IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. VELMA LEE OGDEN-WHITEHEAD and WILSON K. SAYACHACK, Defendants, and JOHN JEFFERY OGDEN, a/k/a JONATHON JEFFREY OGDEN, Appellant.	)	No. 62407-5-I DIVISION ONE UNPUBLISHED OPINION FILED: February 8, 2010

BECKER, J.— John Ogden, a murder suspect, asked for a lawyer during a noncustodial interview. The interview ended and Ogden left. Four hours later, detectives arrested him. He waived his right to a lawyer and made inculpatory statements. Because Ogden was not subject to the inherently compelling pressures of custody between his first request for a lawyer and his later waiver of that right, we hold that Ogden's right to counsel was not violated by the renewed interrogation. We affirm the trial court's ruling admitting his inculpatory

statement.

Ronald Whitehead, John Ogden's stepfather, was shot four times around 5:40 a.m. on March 18, 2005, at an intersection in Des Moines less than two miles from his house. Whitehead had been driving to work in his Ford Mustang. A witness who was stopped at the intersection heard popping sounds from the nearby Mustang and watched as it "stuttered" into the intersection. The witness saw Whitehead's body fall out of the driver's door but could not see who was behind the wheel of the Mustang as it drove away. Whitehead was dead by the time police arrived a few minutes later. He had been shot once in the head at very close range and three times in the back.

Officer Roger Juvet was assigned to go to Whitehead's home. He arrived at 6:09 a.m. Whitehead had shared the home with his wife, Velma Ogden-Whitehead, and Velma's son, John Ogden. Juvet saw Ogden on the couch with a wastebasket nearby. He had been vomiting.

Police located Whitehead's Mustang later that day. An analysis of the evidence inside the Mustang revealed that the shooter had crawled from the trunk to the passenger compartment from the pass-through behind the rear seats. Evidence indicated that the murder weapon was a Makarov pistol. Whitehead had permits for two Makarov pistols that he owned, but only one of them was found at his house.

Five days after the murder, Ogden and his mother agreed to be interviewed at the sheriff's office in Burien. Ogden left after providing a

statement, including a statement that he had lost his cell phone.

More than a year went by during which detectives had only occasional contact with the family. Among other evidence they developed during this time, they obtained cell phone records for several phones associated with Ogden and his mother. The records showed calls and text messages at the time of the murder between Ogden's cell phone and a cell phone registered to "Rose Bowers." On the morning of March 18, 2005, the two phones had exchanged a flurry of texts between 3:19 a.m. and 6:06 a.m. In between, at 5:44 a.m., there was a voice call from the Bowers' phone to Ogden's. Detectives discovered that the Bowers' phone was a phone that had been previously registered to Ogden's cell phone number. The account was activated on March 16, 2005, and the last activity involving the phone was a text message sent to Ogden's phone on March 18, 2005, at 3:19 p.m. Rose Bowers had no idea a phone had been set up in her name, and she did not know the defendants.

On June 22, 2006, detectives asked Ogden and Ogden-Whitehead to come to the Regional Justice Center for an interview. They arrived together around noon. Detectives Thien Do and Mike Garske interviewed Ogden in an unlocked room at the sheriff's office. His mother was interviewed separately in another room. The interview with Ogden lasted about 15 minutes. Detective Garske told Ogden he did not have to answer questions and was free to leave. Ogden denied sending any text messages or calling anyone the night and morning before Whitehead's murder and again said he had lost his cell phone.

When detectives confronted Ogden with phone records, his "jaw dropped." Ogden asked if he could call his attorney.

Ogden waited in the interview room for his mother to finish her interview. Eventually, Ogden asked Garske if he could get his mother's car keys, but Garske told him he would not interrupt the interview. Ogden left the Regional Justice Center at 2:05 and, on his way out, got directions from Garske to an appointment that was located about 10 blocks away.

Officers arrested Ogden at approximately 6:00 p.m. that same evening and brought him back to the Regional Justice Center. Ogden was told that he was not free to leave. Detective Scott Tompkins testified at the CrR 3.5 hearing that he read Ogden his Miranda[1] rights from a preprinted form. Tompkins testified that Ogden acknowledged and signed a form indicating that he understood those rights.

Ogden had a conversation with detectives that was not tape recorded. The detectives provided Ogden with a pen and paper to make a written statement. Ogden read his statement to the detectives. Tompkins testified that Ogden did not ask for an attorney or indicate that he did not want to speak any longer and that Ogden agreed to make a taped statement which began around 9:24 p.m. on June 22, 2006. The transcript shows that Tompkins asked Ogden if he understood that he had the right to remain silent and the right to talk to a lawyer and have one present while being questioned. Ogden replied that he

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).

understood those rights.

Ogden stated that (1) he knew his mother wanted Whitehead out of her life but did not want to divorce him, (2) he suggested his friend Wilson Sayachak, whom Ogden suspected was in a gang, could help her with her problem, (3) he told Sayachak where Whitehead kept the money on his person, (4) he saw his mother carrying gloves to Sayachak in the garage the night before the murder, (5) the morning before the murder he sent text messages to Sayachak about Whitehead's movements, (6) he viewed ammunition online for the type of gun owned by Whitehead, (7) there was no plan for Sayachak to wear a mask during the planned robbery even though Whitehead knew Sayachak, and (8) that he received nothing from Whitehead's murder but "a vehicle that doesn't run for crap."

The trial court found that Ogden had an opportunity to contact an attorney after he left the first interview on June 22, 2006, but did not request one or assert his right to remain silent during the second interview. The trial court found that Ogden was free to leave after the first interview on June 22, 2006. The trial court ruled that all of Ogden's statements from the second interview that day were admissible because Ogden made a knowing, intelligent, and voluntary waiver of his Miranda rights. A jury found Ogden guilty of first degree murder.

