IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
DON R. NOVAK,
Respondent.

No. 44252

FILED

DEC 20 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting respondent Don R. Novak's pre-trial motion to suppress. First Judicial District Court, Carson City; Michael R. Griffin, Judge.

The district court granted Novak's motion to suppress all written and oral statements obtained by Officers Pullen and Dellabitta during their interrogation of Novak in his home. The district court granted the motion based on a determination that the officers conducted a custodial interrogation of Novak without giving him Miranda warnings.

Although neither party raised the Fourth Amendment issue below, implied in the proceedings leading up to the district court's decision was that the officers' warrantless entry contributed to the district court's decision to suppress the statements obtained during the interrogation.

The Fourth Amendment to the United States Constitution forbids unreasonable searches and seizures.[1] Warrantless searches and seizures in a home are presumptively unreasonable.[2] If police illegally

[1]U.S. Const. amend. IV.

[2]Doleman v. State, 107 Nev. 409, 413, 812 P.2d 1287, 1289 (1991).

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enter a suspect's home, all evidence seized must be suppressed as fruit of the illegal entry.[3]

Fifth Amendment

A suspect's statements made during custodial interrogation are inadmissible at trial unless the police first inform the suspect of his Fifth Amendment privilege against self-incrimination.[4] Whether a defendant is "in custody" and constitutionally entitled to Miranda warnings is a mixed question of law and fact.[5] The district court's "purely historical factual findings" pertaining to the circumstances surrounding an interrogation are entitled to deference and will not be overturned absent clear error.[6] However, the ultimate question of whether a person is "in custody" is a question of law reviewed de novo.[7]

Interrogation is express questioning by the police, or any words or actions that the police should know are reasonably likely to elicit an incriminating response from a suspect.[8] A person is "in custody" only where there has been a restriction on a person's freedom.[9] Custody consists of either a formal arrest or restraint on freedom of movement of

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[3]Wong Sun, 371 U.S. 471 (1963).

[4]Miranda v. Arizona, 384 U.S. 436, 479 (1966).

[5]Rosky v. State, 121 Nev. ___, ___, 111 P.3d 690, 694 (2005).

[6]Id.

[7]Id.

[8]Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

[9]Oregon v. Mathiason, 429 U.S. 492, 495 (1977).

the degree associated with formal arrest.[10] When a suspect is not formally arrested, the test to determine if he is in custody is "whether a reasonable person in the suspect's position would feel 'at liberty to terminate the interrogation and leave.'"[11] Whether an accused is in custody is measured by an objective standard,[12] not by the subjective views of either the officers or the person being questioned.[13]

In deciding whether an objective, reasonable, person would feel free to leave, courts consider the totality of the circumstances, including: (1) the site of the interrogation; (2) whether the investigation has focused on the subject; (3) whether the objective indicia of arrest are present; and (4) the length and form of questioning.[14] However, no single consideration is dispositive.[15]

Here, it is undisputed that two armed and uniformed police officers interrogated Novak in his own home, and that Novak was the sole focus of the interrogation. Because no one factor is dispositive, we turn our analysis to the third and fourth factors, indicia of arrest and length and form of questioning. The objective indicia of arrest provided in State v. Taylor are as follows:

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[10]Rosky, 121 Nev. at ___, 111 P.3d at 695.

[11]Id. (quoting Thompson v. Keohane, 516 U.S. 99, 112 (1995)).

[12]Berkemer v. McCarty, 468 U.S. 420, 442 (1984).

[13]Stansbury v. California, 511 U.S. 318, 323 (1994).

[14]Alward, 112 Nev. at 154-55, 912 P.2d at 252.

[15]Id.

> (1) whether the suspect was told that the questioning was voluntary or that he was free to leave; (2) whether the suspect was not formally under arrest; (3) whether the suspect could move about freely during questioning; (4) whether the suspect voluntarily responded to questions; (5) whether the atmosphere of questioning was police dominated; (6) whether the police used strong-arm tactics or deception during questioning; and (7) whether the police arrested the suspect at the termination of questioning.[16]

Novak was never formally under arrest, he appeared to voluntarily respond to the questions, and the police did not use overt strong-arm tactics or deception during the questioning. Further, the length of questioning was brief, lasting no more than thirty minutes.

However, the police never informed Novak that he was free to leave, and a reasonable person in Novak's situation would be placed under the impression that he was not able to move about freely during the questioning. The district court found, and the record shows, that the atmosphere was police dominated, and that the officers conducted the interrogation in an intimidating manner. It was apparent that a reasonable person would have felt that his movement was impaired and that he would be compelled to cooperate. Further, the officers arrested Novak at the end of the interrogation.

Based on the totality of the circumstances, a reasonable person in Novak's situation would not have felt free to leave. In light of the aforementioned factors, we conclude that substantial evidence exists to support the district court's conclusion that Novak was in custody and

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[16]114 Nev. 1071, 1082 n.1, 968 P.2d 315, 323 n.1 (1998).

therefore entitled to Miranda warnings. Consequently, the district court did not err when it suppressed statements obtained from Novak during the custodial interrogation.

Exclusion of officers' testimony

The district court enjoys broad discretion in determining whether evidence should be admitted.[17] Further, this court will not review exclusion of evidence where the trial counsel makes no offer of proof.[18]

The State argues that the district court erred by refusing to allow officers Pullen and Dellabitta to testify at the hearing on Novak's motion to suppress. However, the State failed to make an offer of proof showing the police officers' excluded testimony would differ in any material way from the testimony. Therefore, this court need not address the State's argument on appeal.[19] Nonetheless, this court may review an issue that was not raised below for plain error.[20]

The district court considered Dellabitta's preliminary examination transcript and indicated that it accepted the testimony as true. After a colloquy between the court and the State, the court determined that Pullen had nothing to add to Dellabitta's testimony. The State made no offer of proof that Dellabitta or Pullen's new testimony would differ in any material way from Dellabitta's preliminary hearing testimony. The court consequently ruled that the officers' proposed

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[17]Prabhu v. Levine, 112 Nev. 1538, 1548, 930 P.2d 103, 110 (1996).

[18]McCall v. State, 97 Nev. 514, 516, 634 P.2d 1210, 1212 (1981).

[19]See id.

[20]Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995).

testimony at the suppression hearing would have been needlessly cumulative.[21] We conclude that it was not plain error for the district court to exclude the officers' testimony.

We conclude that the district court did not err in suppressing statements obtained from Novak during his custodial interrogation, and did not err in refusing to allow the State to call the officers as witnesses at the hearing on the motion to suppress. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Douglas, J.

Rose, J.

Parraguirre, J.

cc: Hon. Michael R. Griffin, District Judge
Attorney General
Carson City District Attorney
Jason D. Woodbury
Carson City Clerk

[21]See NRS 48.035(2).