally arraigned on July 17,

2008[,] at which time the Defender Association was formally appointed to represent" him. ***Id.***

On January 12, 2010, Appellee filed an omnibus motion to suppress the statement he gave to police; on August 13th he filed an amended motion. The court held a hearing on April 26 and 27, 2011, at which Detectives Burke and Marano and Appellee's father testified.[3] Appellee did not testify. On May 2nd, the parties appeared before the court, who read its findings of fact. The court concluded: as of July 9, 2008, Appellee was in custody and under arrest in Florida for the murder in Philadelphia; he asserted his right to counsel and right to remain silent in writing on the form provided by the Philadelphia Public Defender's Association; the Philadelphia homicide police department received the form on July 11th; Appellee waived his rights in Philadelphia when Detective Marano met with him; but, pursuant to ***Edwards v. Arizona***, 451 U.S. 477 (1981), Detective Marano could not have "interrogated [Appellee] absent [Appellee] initiating communication with him because [Appellee] had clearly asserted his right to counsel." N.T. Trial, 5/2/11, at 24-25.[4] Accordingly, the court suppressed the statement Appellee gave to Detective Marano. ***Id.*** at 30. The

[3] Both parties called additional witnesses.

[4] It appears that the scheduled proceedings were for trial, and the cover of the transcript bears the title, "Trial (Jury) Volume 1." However, as discussed above, a trial was not conducted that day.

Commonwealth took this timely appeal and complied with the court's order to file a Pa.R.A.P. 1925(b) statement of errors complained of on appeal.

The Commonwealth presents one claim for our review: the trial court erred as a matter of law in finding Appellee's invocation of his Fifth Amendment right to counsel while in Florida was valid when he was questioned, after ***Miranda*** warnings, in Philadelphia six days later. The Commonwealth avers that ***Miranda*** was "intended [to] protect against 'the compelling atmosphere inherent in the process of in-custody **interrogation**[,]" and thus ***Miranda*** safeguards do not apply "in the absence of questioning." Commonwealth's Brief at 14. The Commonwealth maintains that at the time Appellee executed the nonwaiver form, "he was in Florida, nearly a thousand miles away from the Philadelphia police," was not "about to be questioned," and "not interviewed about the shooting (or any other crime) until he returned home almost a week later." ***Id.*** at 16. We find no relief is due.

We note the relevant standard of review:

> When the Commonwealth appeals from a suppression order, we follow a clearly defined standard of review and consider only the evidence from the defendant's witnesses together with the evidence of the prosecution that, when read in the context of the entire record, remains uncontradicted. The suppression court's findings of fact bind an appellate court if the record supports those findings. The suppression court's conclusions of law, however, are not binding on an appellate court, whose duty is to determine if the suppression court properly applied the law to the facts.

Commonwealth v. Boyd, 17 A.3d 1274, 1276 (Pa. Super.) (citation omitted), *appeal denied*, 29 A.3d 370 (Pa. 2011).

In ***Miranda***, the High Court "requir[ed] as an 'absolute prerequisite to interrogation' that an individual held for questioning 'must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation.'" ***Commonwealth v. Colavita***, 993 A.2d 874, 885 n.9 (2010) (citation omitted).

In ***Edwards***, 451 U.S. 477, the High Court announced a prophylactic rule requiring the presence of counsel where the accused previously invoked his right to counsel:

> [***Edwards***] held 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." It further 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 communication with the police.

Commonwealth v. Fears, 836 A.2d 52, 60 (Pa. 2003) (citations omitted).

> The ***Edwards*** rule is "designed to prevent police from badgering a defendant into waiving his previously asserted ***Miranda*** rights." It does this by presuming his postassertion statements to be involuntary, "even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards." This prophylactic rule thus "protect[s] a suspect's voluntary choice not to speak outside his lawyer's presence."

Montejo v. Louisiana, 556 U.S. 778, 787, (2009) (citations omitted). "The purpose of the ***Miranda***-***Edwards*** guarantee . . . is to protect . . . the suspect's 'desire to deal with the police only through counsel[.]'" ***Commonwealth v. Romine***, 682 A.2d 1296, 1299 (Pa. Super. 1996) (*en banc*). ***Edwards***

> established a second layer of prophylaxis for the ***Miranda*** right to counsel: once a suspect asserts the right, not only must the current interrogation cease, but he may not be approached "until counsel has been made available to him," which means, [the United States Supreme Court] held, that counsel must be present. If the police do subsequently initiate an encounter in the absence of counsel (assuming there has been no break in custody), the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspects executes a waiver and his statements would be considered voluntary under traditional standards. This is "designed to prevent police from badgering a defendant into waiving his previously asserted ***Miranda*** rights."

