No. 33048 - *State of West Virginia v. Kevin Ray Middleton*

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Albright, Justice, dissenting:

In this case the majority has fashioned two new points of law from which I vigorously dissent. They read as follows:

> 3. A police officer may continue to question a suspect in a noncustodial setting, even though the suspect has made a request for counsel during the interrogation, so long as the officer's continued questioning does not render statements made by the suspect involuntary.
>
> 4. If, during the course of noncustodial interrogation of a suspect, the police are made aware that legal counsel has been retained for the suspect, the police are under no obligation to inform the suspect that counsel has been retained.

I briefly outline some of the basic principles underlying my concerns. As first established in the United States Supreme Court case of *Escobedo v. Illinois*, 378 U.S. 478 (1964), a person has the right to counsel in the criminal context anytime he or she is taken into custody and interrogated by the police. In reaching this decision, the Court in *Escobedo* considered the government's argument that the number of confessions police obtained during custodial interrogations would likely decrease if the right to counsel extended to custodial interrogations. The Court concluded in *Escobedo* that:

> no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens'

> abdication through unawareness of their constitutional rights. . . . If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.

Id. at 490. The decision in *Escobedo* reflects that the Court struck the balance of these competing interests in favor of individual rights by reducing coercion inherent in custodial interrogation. Custodial interrogation was then subsequently defined by the high court in *Miranda v. Arizon*a, 384 U.S. 436 (1966), to be that point when a suspect who is undergoing police questioning is in "custody or *otherwise deprived of . . . freedom of action in any significant way*." *Id*. at 444 (emphasis added).

The majority solves most of the issues regarding the admissibility of Appellant's statement to police by finding that he was not in custody and ignoring the facts that strongly suggest or outright prove that Appellant was being subjected to a custodial interrogation, as defined in *Miranda*. There is clear indicia that Appellant was deprived of freedom of action in *most* significant ways. The police ignored Appellant's expressed desire for counsel and refused to inform Appellant that counsel had been retained to assist him. Additionally, Appellant was the only suspect in this case, he was being questioned at the state police detachment, he had been informed that he failed the polygraph test, he was not permitted to have his cell phone turned on during the interrogation and the police questioning went on for five hours. While Appellant may not have been in custody at the onset of the interrogation, the cumulative factors present in this case clearly demonstrate that

the circumstances changed during the course of the questioning and Appellant was indeed involved in a custodial interrogation. At that nebulous point when the interrogation became custodial, the police were required not only to again advise Appellant of his constitutional rights but also –and I believe more importantly – to respect those rights when Appellant asserted them. Under the circumstances of this case, that respect should have been shown by stopping the questioning, telling Appellant that a lawyer had been retained and allowing Appellant to talk with a lawyer. It defies common sense to claim that Appellant was not deprived of freedom of action in very significant respects.

The "noncustodial interrogation" determination also was used by the majority to avoid finding that the police officers were required to inform Appellant of the retention of the lawyer as decided previously by this Court in *State v. Hickman*, 175 W. Va. 709, 338 S.E.2d 188 (1985). Instead, the majority, at the State's suggestion, adopts a conclusion reached in the United States Supreme Court case of *Moran v. Burbine*, 475 U.S. 412 (1986), refusing to apply our existing state law. By its discussion of *Moran* and *Hickman*, the majority inappropriately and improvidently raised some doubt about the validity of *Hickman* but did not overrule it

It is clear by the terms of the *Moran* decision that the several states are not bound to follow its course. "Nothing in the [United States] Constitution vests in us the

authority to mandate a code of behavior for state officials wholly unconnected to any federal right or privilege." 475 U.S. at 425. As a matter of fact, the Court later in *Moran* acknowledged

> that a number of state courts have reached a contrary conclusion. We recognize also that our interpretation of the Federal Constitution, if given the dissent's expansive gloss, is at odds with the policy recommendations embodied in the American Bar Association Standards of Criminal Justice. Notwithstanding the dissent's protestations, however, our interpretive duties go well beyond deferring to the numerical preponderance of lower court decisions or to the subconstitutional recommendations of even so esteemed a body as the American Bar Association. Nothing we say today disables the States from adopting different requirements for the conduct of its employees and officials as a matter of state law. We hold only that the Court of Appeals erred in construing the Fifth Amendment to the Federal Constitution to require the exclusion of respondent's three confessions.

