IN THE COURT OF APPEALS OF IOWA

No. 0-797 / 10-0335
Filed January 20, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANTHONY DEVON POLK,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Thomas N. Bower (motion to suppress), Richard D. Stochl (trial), Judges.

Defendant, Anthony Devon Polk, appeals claiming the district court erred in denying his motion to suppress. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ. Tabor, J., takes no part.

SACKETT, C.J.

Defendant, Anthony Devon Polk, appeals from his convictions of intimidation with a dangerous weapon, in violation of Iowa Code section 708.6 (2007), going armed with intent, in violation of Iowa Code section 708.8, and carrying a weapon in violation of Iowa Code section 724.4(1). He contends during questioning the police violated his right to remain silent and his statements were induced by promises of leniency. He argues the district court should have granted his motion to suppress evidence on these grounds.

I. BACKGROUND AND PROCEEDINGS. On July 5, 2008 shots were fired near Manson and Sumner streets in Waterloo. As a result, one person was shot in the back, and another was grazed in the arm by a bullet. During the investigation of the shooting, officers learned there was conflict between rival gangs at the time of the shooting in the same area.

On July 30, 2008, while the defendant, Anthony Polk, was in the Black Hawk county jail on unrelated charges, a police officer questioned him about the shooting. The questioning took place in a designated interview room approximately four to six feet wide by eight feet deep. The room is located on the first floor of the jail away from inmate housing. The interrogation was recorded using a small digital recorded carried in the officer's jacket pocket.

At the beginning of the interrogation Polk was advised of his *Miranda* rights. Approximately three minutes into the interrogation, Polk stated, "I ain't got nothing to say. Can I go back to my pod?" The officer stated that Polk could go back to his pod, "if [Polk didn't] want to know what happens from here on out."

Polk then inquired "What happens?" Polk did not leave the room but continued to discuss the incident with the officer. The officer went on to state that in his experience the county attorney was much more likely to work with an individual who is cooperating with police rather than one that is staying silent and insisting on a trial.

A second time Polk stated that he wanted to go back to his cell. The officer told him he was free to go and "the door is right there if that is what you want to do." At that point, Polk got up and exited the interview room and proceeded to walk toward the elevators to return to his pod. The officer walked to the door of the interview room and said, "Hey Anthony, I do want to tell you I got paperwork down here charging you with possession of a firearm and going armed with intent." Polk then inquired how he was getting charged with possessing a firearm. Polk returned to the interview room from the hallway and sat down. He acknowledged to the officer that he came back under his own power to find out about the new charges and that he was free to go back to his cell if he chose. Polk then proceeded to make incriminating statements during the interrogation.

Polk filed a motion to suppress the statements he made to the officer during the interrogation. Polk contends that 1) he was deprived of his Fifth Amendment right against self incrimination due law enforcement reinitiating questioning; 2) he was deprived of his Sixth Amendment rights under the U.S. and Iowa Constitutions because he failed to have counsel present before any questioning; 3) law enforcement made undue promises of leniency making the

defendant's confession involuntary; and 4) he suffered from a mental disability at the time of the interview making the waiver of his rights involuntary.

The district court denied the motion to suppress and found Polk guilty after a bench trial on the stipulated minutes of testimony. Polk appeals his conviction claiming the district court erred in refusing to suppress the evidence and requests a new trial without the inculpatory statements.

II. SCOPE OF REVIEW. The district court's adverse ruling on Polk's motion to suppress properly preserves the issue for review on appeal. *State v. Naujoks*, 637 N.W.2d 101, 106 (Iowa 2001). In determining whether there has been a violation of a constitutional right, we review de novo the totality of the circumstances. *Id.* We are not bound by the district court's determination, but we do give deference to its credibility findings. *Id.* The issues of Polk's Sixth Amendment right to counsel and his mental disability initially raised in the motion to suppress are not briefed and will not be addressed by this Court. Iowa R. App. P. 6.903(2)(g)(3).

