

IN THE SUPREME COURT OF THE STATE OF NEVADA

VERNON DEAN DILL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39366

FILED

NOV 16 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT
THE JUDGMENT OF CONVICTION

This is an appeal from a judgment of conviction, upon a jury verdict, of one count of attempted robbery with the use of a deadly weapon. Third Judicial District Court, Churchill County; Robert E. Estes, Judge.

Appellant Vernon Dean Dill argues that the district court erred in (1) admitting statements made by Dill after he invoked his right to counsel under Miranda v. Arizona;¹ and (2) giving a jury instruction on deadly weapon enhancement based on the functional definition of deadly weapon provided in NRS 193.165(5)(b), which incorporates the definition of “substantial bodily harm” provided in NRS 0.060. Although we affirm the judgment of conviction entered below, we remand the matter to the district court to correct a clerical error therein.²

¹384 U.S. 436 (1966).

²We have recited only those facts that are necessary to our disposition of appellant’s contentions.

Miranda warnings

Initial investigation of an attempted robbery by local authorities in Churchill County led to Dill, a naval serviceman stationed at the Fallon Naval Air Station. Detective Robert Bridges of the Fallon Police Department requested station authorities detain Dill for questioning, after which U.S. Navy Special Agent Richard Warner accompanied Dill to the Naval Investigative Services office at the base. Although Dill never expressly admitted guilt, he ultimately made statements implicating himself in the affair to Detective Bridges.

Two administrations of Miranda warnings occurred, first by Agent Warner prior to the arrival of Detective Bridges, and second by Bridges himself. Dill refused to discuss the matter with Agent Warner, but agreed to wait for Bridges to arrive. Although advised at various points prior to his arrest that he was free to leave, Dill argues that he was in custody at all times during the “detention” at the Fallon Naval Air Station. Because he invoked his Miranda rights after the first set of warnings, he reasons that the district court erred in admitting statements he made after the second set of warnings. We review a district court’s factual findings pertaining to the circumstances surrounding an interrogation for clear error, and the district court’s ultimate determination of whether a person is in custody de novo.³

The police cannot question a suspect in custody after the suspect invokes his right to counsel under Miranda.⁴ However, a suspect

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

⁴Edwards v. Arizona, 451 U.S. 477 (1981).

must be in custody for Miranda rights to attach.⁵ A suspect questioned in a noncustodial setting has no Fifth Amendment right to legal counsel to assert, even if he has expressed the desire to speak to an attorney.⁶ “Custody” for Miranda purposes means a ““formal arrest or restraint on freedom of movement” of the degree associated with a formal arrest.”⁷ In summary, as we stated in Silva:

It is well settled that one who is not in custody is not entitled to the Fifth Amendment right to counsel. Therefore, the police may continue asking the suspect questions, even if he asks for an attorney during the interrogation, as long as the statements are voluntary.⁸

The district court found that Agent Warner’s interrogation of Dill was noncustodial. We find no abuse of discretion in this ruling. Dill was not “ordered” to the Naval Investigative Services office by his superior officers, rather, he voluntarily rode there with Agent Warner. Even after Dill refused to speak with Agent Warner and requested counsel following the first set of warnings, Warner made it clear that Dill was free to leave at any time and only requested that Dill stay to be interviewed by the Fallon Police Department. And, as stated, Dill agreed to wait at the investigative services office for Detective Bridges. Finally, it appears that

⁵See Silva v. State, 113 Nev. 1365, 1370-71, 951 P.2d 591, 594-95 (1997).

⁶Id.

⁷Alward v. State, 112 Nev. 141, 154, 912 P.2d 243, 252 (1996) (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983); accord Oregon v. Mathiason, 429 U.S. 492, 495 (1977)).

⁸Silva, 113 Nev. at 1370-71, 951 P.2d at 594-95.

Bridges himself made it clear that Dill was free to leave until after the conclusion of the interview, and that Dill was not placed in handcuffs until after Bridges formally placed him under arrest. We therefore conclude that the district court's factual findings that Dill was not in custody prior to Bridges arrival are not clearly erroneous.

Based upon its findings that Dill was not in custody prior to Bridges' administration of Miranda warnings, the district court then concluded that no Miranda violation occurred. We agree. Bridges re-administered Miranda warnings in what was a noncustodial setting, at least up and until the point Bridges initiated his interview, after which Dill voluntarily implicated himself in the matter. We therefore find no error in the admission of Dill's statements to Detective Bridges.⁹

Deadly weapon enhancement

Dill next objects to the district court's use of a jury instruction on deadly weapon enhancement based on the functional definition of deadly weapon provided in NRS 193.165(5)(b), which incorporates the definition of "substantial bodily harm" provided in NRS 0.060. Dill contends that as it applies to him, the functional definition of a deadly weapon is vague, ambiguous, and overbroad because any instrumentality


⁹The State contends under Rice v. State, 113 Nev. 1300, 949 P.2d 262 (1997), that Dill failed to properly preserve any error in connection with admission of his statements by failure to lodge a contemporary objection at trial. We reject this contention based upon the district court's definitive ruling on Dill's motion to suppress the statement. See Richmond v. State, 118 Nev. 924, 931-32, 59 P.3d 1249, 1254 (2002).

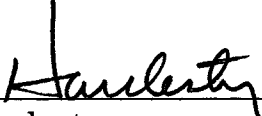
We also conclude that, even if a Miranda violation occurred, the error is harmless beyond a reasonable doubt in light of the wealth of other evidence establishing the appellant's guilt. See Chapman v. California, 386 U.S. 18, 24 (1967).

could be considered a deadly weapon. We conclude that this argument is without merit. Dill struck the victim over the head with a beer bottle. There is no doubt that a beer bottle can cause substantial bodily harm and satisfies the functional definition of a deadly weapon under NRS 193.165(5)(b). Having concluded that Dill's contentions lack merit, we affirm the judgment of conviction. However, our review reveals a clerical error in the written judgment. Specifically, the judgment states that Dill was convicted pursuant to a guilty plea when, in fact, he was convicted pursuant to a jury verdict. Accordingly, we

ORDER the judgment of the district court AFFIRMED and REMAND this matter to the district court for the limited purpose of correcting the judgment of conviction.

 J.

Maupin
 J.
Gibbons

 J.
Hardesty

cc: Hon. Robert E. Estes, District Judge
Paul G. Yohey
Attorney General
Churchill County District Attorney
Churchill County Clerk