No. 22079 - State of West Virginia v. Brian Hopkins

Cleckley, Justice, concurring, in part, and dissenting, in part:

I.

MIRANDA RIGHTS

In State v. Hambrick, 160 W. Va. 673, 236 S.E.2d 247 (1977), we adopted Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966), as part of our state constitutional jurisprudence which established a prophylactic procedural shield to support every citizen's Fifth Amendment right against compelled self-incrimination. Part of this shield is the requirement that, prior to custodial interrogation, the police must advise the individual of his or her right to silence and his or her right to an attorney. The majority seeks to avoid application of this important procedural right by holding that the confrontation between the defendant and the security officer did not amount to "interrogation" or "custody."

Although I believe the majority is probably wrong as to both points, out of deference to the trial court, I concur as to the ruling on Miranda warnings. As an appellate court we are to give deference to factual findings and factual conclusions of the

trial court, and I cannot conclude that the trial court was clearly wrong as to custody. On the other hand, the trial court and the majority's factual and legal conclusion that there was no interrogation is clearly wrong. Of course, as the majority states, if there is no custody, the mere existence of interrogation is not sufficient to trigger Miranda warnings. Nevertheless, unless the opinion of the majority is challenged, I believe that no trial court would ever feel obligated, short of actual arrest, to find custody for Miranda purposes. Establishing bright line rules for custodial interrogation determinations is not always desirable, but there are some well recognized legal principles that must be honored by the courts, including us.

A.

Custody

Miranda defines "custody" as whether a person is "deprived of his freedom of action in any significant way." 384 U.S. at 444, 86 S. Ct. at 1612, 16 L.Ed.2d at 706. Custodial interrogation is ordinarily conducted by officers who are "'acutely aware of the potentially incriminating nature of the disclosures sought.'" Minnesota v. Murphy, 465 U.S. 420, 429, 104 S. Ct. 1136, 1143, 79 L.Ed.2d 409, 421 (1984), quoting Garner v. United States, 424 U.S. 648, 657, 96 S. Ct. 1178, 1184, 47 L.Ed.2d 370, 379 (1976). This

custodial setting is thought to contain "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." Miranda, 384 U.S. at 466, 86 S. Ct. at 1624, 16 L.Ed.2d at 719. In this case the security officer's reasons for stopping and questioning the defendant were evident. The security officer testified that he observed the defendant remove from the shelves and place in his pocket two packs of cigarettes. This motivated the security officer to confront the defendant as he attempted to leave the business premises and question him.

As the majority opinion suggests, the question whether a person is in custody for purposes of Miranda is answered by the "objective circumstances" of the interrogation. It does not depend on the subjective view of either the person interrogated or the officers who conduct the interrogation. See Stansbury v. California, __ U.S. __, 114 S. Ct. 1526, 128 L.Ed.2d 293 (1994) (per curiam).

Thus, there are several objective factors I would consider crucial in determining whether there was custody. See United States v. Griffin, 922 F.2d 1343 (8th Cir. 1990) (detailed discussion of relevant factors which includes most of those listed below). The first and most important factor is whether the officer informed the

suspect at the time of questioning that the questioning was voluntary, that the suspect was free to leave, or that the suspect was not under arrest. Although the officer did not tell the defendant that he was under arrest or that he was not free to walk away, the evidence shows that he did not tell the defendant he could.

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[1]A simple statement by the officer informing the defendant that he was not under arrest and was free to leave would usually be sufficient to preclude a finding of custody and would most definitely circumvent a finding of de facto arrest. See State v. Wyant, 174 W. Va. 567, 328 S.E.2d 174 (1985); State v. Stanley, 168 W. Va. 294, 284 S.E.2d 367 (1981). Most disputed cases concerning custody arise when there is silence on the part of the investigating officer and the questioning takes place in a public setting. Already in this Term, we have spent considerable time defining and determining custody in three separate cases. The easiest case we dealt with this Term was State v. Farley, __ W. Va. __, __ S.E.2d __ (No. 22139 11/18/94), where we implied in note 10 that there was no custody. Significantly, in Farley, the police advised the defendant that he was not under arrest and was free to leave. See also California v. Beheler, 463 U.S. 1121, 103 S. Ct. 3517, 77 L.Ed.2d 1275 (1983) (defendant was told he was not under arrest and was released after confessing); Oregon v. Mathiason, 429 U.S. 492, 97 S. Ct. 711, 50 L.Ed.2d 714 (1977) (defendant was informed that he was not under arrest and he left the station without hinderance after he confessed).

Rather than evaluating the specific facts of each custody issue on a case-by-case basis, I believe judicial time and resources could be better spent. These questions take up an inordinate and disproportionate amount of time in trial and appellate courts. I see no reason why this Court should not adopt a bright line rule mandating the police to advise a defendant that he is not under arrest, he is not required to answer any questions, and he may leave at any time. Where there is noncompliance with this proposed requirement, we should presume that the custody component of Miranda is satisfied and move on to the issue of whether there was interrogation. Any reasonable doubt as to custody should be resolved in favor of the defendant. Although the presumption would be rebuttable, its mere existence should facilitate decisionmaking

It should come as no surprise that the court in Griffin states "the absence of police advisement that the suspect is not under formal arrest, or that the suspect is at liberty to decline to answer questions, has been identified as an important indicium of the existence of a custodial setting." 922 F.2d at 1350. Similarly, even under the "objective circumstances" rule articulated in Stansbury, the Supreme Court stated that the officer's subjective view of custody is relevant "but only if the officer's views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave." __ U.S. at __, 114 S. Ct. at 1530, 128 L.Ed.2d at 300.

