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Dewey v. State, 123 Nev. Adv. Op. No. 47 (2007).¹

Criminal Law – Miranda Rights

Summary

Appeal from a jury conviction of second degree murder with a deadly weapon, from the Fourth Juridical District Court, District of Nevada.

Disposition/Outcome

Affirmed. To invoke the right to counsel under *Miranda*, a suspect must make a “clear, unequivocal, and unambiguous request for an attorney.”² Choosing to remain silent is not the equivalent of a request for counsel. When a suspect has chosen to remain silent, police can resume questioning a suspect after they have “scrupulously honored” the suspect’s exercise of their right to terminate questioning, and have reissued *Miranda* rights prior to reinitiating questioning.

Factual and Procedural History

On the morning of September 12, 2004, Shelli Rose Dewey placed a 911 call, answered by Elko Police. In the call Dewey told operators that her husband, Steven, had been stabbed. Dewey also told operators that she did not know who stabbed her husband.

Once on the scene, police noted that Dewey appeared intoxicated and slightly unintelligible. She reiterated that her husband had been stabbed, and police unsuccessfully searched the area for the weapon. There were several witnesses on scene. They told the police that Dewey and Steven had been drinking, had created a disturbance earlier in the night, and had been asked to leave by the bartender. Thirty minutes after being asked to leave, a witness reported that they had been arguing in the parking lot. A different witness reported a loud argument and hysterical crying. That witness saw Dewey draped over Steven saying, “Please don’t die! Please don’t die on me!”³

Dewey was taken to the Elko Police State for an interview after Steven’s death. The police told Dewey that the interview was going to be recorded, and Detective Larry Kidd advised Dewey of her *Miranda* rights. Dewey was given a card with the *Miranda* rights on it, she then read the card and initialed line by line.

During the interview, Detective Kidd informed Dewey that she could stop the interview at any time, even if she chose not to have a lawyer present. *Miranda* rights were again read to Dewey, and Dewey confirmed that she understood her rights. Dewey asked if she was a suspect,

¹ By Emily Reed.

² *Dewey v. State*, 123 Nev. Adv. Op. 47, 2 (2007).

³ *Id.* at 3.

and Detective Kidd confirmed that she was. At that point Dewey told Detective Kidd that she did not want to speak to anyone. The interview ended, and Dewey was arrested.

Two hours later, Officer Connie Bauers initiated a discussion with Dewey. Officer Bauers had Dewey reread her *Miranda* rights and had Dewey sign a waiver form. Dewey was advised that she was free to end the interview at any time. During this interview Dewey admitted to hitting Steven with a knife in her hand. She stated that she had intended to punch Steven but had hit him with the knife instead. Dewey also told the police where the knife might be, and the police found the knife in this location.

The next day police tried to interview Dewey again and she invoked her right to counsel and the interview did not take place. Dewey was charged with murder with the use of a deadly weapon. Dewey filed a motion to suppress, and the district court found that Dewey had not clearly invoked her right to counsel during her first interview. She was convicted at a jury trial of second-degree murder with a deadly weapon. She appealed on the grounds that the inculpatory statements made during the second interview were in violation of her constitutional rights and should have been suppressed.

Discussion

In this appeal, the Nevada Supreme Court considers whether the incupatory statements Dewey made “should have been suppressed on one or more of three grounds: (1) her statements were obtained in violation of her Fifth and Sixth Amendment rights under the United States Constitution, (2) her statements were obtained in violation of her Fifth Amendment right to remain silent, and (3) her statements were involuntary.”⁴

Right to counsel

In *Fellers v. United States* the United States Supreme Court held “[t]he Sixth Amendment right to counsel is triggered “at or after the time that judicial proceedings have been initiated” either “by way or formal charge, preliminary hearing, indictment information, or arraignment.”⁵ The Nevada Supreme Court held that Dewey’s Sixth Amendment right to counsel was not an issue because at the time of the first interview, judicial proceedings had not been initiated against Dewey. Therefore, Dewey’s argument that she was deprived of her Sixth Amendment rights is without merit.