Commonwealth v. Wyatt, 669 A.2d 954, 957 (Pa. Super. 1995) (citations omitted).

In a footnote in ***McNeil v. Wisconsin***, 501 U.S. 171 (1991), the United States Supreme Court addressed the concept of an "anticipatory" invocation of ***Miranda*** rights:

> . . . We have in fact never held that a person can invoke his ***Miranda*** rights anticipatorily, in a context other than "custodial interrogation"—which a preliminary hearing will not always, or even usually, involve[.] . . . 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 we will allow it to be asserted initially outside the context of custodial interrogation, with similar future effect. Assuming, however, that an assertion at arraignment would be effective, and would be routinely made, the mere fact that adherence to the principle of our decisions will not have substantial consequences is no reason to abandon that principle. It would remain intolerable that a person in custody who had expressed no objection to being questioned would be unapproachable.

Id. at 182 n.3 (citations omitted).

In the 1996 *en banc* Superior Court case of ***Romine***, the defendant was advised of his ***Miranda*** rights, confessed to drug and firearms offenses, was arrested, and placed in jail. ***Romine***, 682 A.2d at 1297. Subsequently-appointed counsel forwarded a letter to the Commonwealth, indicating the defendant was exercising his rights to remain silent and to have his attorney present during any contact with the Commonwealth. ***Id.*** While in custody, the defendant attempted to solicit murder and was subsequently arrested for this offense. ***Id.*** He signed a form waiving his ***Miranda*** rights and gave a statement to police about the new solicitation charge. ***Id.*** at 1298. The trial court suppressed this post-arrest statement, reasoning that the defendant "invoked his Fifth Amendment rights when, after having been charged with the [initial] drug and firearms offenses, he signed the statement at the bottom of the form letter provided by" his counsel. ***Id.***

On appeal, a majority of an *en banc* panel of this Court held that the defendant's initial invocation of his rights, following his drug and firearms offenses arrest, invoked only his Sixth Amendment right to counsel. ***Id.*** at

1301-02 (finding counsel's letter to Commonwealth expressly limited defendant's invocation of rights to pending drug and firearms charges, and thus did not extend to any unrelated charges). In rejecting the defendant's claim that he also invoked his Fifth Amendment right to counsel, this Court stated: "[T]he Fifth Amendment right to counsel cannot be invoked anticipatorily outside of the context of custodial interrogation." ***Id.*** at 1302. This Court then quoted the footnote in ***McNeil*** without further discussion. ***Id.***

In the 2009 decision of ***Sherwood***, the Pennsylvania Supreme Court cited this statement in ***Romine*** and the relevant footnote of ***McNeil***. ***Commonwealth v. Sherwood***, 982 A.2d 483, 500 (Pa. 2009). In ***Sherwood***, the trial court held that the defendant was not in custody when police interviewed him and he "affirmatively stated: 'I feel like I should have an attorney.'" ***Id.*** at 499-500. "The suppression court held that because [the defendant] was not in custody when he made the remark, he was not entitled to counsel under the Fifth Amendment." ***Id.***

On appeal, our Supreme Court considered "whether [the defendant's] statement, 'I feel like I should have an attorney,' was sufficiently specific to trigger his right to counsel under both the Fifth and Sixth Amendments." ***Id.*** at 499. The Court affirmed the trial court's ruling denying suppression:

> **This ruling comports with the law which provides that one cannot anticipatorily invoke the Fifth Amendment right to counsel, as recognized by the *Miranda* decision, and that**

> ***Miranda*** **applies only after one is placed in custody.** ***See*** [***Romine***]. In ***Romine***, the Superior Court stated: [quoting ***McNeil*** footnote].
>
> ***See also Commonwealth v. Morgan***, . . . 610 A.2d 1013, 1016 (Pa. Super. 1992) (holding that the exercise of ***Miranda*** rights need not be honored when a defendant is not in custody). Since [the defendant] was not in custody when he made his statement about a lawyer, his alleged invocation of his right to counsel had no Fifth Amendment effect and thus police had no obligation to provide him with counsel, or to desist from interviewing him until they provided him with counsel.