Id. at 427-28 (internal citations omitted). Footnote ten of Justice Stevens' dissent in *Moran* cites the cases from a significant number of states which had already reached a contrary conclusion. *Id*. at 439-40. Additionally, as predicted, several states have since recognized the holding in *Moran* but have found that their state constitutions require broader protection for their citizens on either or both self-incrimination principles or due process grounds. *See e.g. State v. Stoddard,* 537 A.2d 446 (Conn. 1988); *Bryan v. State*, 571 A.2d 170 (Del. Supr. 1990); *People v. McCauley*,645 N.E.2d 923 (Ill. 1994)*; West v. Cmmw.,* 887 S.W.2d 338 (Ky. 1994); *Cmmw. v. Mavredakis,* 725 N.E.2d 169 (Mass. 2000); *People v. Bender*, 551

N.W.2d 71 (Mich.1996); *State v. Roache*, 803 A.2d 572 (N.H. 2002); *State v. Reed*, 627 A.2d 630 (N.J. 1993).

This case presents an instance where the due process[1] and self-incrimination[2] provisions of the West Virginia Constitution should "require higher standards of protection than afforded by the Federal Constitution" in keeping with the long-standing jurisprudence of our state. Syl. Pt. 1, *State v. Bonham*, 173 W. Va. 416, 317 S.E.2d 501 (1984). Requiring police to advise a person that an attorney has been retained to represent that person, and granting a lawyer who has been retained admission to an interrogation site to talk with the person being interrogated promotes the justice and fairness that is and should be an inherent part of our justice system. As Justice Stevens observed in his dissent in *Moran*, "[t]he recognition that ours is an accusatorial, and not an inquisitorial system . . . requires that the government's actions, even in responding to . . . brutal crime, respect those liberties and rights that distinguish this society from most others." 475 U.S. at 436.

The final major concern I address here involves the majority's discussion of the voluntariness of the statement in question. In its examination of this issue, the majority

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[1]*See* W.Va. Const. art. III, § 10 ("No person shall be deprived of life, liberty, or property, without due process of law. . . .")

[2]See W.Va. Const. art. III, § 5 ("No person shall . . ., in any criminal case, be compelled to be a witness against himself. . . .")

defers to the lower court's determination that the state met its burden of proving that the statement was given voluntarily based on the testimony taken at the suppression hearing. Even the majority felt compelled to qualify its holding in syllabus point three to note that continued interrogation after a request for counsel has been made may render the questioning involuntary. This qualification simply points out that the majority's holding in this new syllabus point is likely to generate more, not less, litigation where access to legal counsel is unfairly denied a suspect. Of course, the deck will often be stacked against a defendant in such cases because the suspect, having been kept in isolation and otherwise held incommunicado, will be the only witness on his own behalf, whereas the State will often have several officers to refute any suggestion that anything that was said or done during the questioning rendered the statements involuntary. From this standpoint, the new point of law set forth as syllabus point three has little meaning and even less protection to a person who voluntarily complies with a police investigation. It certainly provides no incentive to cooperate with law enforcement investigations and will probably result in fewer confessions under these circumstances, as well as serve to promote litigation of custody issues in cases where confessions are obtained.

In sum, I fear there will be untoward consequences which will emanate from this decision. It may produce less public cooperation in investigations and conceivably fewer useable confessions obtained by law enforcement, and perhaps some manipulative and secretive tactics by police. I believe the people of this state expected a better interpretation

of the protections afforded our citizens by Article III of our West Virginia Constitution than was rendered in the majority opinion in this case. Accordingly, I dissent.