Under the Fifth Amendment, Dewey did have a right to counsel to protect herself from compulsory self-incrimination. However, a suspect under *Miranda* must exercise the right to remain silent or make an unambiguous and unequivocal request of an attorney. This request must be “some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.”⁶ There must be an affirmative request; simply remaining silent is not enough. Further, “a limited invocation of the right to counsel does not prohibit all further

⁴ *Id.* at 5.

⁵ *Id.* at 6 (citing *Fellers v. United States*, 540 U.S. 519, 523 (2004)).

⁶ *Id.* at 7 (citing *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991)).

interrogation.”⁷ In this case Dewey invoked her right to remain silent during the first interview, and invoked her right to counsel during the third interview. The Nevada Supreme Court upheld the District Courts findings that Dewey had not made an affirmative, unequivocal, or unambiguous request for counsel at the time she made the inculpatory statements (during the second interview). Therefore the District Court correctly allowed the statements to be heard as evidence.

Right to remain silent

Depending the *Miranda* rights invoked by a suspect, police may have the right to re-question a witness. If the suspect has requested counsel, under *Miranda*, then the police cannot question the suspect unless there is an attorney present, or the suspect initiates the communication, or conversation. If only the right to remain silent has been invoked, the police are allowed to begin questioning the suspect again. Prior to reinitiating questioning the police must scrupulously honor the suspect’s exercise of their right to remain silent and reissue the *Miranda* warning.

The standard for determining if a suspect’s right has been scrupulously honored as determined in *Michigan v. Mosley*, is using the totality of the circumstances to determine: (1) whether the police immediately ceased questioning after the suspect invoked the right to remain silent, (2) whether there was a significant period of time prior to resuming questioning, (3) whether new *Miranda* warnings were issued, and (4) whether the police focused on a different crime in the second round of questioning.

In *United States v. Hsu*, the Ninth Circuit Court of Appeals held that “neither the amount of elapsed time nor the identity of subject matter of the interview are of primary importance.”⁸ The Nevada Supreme Court held that the Ninth Circuits rule is correct, and the factors from *Mosley* should be used as relevant factors for consideration under the *Hsu* rule.

In this case, the police immediately ended the first interview after Dewey invoked her right to remain silent. The next interview occurred approximately two hours later, and Dewey was given new *Miranda* warnings at the start of this second interview. Even though the second interview dealt with the same crime, the Nevada Supreme Court held it was immaterial because of the repeated *Miranda* warnings given to Dewey. The police “scrupulously honored” Dewey’s right to remain silent through the immediate cessation of questioning in the first interview, and the repeated *Miranda* warnings. Therefore the Nevada Supreme Court determined the statements were not obtained in violation of Dewey’s right to remain silent.

Dewey’s statements were voluntary

The State has the burden of proving that the statements made were voluntary based on a totality of the circumstances. To be voluntary a confession must be “the product of a ‘rational intellect and a free will.’”⁹ The criteria to be considered is: “[t]he youth of the accused; his lack

⁷ *Id.* at 7 (citing *Connecticut v. Barrett*, 479 U.S. 523, 527-30 (1987)).

⁸ *Id.* at 11(citing *United States v. Hsu*, 852 F.2d 407, 410 (9th Cir. 1988)).

⁹ *Id.* at 12 (citing *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960)).

of education or his low intelligence; the lack of any advice of constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep.”¹⁰ Prior experience with law enforcement may also be considered.

Dewey was over thirty years old at the time she made the statements, she was a high school graduate with some college education, her children were home schooled, she was advised on her constitutional rights prior to each interview, and exercised those rights on two separate occasions. Dewey’s conduct demonstrated that she had an understanding of both her right to remain silent, and her right to counsel. Dewey also had the opportunity to ask questions regarding her *Miranda* rights each time she was given the rights. Because of these facts the Nevada Supreme Court confirmed the District Courts ruling that her confession was voluntary.

Conclusion

Dewey did not clearly and unequivocally invoke her right to counsel during the initial interview. After Dewey invoked her right to remain silent, the police “scrupulously honored” her right to remain silent prior to reinitiating questioning. Further, Dewey voluntarily waived her *Miranda* rights prior to making the inculpatory statements; therefore, the statements were properly admitted as evidence at her trial. The conviction was affirmed.

¹⁰ *Id.* at 13 (citing *Alward v. State*, 112 Nev. 141, 155, 912 P.2d 243, 252 (1996)).