III. PRIVILEGE AGAINST SELF-INCRIMINATION. The Fifth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, promises that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; *Malloy v. Hogan,* 378 U.S. 1, 6, 84 S. Ct. 1489, 1492, 12 L. Ed. 2d 653, 658 (1964). This Court utilizes a dual test when making a determination as to the admissibility of inculpatory statements over a Fifth Amendment challenge. *State v. Countryman*, 572 N.W.2d 553, 557 (Iowa 1997). We first determine

whether *Miranda* warnings were required and whether they were properly given. *Id*. Secondly, we determine whether the statements were voluntary and satisfy due process. *Id*.

A. Miranda Warnings. In *Miranda v. Arizona*, the U.S. Supreme Court required the police to use "procedural safeguards effective to secure the privilege against self-incrimination" when a defendant is subject to "custodial interrogation." 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706 (1966). "Custodial interrogation" is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id*.

In this case, Polk was incarcerated on unrelated charges when the interrogation with police took place. Incarceration alone does not automatically establish that individual is "in custody" for the purposes of *Miranda*. *State v. Deases*, 518 N.W.2d 784, 789 (Iowa 1994). The question that must be answered is whether or not "a reasonable person in the inmate's position would understand himself to be in custody." *Id*. There needs to be added restriction on the inmate's freedom of movement resulting from the interrogation and not just the fact that the inmate is unable to leave the prison. *Id*. In *Deases*, the Iowa Supreme Court adopted a four factor test to provide guidance in determining whether an inmate is "in custody." *Id*. The factors include:

> (1) the language used to summon the individual;
> (2) the purpose, place, and manner of interrogation;
> (3) the extent to which the defendant is confronted with evidence of her guilt; and
> (4) whether the defendant is free to leave the place of questioning.

Countryman, 572 N.W.2d at 558.

On the record before us, we find that Polk was not in custody when the police interrogation took place. While the current record fails to address what language was used to summon Polk to the interview room, the record does establish the interrogation took place in an interview room on the first floor of the jail away from Polk's cell. Polk was told on two occasions that he was free to leave the room and on one occasion did freely get up, leave the room, and walk to the elevator to return to his cell. He was not physically restrained in his movements by any authority. *See State v. Peterson*, 663 N.W.2d 417, 428 (Iowa 2003) (asserting that the defendant was deemed to be in custody in part due the fact he could not have voluntarily left the room). The interrogation lasted only thirty-four minutes. *See State v. Brown*, 341 N.W.2d 10, 16 (Iowa 1983) (finding two and one-half hours of questioning not custodial). While Polk was confronted with evidence of his guilt during the interrogation, this occurred only after Polk voluntarily returned to the room to discover what evidence the police had to implicate him in the July 5th shooting.

Because we find that Polk was not in custody at the time of the interrogation, no *Miranda* protections are afforded to Polk. Polk contends the police officer failed to scrupulously honor his right to remain silent by reinitiating the interrogation after Polk stated "I ain't got nothing to say." However, because we find that Polk was not in custody, the protections of *Miranda*, including the right to remain silent did not attach. *See State v. Evans*, 495 N.W.2d 760, 762 (Iowa 1993).

Polk could at any time terminate the interrogation by leaving the room and in fact did just that on one occasion. The interrogation only continued after Polk voluntarily returned to the interview room seeking to know what information the police had against him in the July 5th shooting. Polk acknowledged upon returning to the room that he was free to go back to his cell if he wanted. In order for the officer to have violated Polk's right to remain silent through reinitiating, Polk would have had to first be in custody. Because Polk was never in custody pursuant to *Miranda*, no violation of the Miranda protections occurred.

B. Voluntary and Satisfies Due Process. Determining that Polk was not in custody at the time of the interrogation does not end our inquiry as to whether the inculpatory statements were properly admitted. We must also determine whether the statements made were voluntary and satisfied due process. *Countryman*, 572 N.W.2d at 557. Polk contends the statements he made during the interrogation were involuntary as they were the result of promissory leniency.