The second factor is the absence of restraints. There were no physical restraints in this case, and this factor weighs heavily for the police.

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on this issue and would prompt the police to more readily comply with the Miranda mandates. History has shown that the giving of Miranda warnings has not undermined the effectiveness of law enforcement. See White, Defending Miranda: A Reply to Professor Caplan, 39 Vand. L.Rev. 1 (1986) (the great weight of empirical evidence supports the conclusion that Miranda's impact on the police's ability to obtain confessions has not been significant).

The third factor is whether the suspect initiated contact with the authorities or did the suspect voluntarily acquiesce to the police requests to respond to questions. Certainly, it was the security officer who stopped the defendant; and, although the defendant somewhat engaged the police in conversation, it is clear the defendant did not voluntarily agree to this stop and questioning.

The fourth factor deals with the tactics used, and I find nothing to suggest any misconduct on the part of the officer. While relevant, police tactics are not considered as crucial in determining custody. "An interrogation can still be custodial even though no strong-arm tactics are used, but the absence of such tactics is a factor which can assist us in reaching an objective conclusion that the suspect could not have associated the questioning with formal arrest." Griffin, 922 F.2d at 1351 (citations omitted).

The fifth factor deals with whether the atmosphere of the questioning was dominated by the police. Any fair and objective reading of what took place indicates that this was exclusively the security officer's show. The statements made by the defendant were all in response to the interrogation of the security officer. This leads to the sixth factor of whether the defendant was placed under

arrest at the termination of questioning. The majority opinion concludes that the defendant was orally placed under arrest once the security officer was told where the cigarettes had been placed. Although the defendant later "escaped," it is apparent the defendant understood that he was under arrest. After the security officer retrieved the cigarettes, the defendant stated: "Okay, man you got your stuff back; let me go."

I believe that considering all the objective facts and circumstances of this interrogation, a reasonable person would conclude that the defendant was in custody within the contemplation of Miranda. The facts of this case are distinguishable from those in Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138, 82 L.Ed.2d 317 (1984), where the Supreme Court held "the roadside questioning of a motorist detained pursuant to a routine traffic stop" does not amount to "custodial interrogation." Syllabus Point 2, in part. As Justice Marshall suggested, "detention of a motorist pursuant to a traffic stop is presumptively temporary and brief. The vast majority of roadside detentions last only a few minutes." 468 U.S. at 437, 104 S. Ct. at 3149, 82 L.Ed.2d at 333. Also, the Supreme Court stated the "atmosphere surrounding an ordinary traffic stop is substantially less 'police dominated' than that surrounding the kinds of interrogation at issue in Miranda itself, and in the

subsequent cases in which we have applied Miranda." 486 U.S. at 439, 104 S. Ct. at 3149, 82 L.Ed.2d at 334. (Citation omitted). In the case sub judice, the purpose of the stop was to investigate criminal conduct that the security officer had "probable cause" to know had taken place. There was no chance this defendant would be released without being charged.

As I suggested earlier, however, resolution of this issue falls initially in the hands of the trial court; and, under the guiding principles of judicial restraint, an appellate court should not interfere as to factual determinations unless the lower court was clearly erroneous. See State v. Stuart, ___ W. Va. ___, ___ S.E.2d ___ (No. 22033 12/8/94) (legal conclusions involved in suppression determinations reviewed de novo; factual determinations informing those legal conclusions reviewed under clearly erroneous standard). Under these facts, I cannot make such a pronouncement. I am comforted in this conclusion by the awareness that most courts conclude that absent special circumstances (such as drawn guns or the use of physical force), interrogation in a public place is not "custodial."

B.

Interrogation

In addition to the custody requirement, the police also must be interrogating the suspect before the need for Miranda warnings arises. The facts as taken from the majority's opinion state:

> "Finally Mr. Hopkins, without paying, walked through the check-out counter, after which he was stopped by Mr. Pyatt. When Mr. Pyatt asked Mr. Hopkins where the two cigarette packs were, Mr. Hopkins responded that he did not have any cigarettes. When Mr. Pyatt told Mr. Hopkins the brands of cigarettes, Mr. Hopkins said, 'Man, you're slick; I didn't see you. How did you see me do that? Where were you at?'" (Emphasis added).

Based on the above, the majority concludes there was no interrogation. In my opinion, the conclusion that no interrogation took place is clearly wrong both legally and commonsensically. If asking a stopped shoplifting suspect where the shoplifted merchandise is located does not amount to interrogation by a security officer, it is hard to imagine what would, short of the third degree.