Ogden argues that his statements to police during the second interview on June 22, 2006, should have been suppressed because he had asserted his right to counsel during the first interview that day and was "out of custody" for

only a short period of time. We review the trial court's conclusions of law de novo. State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002).

When an accused invokes the right to counsel during a custodial interrogation by police, all questioning must cease until counsel has been made available, unless the accused initiates further communication with the police. For the police to continue such interrogation at their own instance is inconsistent with Miranda. Edwards v. Arizona, 451 U.S. 477, 485, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). The Edwards rule against renewed interrogation, however, does not apply to situations where a defendant is reinterrogated after being released from custody. State v. Jones, 102 Wn. App. 89, 97, 6 P.3d 58 (2000).

In Jones, there had been a gap of several weeks between the first request for counsel and the renewed interrogation. The court framed the issue as whether Edwards applies "when the defendant has been out of custody for a substantial period of time." Jones, 102 Wn. App. at 96. The court concluded it did not. Ogden contends that the four hour gap in his case, compared to the gap of several weeks in Jones, was too insubstantial to relieve the State from the Edwards rule against continuing interrogation of a suspect who has asked for a lawyer.

A person who invokes the right to counsel while being questioned by police is not entitled to the protection of Edwards where that person is not being held in continuous custody. United States v. Skinner, 667 F.2d 1306, 1309 (9th Cir. 1982), cert. denied, 463 U.S. 1229 (1983). In Skinner, a murder suspect

was allowed to leave the police station in the afternoon after stating that he wanted to speak to an attorney before answering more questions. He was arrested the following morning and advised of his right to consult a lawyer. He agreed to answer questions and immediately confessed. Skinner, 667 F.2d at 1308-09. Under these circumstances, the court rejected the defendant's argument that his confession should have been suppressed. He "had the opportunity to contact a lawyer or seek advice from family and friends if he chose to do so." Skinner, 667 F.2d at 1309.

Another pertinent case is United States v. Harris, 221 F.3d 1048 (8th Cir. 2000). Harris, an arson suspect, said he wanted to speak to a lawyer after a federal agent confronted him with inconsistencies during a noncustodial interview. Harris was allowed to leave the police station where he had been interviewed. The federal agents called him back three hours later and obtained his agreement to come in the next day for another interview. Harris, 221 F.3d at 1049-50. The next day, Harris came to the police station without a lawyer and confessed. Harris, 221 F.3d at 1050. The Eighth Circuit held that the three hour break between leaving the station and the call was sufficient to defeat Edwards protection since Harris had ample opportunity to consult his family, friends, or a lawyer during that gap. Harris, 221 F.3d at 1051-52. The court recognized that Edwards prevents police from reapproaching a suspect who has invoked the Miranda right to counsel unless counsel is made available. But Edwards protection is not without boundaries, and many courts (beginning with the Ninth

Circuit in Skinner) have expressly limited Edwards protection to suspects who remain in continuous custody from the time they request counsel to the time they are interrogated again.

> Concern that a suspect will be "badgered" is greatest when a suspect remains in confinement from the time he requests a lawyer until the time that police attempt to reinterrogate him. That concern is not present in cases such as this, however, where a person is not in continuous custody and the coercive effects of confinement dissolve. Finding the limitation in Skinner well founded, we adopt the rule as our own.

Harris, 221 F.3d at 1052 (citation omitted).

Harris and Skinner are consistent with Jones; indeed, Skinner is one of the cases cited and relied upon in Jones, 102 Wn. App. at 96 n.17. These authorities establish that renewed interrogation does not violate the right to counsel of a suspect who has not been under the inherently compelling pressures of continuous custody and who has had an opportunity to consult family, friends, or a lawyer about whether to submit to a police request for a further interview. Because Ogden had ample time to consult a lawyer or anyone else between his request to speak with an attorney at roughly 12:15 p.m. and his postarrest waiver of that right around 6:00 p.m., we affirm the trial court's order admitting his second interview on June 22, 2006.

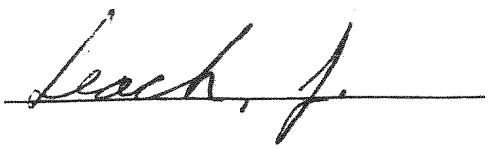
Ogden argues that the officers effectively held him in custody until 2:00 p.m. by refusing to let him get his mother's car keys from her. But Garske testified that he told Ogden before the first interview that he was free to go at any point and that he again told Ogden he was free to go when Ogden

requested counsel. It is evident that a lack of access to car keys did not prevent Ogden from leaving the police station because he did leave at 2:05 p.m. without getting his mother's car keys. Garske even helped Ogden leave by giving him directions to where he needed to go. That evidence supports contested findings 7 and 8 by showing that Ogden was free to leave at all points during and after the interview even though he did not actually leave until 2:05. And even if the detectives had actually held Ogden in custody until 2:00 p.m., he remained out of custody for roughly four hours before they came to arrest him. In these circumstances, as in Harris, the four hour break in time defeats Edwards protection.

We conclude the trial court properly denied the motion to suppress and the conviction must be affirmed. As to Ogden's challenge to the court's imposition of a DNA (deoxyribonucleic acid) collection fee, it is foreclosed by State v. Brewster, 152 Wn. App. 856, 218 P.3d 249 (2009). See also State v. Thompson, No. 61998-5-I, 2009 WL 4021935 (Wash. Ct. App. Nov. 23, 2009).

Affirmed.

WE CONCUR:



Dwyer, A.C.J.