State v. Piatnitsky, No. 66442-5-I

Becker, J. (dissenting) — Detectives tried to get appellant Samuel Piatnitsky to sign a waiver of rights so that they could take a statement from him about a killing. Piatnitsky said, "I don't want to talk right now, man." The majority accepts the trial court's conclusion that Piatnitsky's statement, taken in context, indicated that he was willing to talk. In my view, Piatnitsky unequivocally invoked his right to remain silent. The motion to suppress should have been granted. The error was not harmless. I respectfully dissent.

Piatnitsky was advised of his Miranda[1] rights before any interrogation began. Detectives questioned Piatnitsky for an hour off the record until he agreed to give a tape recorded statement. When the recording began, Piatnitsky was again advised of his Miranda rights. He said, "I'm not ready to do this, man." A detective reminded Piatnitsky that he had previously said he wanted to get his version on tape, in his own words. Piatnitsky responded, "I just write it down, man . . . I don't want to talk right now, man."

When Piatnitsky said, "I don't want to talk right now, man," he unequivocally invoked his right to silence. Questioning should have ceased. Instead, Detective Keller continued, "Okay, but let's go over the rights on tape, and then you can write it down, okay." But the officers had no intention of letting Piatnitsky take pen in hand to write a statement.[2] They wanted to ask questions, get answers, and then write up a

[1]Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

statement for Piatnitsky to sign. And that is exactly what happened. The detectives went over the rights on tape, obtained Piatnitsky's signature on a waiver of his constitutional rights, and tried one more time to get him to talk on tape. Piatnitsky declined. Detective Keller paraphrased, "Okay, it's too hard to talk about; you'd rather write it." Then the detectives turned off the audiotape, questioned Piatnitsky about the homicide, used his answers to write up a statement, and obtained his signature on the statement. The fact that the officers gave Piatnitsky the opportunity to review the written statement and make changes in it does not overcome the fact that they obtained the statement by getting Piatnitsky to talk right after he said he did not want to talk.

Piatnitsky challenges the finding that "At no time prior to the conclusion of the interview did the defendant . . . state that he desired to remain silent."[3] The majority defends this finding as supported by the context of the recorded statement. The finding is supported only if it was reasonable for the officers to decide that what Piatnitsky really meant to say was "I don't want to talk while the tape is running." The majority does not cite authority for giving "such an elaborate contextual interpretation" to words as plain as Piatnitsky's. Cf. State v. Nysta, 168 Wn. App, 30, 42, 275 P.3d 1162 (2012). In State v. Gutierrez, 50 Wn. App. 583, 588, 749 P.2d 213, review denied, 110 Wn.2d 1032 (1988), during a post-Miranda interrogation, the defendant said, "I would rather not talk about it." We referred to this as "a simple statement" asserting the right to remain silent. Gutierrez, 50 Wn. App. at 588-89. The same is true of "I don't want to

[2] See the trial court's conclusion (c), Clerk's Papers at 315: "The detectives' explanation that they do not normally allow suspects to write their own statement because they need it to be legible is reasonable and a common practice of law enforcement."

[3] Clerk's Papers at 313.

talk right now, man."

In contract law, we interpret what was written, not what was intended to be written. Hearst Commc'ns, Inc., v. Seattle Times Co., 154 Wn.2d 493, 504, 115 P.3d 262 (2005). The standard in criminal law should be no less. Heretofore, cases allowing the use of context to interpret a suspect's response to an attempt at interrogation have been limited to those situations where the defendant uses equivocating words such as "maybe," "perhaps," and "if." See State v. Pierce, No. 40777-9-II, 2012 WL 2913290, at *6 (Wash. Ct. App. July 17, 2012), and cases cited therein. Piatnitsky did not use words of that nature.

The majority's elastic use of context as a tool of interpretation goes far beyond what was done in the cases the majority relies on. For example, in Connecticut v. Barrett, 479 U.S. 523, 525, 107 S. Ct. 828, 93 L. Ed. 2d 920 (1987), the defendant made it quite clear that he was willing to talk, though he would not give a *written* statement unless his attorney was present. In U.S. v. Goodwin, 470 F.2d 893, 902 (5th Cir. 1992), cert. denied, 411 U.S. 969 (1973), the court held that the motion to suppress should have been *granted*, noting that it was "axiomatic that a waiver of constitutional rights is not lightly to be implied." In People v. Arroya, 988 P.2d 1124, 1134 (Colo. 1999), the court affirmed a trial court's ruling that "I don't wanna talk no more" was a clear invocation of the right to remain silent. In Bradley v. Meachum, 918 F.2d 338, 342, 343 (1990), cert. denied, 501 U.S. 1221 (1991), as part of "an ongoing stream of speech," the defendant told detectives that he "was not going to say whether he was involved in the crime," but the court did not regard it as an invocation of the right to

silence because "in the same breath," he denied any involvement. Piatnitsky, by contrast, did not begin to discuss his involvement or lack thereof. The officers nevertheless insisted that he cooperate with their desire to conduct an interrogation. The majority emphasizes that Piatnitsky did cooperate once the audiotape was turned off. But his participation at that point, after he said, "I don't want to talk right now, man" and received the "Okay, but . . ." response, cannot be used as context to "cast retrospective doubt" on the clarity of his invocation of the right to remain silent. Smith v. Illinois, 469 U.S. 91, 100, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984).

As the majority recognizes, there are no talismanic phrases a suspect must use to invoke the right to remain silent. Majority, at 20. The majority then turns this principle in favor of the State by holding it is improper to preclude admission of a statement "based solely upon the utterance of 'magic words.'" Majority, at 22. If by "magic words," the majority means plain language that a reasonable officer should recognize as an invocation of the right to silence, then that is the correct analytical approach under Miranda. "I don't want to talk right now, man" was plain language that should have caused the detectives to stop questioning Piatnitsky, regardless of the fact that he earlier seemed to be willing to talk. To tolerate the trial court's reinterpretation of the defendant's remark in this case waters down the protection of Miranda to the point where it is illusory.

Piatnitsky had alleged self-defense, and the jury was instructed on lesser-included offenses. In the statement produced by the interrogation, Piatnitsky admitted that he fired one or two shots at the victim and that the victim was "trying to scurry

away" at the time. The written statement was read by a detective for the jury and emphasized during closing argument by the prosecutor. The illegally obtained statement made it easier for the jury to reject Piatnitsky's claim of self-defense and conclude he was guilty of murder. Given these circumstances, the error was not harmless. I would reverse and remand for a new trial.

Becker, J.