In analyzing this issue, I believe there are two problems with the majority's reasoning. First, in assessing whether there was interrogation, a court should look at the entire conversation,

not just one isolated sentence. The majority seems concerned only with the latter portion of the above statement that was emphasized. This approach seems to miss the forest for the trees. The better way to assess the facts under an "objective reasonable" standard is to view the exchange in its full context, with an eye toward whether incriminating information from the suspect is being sought in light of all the circumstances. Artificial division in the sequence of a conversation does not aid a court's evaluation of whether interrogation existed. It seems far better in these cases to frame the interrogation determination in a larger perspective, evaluating all relevant parts of the conversation rather than any one sentence in isolation.

Second, even if we looked in isolation to the emphasized portion of the conversation, the only reasonable conclusion is that the response came as the result of interrogation. It must be remembered that the defendant's initial denial was followed by an effort of the security officer to identify the merchandise. Obviously, the security officer was trying to demonstrate his knowledge of the theft to convince the defendant to come clean. His statement seems clearly to be an interrogation under Rhode Island v. Innis, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 1689-90, 64 L.Ed.2d 297, 307-08 (1980):

> "We conclude that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. . . . A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation." (Emphasis added).

The majority suggests that the defendant's statements were volunteered. While I agree with the notion that volunteered statements are not barred by the fact that they are not preceded by Miranda warnings, a volunteered statement is usually the exception, not the rule. Normally, a volunteered statement is (a) where the suspect walks into the police station and immediately gives a confession, see Colorado v. Connelly, 479 U.S. 157, 107 S. Ct. 515, 93 L.Ed.2d 473 (1986); State v. Stewart, 180 W. Va. 173, 375 S.E.2d 805 (1988); (b) where the police comments are not directed to the suspect, see Rhode Island v. Innis, supra; (c) where the police are merely present, but not directly involved in the oral exchange, see Arizona v. Mauro, 481 U.S. 520, 107 S. Ct. 1931, 95 L.Ed.2d 458 (1987); or (d) where the suspect in response to greetings or

salutations to law enforcement officers makes an inculpatory statement, see State v. McFarland, 175 W. Va. 205, 332 S.E.2d 217 (1985). Not only did the police ask a specific question in this case, but after the defendant's denial, the officer followed it with a detailed description of what he believed the defendant stole.

Viewed in this light, I have no doubt that what took place was interrogation in its classical and traditional form. See United States v. Green, 776 F. Supp. 565 (D.D.C. 1991) (threat that drugs found in the car would be attributed to the defendant constituted interrogation).

II.

SENTENCE ENHANCEMENT

Under Part II of the opinion, the majority concludes that prior shoplifting convictions are elements of the West Virginia shoplifting enhancement provision, W. Va. Code, 61-3A-3(c) (1994), and, as such are admissible before the jury in this shoplifting case. Thus, I dissent.

The majority cites State v. Cozart, 177 W. Va. 400, 352 S.E.2d 152 (1986), a DUI enhancement case, for this proposition. I think this case is wrong. Allowing the admission of prior

convictions in this case on the merits, ostensibly as elements, conflicts with all the policies behind Rule 404(b) of the West Virginia Rules of Evidence. See State v. McGinnis, __ W. Va. __, __ S.E.2d __ (No. 22031 12/8/94). Unquestionably, a jury will be more inclined to convict on the underlying charge if they know the defendant has been twice convicted of similar conduct. In order to avoid application of Rule 404(b), the majority suggests that the two prior convictions are material elements of the present crime. See United States v. Tran Trong Cuong, 18 F.3d 1132 (4th Cir. 1994) (the prohibitions of Rule 404(b) against collateral evidence are inapplicable when evidence is being offered to prove essential elements of the charge). I emphatically reject this holding as a torture of sound legal reasoning. The prior convictions are not elements of the current charge; they are elements of penalty enhancement.

The trial in these cases should be bifurcated. The jury should first determine guilt on the underlying charge; and then if, and only if, guilt is found, evidence should be received of the prior convictions for enhancement purposes. This is the way legislative directives operate under our other recidivist statutes. See W. Va. Code, 61-11-18 (1994); W. Va. Code, 61-11-19 (1943); II Franklin D. Cleckley, Handbook on West Virginia Criminal Procedure 453 (1993).

This suggested procedure ensures fairness and avoids Rule 404(b) problems, and is the only reasonable way that the DUI and shoplifting enhancement statutes can be construed.

Finally, although I would not have voted with the majority in Nichols v. United States, __ U.S. __, 114 S. Ct. 1921, 128 L.Ed.2d 745 (1994), I am not particularly troubled by the Supreme Court's overruling of Baldasar v. Illinois, 446 U.S. 222, 100 S. Ct. 1585, 64 L.Ed.2d 169 (1980). Thus, I concur with the majority's adoption of Nichols. To me, the fuss over the vitality of Baldasar is over nothing. It seems quite debatable whether uncounseled misdemeanor convictions are reliable enough to be used. Often, much less reliable information such as gossip, arrests, and other activities not even resulting in a trial, is considered during sentencing. My feeling is that Nichols merely allows evidence that is no worse than what ordinarily comes before the sentencing decisionmakers.