IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
JERALD GARRETT,
Respondent.

No. 42310

FILED

DEC 01 2004

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

ORDER OF REVERSAL AND REMAND

This is an appeal by the State of Nevada from a pretrial order of the district court excluding a statement to police made by respondent, Jerald Garrett, while under custodial interrogation. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Police conducted an out-of-custody interview of Garrett, without Miranda[1] warnings, after receiving a report that he sexually assaulted another adult male. During that interview, Garrett denied having a sexual encounter with the accuser. Police later arrested Garrett and brought him to the police station for interrogation. The interrogating officer attempted to read Garrett his Miranda rights three times, but Garrett alternately denied understanding them, claimed he was deaf, and was non-responsive and/or threatened the officer when asked if he understood his rights. At no time did Garrett request an attorney or inform police that he wished to stop speaking. Garrett eventually admitted to consensual sex with the victim.

Prior to trial, the district court granted Garrett's motion to suppress his post-arrest statement. The court ruled that Garrett's failure

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

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to sign a rights waiver card or otherwise expressly acknowledge that he was waiving his rights rendered his statement to police inadmissible.

The State appeals, contending that the district court abused its discretion by suppressing Garrett's second statement to the police.[2]

DISCUSSION

"The Fifth Amendment privilege against self-incrimination requires that a suspect's statements made during custodial interrogation not be admitted at trial if the police failed to first provide a Miranda warning. In order to admit statements made during custodial interrogation, the defendant must knowingly and voluntarily waive the Miranda rights."[3]

When the voluntariness of a defendant's statement is placed in issue, "the trial judge receives evidence on the voluntariness of the statement and determines whether the statement was voluntary. If so, it is admitted."[4] "'In order to be voluntary, a confession must be the product of a "rational intellect and a free will."'"[5] Further, the State must prove, by a preponderance of the evidence, that the defendant's waiver of Miranda warnings was knowing and intelligent.[6]

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[2]Neither party contests the district court's ruling admitting Garrett's pre-arrest statement.

[3]Koger v. State, 117 Nev. 138, 141, 17 P.3d 428, 430 (2001) (citations omitted).

[4]Laursen v. State, 97 Nev. 568, 570, 634 P.2d 1230, 1231 (1981).

[5]Chambers v. State, 113 Nev. 974, 981, 944 P.2d 805, 809 (1997) (quoting Passama v. State, 103 Nev. 212, 213-14, 735 P.2d 321, 322 (1987) (quoting Blackburn v. Alabama, 361 U.S. 199, 208 (1960))).

[6]Harte v. State, 116 Nev. 1054, 1062, 13 P.3d 420, 426 (2000).

The admissibility of a confession is primarily a factual question. Where substantial evidence supports the district court's determination, it should not be disturbed on appeal.[7] "The district court's decision regarding voluntariness is final unless such finding is plainly untenable."[8] "In determining whether a confession is the product of free will, this court employs a 'totality of the circumstances test' to determine 'whether the defendant's will was overborne when he confessed.'"[9] Relevant factors include: the age of the accused; his level of education and intelligence; whether he was advised of his constitutional rights; the length of any detention; the repeated or prolonged nature of the questioning; and the use of physical punishment, such as the deprivation of food or sleep.[10]

The State asserts that the district court abused its discretion in its exclusion of the statement based on the lack of an explicit waiver of his Miranda rights. In this, the State contends that such a waiver is unnecessary.[11] More particularly, the State argues that Garrett

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[7]Floyd v. State, 118 Nev. 156, 172, 42 P.3d 249, 260 (2002), cert. denied, 537 U.S. 1196 (2003).

[8]Thompson v. State, 108 Nev. 749, 753, 838 P.2d 452, 455 (1992), overruled on other grounds by Collman v. State, 116 Nev. 687, 7 P.3d 426 (2000).

[9]Elvik v. State, 114 Nev. 883, 892, 965 P.2d 281, 287 (1998) (quoting Passama, 103 Nev. at 214, 735 P.2d at 323).

[10]Passama, 103 Nev. at 214, 735 P.2d at 323 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)).

[11]The State relies upon Allen v. State, 91 Nev. 568, 540 P.2d 101 (1975), for this proposition.

voluntarily spoke with police after they advised him on several occasions of his Miranda rights, that Garrett knowingly and voluntarily waived his rights by continuing to speak with police, and that the district court actually found that Garrett understood his rights. Accordingly, the State requests that we reverse the district court with instructions to admit the statement.

Garrett argues that the district court correctly exercised its discretion because the transcript of the suppressed interrogation does not demonstrate a waiver or acknowledgement of his rights, and because Garrett repeatedly stated that he did not understand his rights.

Here, the district court excluded Garrett's post-arrest statements with the following comment:

> I think it's imperative that the police get an affirmative response that someone understands their rights, and I'm sure he was being a jerk and I'm sure he was playing games and I'm confident that he knew what his rights were, but that's not what the law requires. What the law requires is that the defendant indicate in writing by signing his name to the sheet of paper or on tape that he understands his rights, and he didn't. He didn't do that, and because he didn't do that he – in my opinion it's not up to a defendant to say I'm not talking to you and I want a lawyer.[12]

In North Carolina v. Butler, the United States Supreme Court considered a state court's suppression of a confession based entirely upon the defendant's refusal to sign a written waiver of his Miranda rights or make a specific oral waiver of them.[13] The Court reversed, stating:

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[12](Emphasis added.)

[13]441 U.S. 369, 372 (1979).

> An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the Miranda case. As was unequivocally said in Miranda, mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated.[14]

Going further, in Allen v. State, this court held that a Mirandized custodial statement to police was admissible in a situation where the defendant never expressly accepted or rejected his rights and continued to speak to authorities.[15] Thus, an express waiver of rights is not per se necessary for admission of a defendant's custodial confession, and a court may infer a waiver of rights from a defendant's conduct.

Although the district court factually believed that Garrett attempted to manipulate the officers into some sort of error that would poison the prosecution against him, the court suppressed the statement for lack of a written or tape-recorded waiver of his Miranda rights. As noted above, this is not an absolute requirement under state or federal constitutional jurisprudence.

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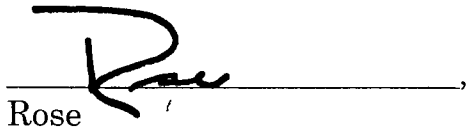
[14]Id. at 373.

[15]91 Nev. at 571, 540 P.2d at 595.

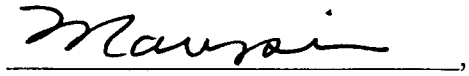
CONCLUSION

We conclude that the district court erroneously suppressed the custodial statement as a matter of law for lack of an explicit waiver, written or otherwise. Accordingly, we

REVERSE and REMAND this matter to the district court to reconsider its suppression order and determine anew whether, under a totality of the circumstances, Garrett's post-arrest statement was voluntary, knowingly and intelligently given.



_____, J.
Rose



_____, J.
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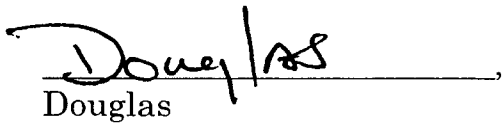

_____, J.
Douglas

cc: Hon. Sally L. Loehrer, District Judge
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Public Defender Philip J. Kohn
Clark County Clerk