Id. at 500 (emphasis added).

The question presented in the instant matter is the validity of Appellee's invocation of his right to counsel, made six days earlier while in custody in Florida, with respect to the statement he gave police in Philadelphia. Pursuant to ***Sherwood***, a suspect may not anticipatorily invoke his Fifth Amendment right to counsel **before he is in custody**. ***Sherwood*** does not require, as the Commonwealth's argument avers, that **questioning** is imminent.

The trial court reasoned:

> Although the U.S. Supreme Court stated in footnote three of [***McNeil***] that the Court had "never in fact held that a person can invoke his ***Miranda*** rights anticipatorily, in a context other than 'custodial interrogation,'" it does not follow that the Court held that one cannot do so. ***See also Commonwealth v. Sherwood***, 982 A.2d 483, 499 (Pa. 2009) (quoting [***McNeil***]). Despite the language in the footnote in the ***McNeil*** opinion, neither the U.S. Supreme Court nor the Pennsylvania Supreme Court has ever held that one who is in custody **cannot** validly assert ***Miranda*** rights prior to being interrogated. It is clear that [Appellee] was in custody at the time he invoked his

> rights. It is well settled that the test for whether a person is in custody for ***Miranda*** purposes is whether a reasonable person in the suspect's position would feel free to leave or compelled to stay. . . . Here, [Appellee,] having been arrested and taken to a juvenile facility in Florida, based on the Philadelphia arrest warrant, was considered to be in custody for ***Miranda*** purposes and, furthermore, there was no break in custody.

Trial Ct. Op. at 9 n.13.

We agree with this analysis. While the Commonwealth emphasizes that Appellee was not **questioned** in Florida, it does not dispute that he was in custody for the underlying Pennsylvania murder charge. Indeed, the trial court pointed out that law enforcement took Appellee "into custody from his mother's house based on the Philadelphia warrant of arrest on July 9, 2008." Trial Ct. Op. at 2. Accordingly, we agree with the trial court that, pursuant to ***Edwards***, his invocation of rights remained valid when Philadelphia police questioned him. The police had acknowledged receipt of written notice that Appellee, a juvenile who was in custody for the murder charge, had invoked his right to counsel. Nevertheless, Detective Marano questioned him in Philadelphia without counsel present about the murder for which Appellee was under arrest. Pursuant to ***Edwards*** and ***Sherwood***, we agree that this questioning, despite ***Miranda*** warnings, was not proper.

We do not find the passage of six days—which in this case was attributed to Appellee's arrest in Florida and transport rules for juveniles—or the geographical distance mitigates against the validity of his invocation of ***Miranda*** rights. We also disagree with the Commonwealth's contention that

the trial court's ruling would allow defense attorneys to "go into high crime areas and hand out free 'I INVOKE MY RIGHT TO COUNSEL' t-shirts to prospective clients[,]" which would "automatically trigger[ ] the Fifth Amendment, precluding any future questioning with or without a subsequent decision to waive ***Miranda*** on his part." ***See*** Commonwealth's Brief at 15. Here, assistant public defender Attorney Conway did not provide the nonwaiver form to a person who was merely present in a high crime area and not suspected of or related to any criminal activity. Instead, Attorney Conway provided the nonwaiver form to Appellee, a juvenile, only after his father had contacted the public defender's office about his son's arrest. Finally, we find no merit in the Commonwealth's statements that the nonwaiver of rights form was provided by someone who was not Appellee's counsel, that Appellee never verbalized any interest in having counsel present during a police interview," and that the Philadelphia public defender's office made "an improper attempt . . . to stop the police from doing their job." ***See id.*** To the extent that the Commonwealth argues such factors are relevant to the validity of the invocation of ***Miranda*** rights, we disagree that ***Miranda*** rights must be invoked through or with the help of an attorney of record, or after a defendant first independently asserts a desire to do so. For the foregoing reasons, we affirm the order of the trial court granting Appellant's motion to suppress his statement.

Order affirmed.

Stevens, P.J. files a Dissenting Memorandum.