No. 33048 - State of West Virginia v. Kevin Ray Middleton

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Maynard, Justice, concurring:

In this case the majority opinion has affirmed Mr. Middleton's convictions and sentences for sexually abusing a five year old girl. I fully embrace the majority's reasoning and ultimate decision. I write separately only for the purpose of responding to some points raised in the dissenting opinions.

To begin, Justice Albright takes the position that Mr. Middleton was in custody during the post-polygraph questioning. The problem with Justice Albright's position is that no evidence was found in the record to show that Mr. Middleton was in custody. In fact, Justice Albright's dissenting opinion acknowledges this fact. His dissenting opinion states the following regarding the evidence of custodial interrogation:

> While Appellant may not have been in custody at the onset of the interrogation, the cumulative factors present in this case clearly demonstrate that the circumstances changed during the course of the questioning and Appellant was indeed involved in a custodial interrogation. At that nebulous point when the interrogation became custodial, the police were required not only to again advise Appellant of his constitutional rights but also – and I believe more importantly – to respect those rights when Appellant asserted them.

Nowhere in Justice Albright's dissenting opinion does he identify the

"cumulative factors" that demonstrate the "nebulous point" when the interrogation became custodial. Simply put, you "cannot make a silk purse out of a sow's ear. As we review a case, we are, for better or worse, confined to the record before us." *Rosa S. v. Superior Court*, 122 Cal. Rptr. 2d 866, 870 (2002). The record in this case was simply devoid of any evidence to show that Mr. Middleton was in custody. The glaring absence of such evidence in Justice Albright's dissenting opinion supports the majority's determination that Mr. Middleton was not in custody during the post-polygraph testing.

Justice Albright also suggests that because Mr. Middleton was a suspect the protections of Miranda were applicable. This position is inconsistent with well-settled law. The United States Supreme Court "decisions make clear that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California*, 511 U.S. 318, 323, 114 S. Ct. 1526, 1529, 128 L. Ed. 2d 293 (1994). Indeed, "[t]he mere fact that an investigation has focused on a suspect does not trigger the need for Miranda warnings in noncustodial settings[.]" *Minnesota v. Murphy*, 465 U.S. 420, 431, 104 S. Ct. 1136, 1144, 79 L. Ed. 2d 409 (1984). *See also Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 714, 50 L. Ed. 2d 714 (1977) ("Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer Miranda

warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect."). In the final analysis, the position taken by Justice Albright would have this Court apply Miranda protections to both custodial and noncustodial interrogations. Such a position is inconsistent with Miranda.

Finally, both dissenters take issue with the majority opinion's conclusion that "[i]f, during the course of noncustodial interrogation of a suspect, the police are made aware that legal counsel has been retained for the suspect, the police are under no obligation to inform the suspect that counsel has been retained." As pointed out by the Ohio Supreme Court, "[t]he United States Supreme Court has rejected any per se requirement that 'the police inform a suspect of an attorney's efforts to reach him.'" *State v. Williams*, 793 N.E.2d 446, 459 (Ohio 2003) (quoting *Moran v. Burbine*, 475 U.S. 412, 425, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986)). *See also Ex parte Neelley*, 494 So. 2d 697, 699 (Ala. 1986) ("[N]either petitioner's Fifth nor Sixth Amendment rights were violated by the failure of the interrogating authorities . . . to inform her of the presence of an attorney who had been sent at the request of a third party."); *Mitchell v. State*, 816 S.W.2d 566, 568 (Ark. 1991) ("During appellant's interrogation, counsel repeatedly telephoned the sheriff's department attempting to gain information about appellant's case. The police never told appellant of counsel's efforts. When counsel failed to contact appellant, counsel instructed the police to cease questioning of appellant. The police ignored counsel's instructions. . . . [A]ppellant did not

know of counsel's efforts on his behalf. Consequently, we find that the police treatment of counsel is irrelevant to the validity of appellant's waiver."); *Ajabu v. State*, 693 N.E.2d 921, 927 (Ind. 1998) ("[N]either the Fifth Amendment nor the Fourteenth Amendment guarantee of due process is violated by admission of a confession obtained after an attorney, unknown to the suspect, unsuccessfully seeks to intervene in an interrogation."); *Lodowski v. State*, 513 A.2d 299, 304 (Md. 1986) ("[W]e now hold that the waiver of the rights was not rendered ineffective under the Fifth Amendment by the failure of the police to inform [defendant] that counsel had been employed to represent him and were attempting to consult with him."); *Terrell v. State*, 891 S.W.2d 307, 311 (Tex. App. 1995) ("Sgt. Gafford . . . refused to interrupt the interview of Appellant to advise him that [counsel] was present and available to talk with him. . . . The record reflects that Appellant independently decided to forgo the advice of counsel and did not invoke that right even though he had been represented by [counsel] in the past and allegedly considered him to be the family attorney. The record supports a finding that Appellant knowingly, voluntarily, and intelligently waived his right to counsel."); *State v. Bradford*, 978 P.2d 534, 539-540 (Wash. App. 1999) ("[U]nder the holdings in *Burbine* and *Earls*, police need not tell an accused of the presence of an attorney immediately available to counsel them."). Insofar as the United States Supreme Court and courts of other jurisdictions do not require the police to inform a suspect that an attorney represents him/her, the majority opinion reached the correct and legally sound result.[1]

[1]Contrary to suggestions by Justice Albright, the majority's decision does not disturb the requirement under *State v. Hickman*, 175 W. Va. 709, 338 S.E.2d 188 (1985), that police

Based upon the foregoing, I repectfully concur.

inform a suspect under "custodial interrogation" that legal counsel has been retained for the suspect. The majority opinion stated in clear terms that "we need not decide today whether *Hickman* should remain good law [.]"