

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,  
Appellant,  
vs.  
ARNOLD PRESTON BERTNICK,  
Respondent.

No. 41238

FILED

FEB 18 2004

ORDER OF AFFIRMANCE

JANEITE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richard*  
CHIEF DEPUTY CLERK

This is an interlocutory appeal of the district court's order granting respondent Arnold Preston Bertwick's motion to suppress statements made during a police interrogation. The district court found that the police subjected Bertnick to custodial interrogation, and that the officers should have ceased all questioning when Bertnick invoked his right to an attorney.

The State contends that the district court erred in holding that Bertnick was in custody when he made statements to law enforcement. Thus, the State concludes that there was no requirement for police to advise Bertnick about his rights pursuant to Miranda<sup>1</sup> before Bertnick made statements to police. We disagree.

This court has held that "[t]he district court's findings in a suppression hearing will be upheld unless this court is"<sup>2</sup> "left with the

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<sup>1</sup>Miranda v. Arizona, 384 U.S. 436 (1966).

<sup>2</sup>Proferes v. State, 116 Nev. 1136, 1138, 13 P.3d 955, 956 (2000).

definite and firm conviction that a mistake has been committed.”<sup>3</sup> This court will uphold the district court’s decision to suppress statements if its decision is based on substantial evidence in support of its conclusion.<sup>4</sup>

“The Fifth Amendment privilege against self-incrimination provides that a suspect’s statements made during custodial interrogation are inadmissible at trial unless the police first provide a Miranda warning.”<sup>5</sup> When deciding whether a defendant is in custody, the court considers all surrounding facts and circumstances, but ultimately a defendant is in custody if there is “a restraint on freedom of movement of the degree associated with a formal arrest so that a reasonable person would not feel free to leave.”<sup>6</sup> “[T]he pertinent inquiry [for determining custody] ‘is how a reasonable man in the suspect’s position would have understood his situation.’”<sup>7</sup>

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<sup>3</sup>United States v. Gypsum Co., 333 U.S. 364, 395 (1948) quoted in Proferes, 116 Nev. at 1138, 13 P.3d at 956.

<sup>4</sup>See Bopp v. Lino, 110 Nev. 1246, 1249, 885 P.2d 559, 561 (1994).

<sup>5</sup>State v. Taylor, 114 Nev. 1071, 1081, 968 P.2d 315, 323 (1998). The Fifth Amendment right against self-incrimination was incorporated to the states through the Due Process Clause of the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 6 (1964).

<sup>6</sup>Taylor, 114 Nev. at 1082, 968 P.2d at 323.

<sup>7</sup>Alward v. State, 112 Nev. 141, 154, 912 P.2d 243, 252 (1996) (quoting Berkemer v. McCarty, 468 U.S. 420, 442 (1984)).

In order to determine whether custodial interrogation has actually occurred, this court noted in State v. Taylor several objective elements that indicate arrest:

(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.<sup>8</sup>

This court has held that every factor need not be present in order to determine whether a suspect is in custody.<sup>9</sup>

In the morning of February 5, 2002, police interviewed Bertnick after his girlfriend's two-year-old daughter, Asiamae, died from injuries consistent with child abuse. During this interview, Bertnick was visibly upset and crying over the death of Asiamae.

Bertnick voluntarily returned to the police station for additional questioning on the evening of February 5, 2002. As he entered the police station, his girlfriend, Tiffany Basa, advised him that he would be charged for murder. Thirty minutes into this second interview, the line of questioning became more focused on Bertnick:

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<sup>8</sup>114 Nev. at 1082 n.1, 968 P.2d at 323 n.1 (emphasis added).

<sup>9</sup>Id.

DETECTIVE HOHNHOLZ: Preston, I'd like, I'd like to talk to you about Asiamae's injuries, what we learned from the autopsy. Are you up to that?

BERTNICK: (nods slowly)

HOHNHOLZ: Okay, before we go any further, okay, I need to explain your rights to you. Okay.

BERTNICK: (moaning while speaking) What, am I being charged for something?

HOHNHOLZ: No, you are not. Not at this point, but I want you to understand because there are certain things we need to talk about and based on that, I think you should know what your rights are.

BERTNICK: Do I need a lawyer here?

HOHNHOLZ: I can't say whether you need a lawyer or not. That's up to you. (Bertnick moaning while det. speaking)

BERTNICK: I want my lawyer here, . . . since I don't know what's going on, just want my baby back.

HOHNHOLZ: Okay, well if you want your lawyer here then I can't talk to you anymore. I know you want to find out what happened, but in order for me to discuss you're, her injuries and what she died of and that type of thing. If you want your attorney here, we can't go any further. (some audible moans from Bertnick while det. speaking)

BERTNICK: I want to know what happened to my baby. I want to know what happened to my baby.

HOHNHOLZ: Okay, let me read you your rights.

BERTNICK: Am I under arrest?

HOHNHOLZ: No, you are not. You're free to leave any time you want. You are not under

arrest. Okay. (Some audible moans from Bertnick while det. speaking.)

BERTNICK: (While moaning and crying:) I love my baby so much, I want my baby back.

HOHNHOLZ: I need you to be, start relaxing. I want to make sure you understand what your rights are and what we're going to be talking about. Okay. (some audible moans from Bertnick while det. speaking)

BERTNICK: Yes, . . .

HOHNHOLZ: So, it is your wish that I explain your rights to you now?

BERTNICK: Yeah.

HOHNHOLZ: Without an attorney here?

BERTNICK: (moaning/crying:) Yeah, I just want to know what happened to my baby.

Bertnick then proceeded to waive his rights when Hohnholz provided him Miranda warnings.

It is undisputed that police officers arrested Bertnick after the evening interview on February 5, 2002. This arrest at the end of the interview corresponds with the sixth indicia of arrest element this court detailed in Taylor.<sup>10</sup> The deceptive tactics employed by the detective to persuade Bertnick to waive his privilege against self-incrimination are strong-arm tactics often associated with formal arrest, the seventh element listed in Taylor.<sup>11</sup> Such strong-arm police tactics were coercive

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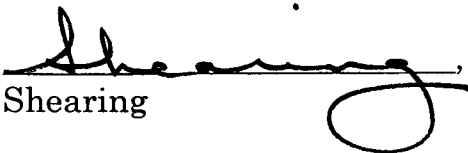
<sup>10</sup>Id.

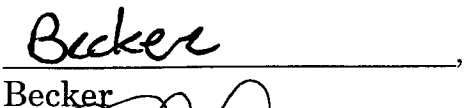
<sup>11</sup>Id.

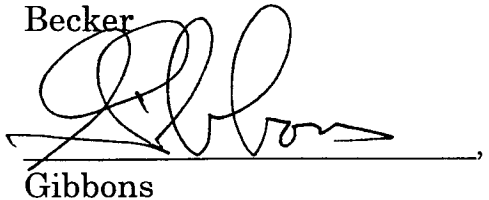
and indicate that Bertnick was actually in custody when he requested an attorney, especially since police used such tactics to convince Bertnick to waive his constitutional rights. Therefore, we conclude that there was substantial evidence to support the district court's decision to suppress Bertnick's statements.

Accordingly, we affirm the order granting the motion to suppress the statements.

It is so ORDERED.

  
\_\_\_\_\_, C.J.  
Shearing

  
\_\_\_\_\_, J.  
Becker

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Jerome Polaha, District Judge  
Attorney General Brian Sandoval/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe County Public Defender  
Washoe District Court Clerk