> To be admissible the statement must freely emanate from the mind of the speaker. If the statement is not the product of "rational intellect and free will," but results from a promise of help or leniency by a person in authority it is not considered voluntary and is not admissible.

State v. Hodges, 326 N.W.2d 345, 348 (Iowa 1982). An officer is able to tell the suspect that it is better or wiser to tell the truth without crossing the line. *State v. Mullin*, 249 Iowa 10, 15, 85 N.W.2d 598, 601 (1957). However, if the officer tells the suspect what is to be gained or likely to occur as a result of making a confession, the statements become promises or assurances rendering the

accused subsequent confession involuntary. *State v. McCoy*, 692 N.W.2d 6, 28 (Iowa 2005).

Polk contends his statements were involuntary because the officer told him that 1) the county attorney would be more willing to work with him and would cut him a better deal if he confessed; 2) Polk could get back to his children faster if he confessed; and 3) if Polk did not tell his story now, he may never get to tell it. For the reasons stated below, we find that Polk's statements were voluntary and the district court properly denied Polk's motion to suppress.

First, during the interrogation the officer informed Polk twice that "what we talk about now can influence and has the potential to influence things that happen down the road." He told Polk on three occasions that if Polk cooperates now, the county attorney will be much more willing to work with him. Polk did not understand what the county attorney was and the officer explained that the county attorney was "the one that is going to prosecute this. The one that can have a say in how much time someone does if they are found guilty or the one that cuts a deal with your defense lawyer." The officer went on to state that if Polk was thinking that he may want "to cop a plea and I want to get the best plea possible, one of the things that can help you with that, can possibly help you is cooperating now."

An offer to inform the prosecutor of the defendant's cooperation is not considered by this court to be a promise of leniency. *State v. Whitsel*, 339 N.W.2d 149, 153 (Iowa 1983). The officer is dangerously close to crossing the line when he states that the prosecutor will be much more willing to work with

Polk and he would possibly be able to get the best plea if he cooperates. *See Mullin*, 249 Iowa at 18, 85 N.W.2d at 602-03 (holding that the statement by the officer that "more mercy is going to be granted to you by the authorities that will handle the prosecution" crossed the line by communicating "if he confessed he would be given more lenient treatment, special consideration by the prosecuting authorities and the court than if he denied his guilt and was found guilty in the eventual trial"). However, the officer in this case never affirmatively states that a confession equals the best plea deal. Instead he stated that "one of the things that can **possibly** help you, is cooperating now." (Emphasis added.)

Secondly, the officer tells Polk that he needed to think about what was best for him and best for his kids, stating, "I hate to see those kids miss their daddy for a long time because you didn't want to talk about what's going on." Later the officer reiterated that Polk needed to do this for his kids because the kids "need their pops around" and they "are going to depend on you." It is clear from this statement that the officer meant to communicate that if Polk confessed, he would spend less time away from his children. However, the officer did not go so far as to threaten to take away Polk's children and did not promise to lessen the charges if Polk were to confess. *See Lynumn v. Illinois*, 372 U.S. 528, 534, 83 S. Ct. 917, 920, 9 L. Ed. 2d 922, 926 (1963) (confession ruled involuntary where the police told the accused that the financial aid would be cut off from her children and they would be taken away from her if she did not cooperate). Again, in this case the officer is dangerously close to the line, but these statements to not make Polk's confession involuntary.

Finally, the officer told Polk that if he did not tell his story now, "it may never get told. . . . People may never understand what these guys have done to you to make you want to do something like that." The officer did not say that if Polk told his side of the story, that Polk would face lesser charges or no charges at all. *See Hodges*, 326 N.W.2d at 349 (holding that the officer when beyond advising the defendant to tell the truth when he stated that a lesser charge would be much more likely if the defendant gave "his side of the story"). Because there was no promise that the charges would be dropped or lessened if Polk told his side of the story, we find that this statement by the officer did not make Polk's confession involuntary.

Accordingly we find Polk's confession was voluntary and satisfied due process and the district court properly denied Defendant's motion to suppress.

AFFIRMED.