

RENDERED: May 9, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court Of Appeals

NO. 2002-CA-000915-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 01-CR-002133

RUDOLPH BARKER

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: COMBS, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: During questioning on an unrelated matter, Rudolph Barker made statements to the police implicating himself in a shooting. As a result, he was indicted for attempted murder and robbery. Prior to trial he moved to suppress his incriminating statements. By order entered April 3, 2002, the trial court found that the statements had been obtained in violation of Barker's rights under Miranda v. Arizona,¹ and so

¹ 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

granted the suppression motion. It is from that order that the Commonwealth has perfected this interlocutory appeal. It contends that Barker validly waived his Miranda rights. We disagree and affirm the trial court's order.

At the hearing on Barker's motion to suppress, the parties essentially agreed to the following facts. On August 29, 2001, Barker attended a pre-trial hearing in Jefferson Circuit Court in a case involving misdemeanor drug charges. He was represented in that matter by a public defender. Following the hearing, in the hallway outside the courtroom, a detective with the Jefferson County Police Department arrested Barker on burglary charges that were unrelated to the alleged drug offense. A few moments later, when Barker's public defender came into the hallway and asked the detective what he was doing, the detective replied that he had probable cause to arrest Barker for burglary and that he was preparing to take him in for questioning.

The attorney thereupon conferred with Barker, informed him of his right to have an attorney present during questioning, urged him to assert that right, and asked him if he wished to do so. When Barker indicated that he did wish to assert his rights, the attorney had him execute an "assertion of rights"

form prepared by the public defender's office² and told the detective that Barker desired the assistance of an attorney during questioning. Although the detective acknowledged the attorney's statement and suggested that he would take Barker to jail, he instead took Barker to the Middletown police station, obtained his waiver of his Miranda rights, and questioned him for more than two hours, initially about the alleged burglary, but also about the shooting. During the interview Barker made several incriminating statements, prefaced, according to the detective, by the remark, "F**k my attorney."

In Edwards v. Arizona,³ the Supreme Court held that when a suspect confronted with custodial interrogation has "expressed his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the

² The form provides as follows:

Assertion of Constitutional Rights

After consulting with my lawyer and being apprised of my constitutional rights, I have decided not to answer questions about any state or federal investigations and not to reply to accusations about anything whatsoever unless my lawyer is present to advise and represent me. Please call my lawyer if you wish to: (1) ask me questions about a case pending against me or any other matter; (2) search me or my property; (3) perform any tests or examinations including, but not limited to, any blood or bodily fluids tests, hair analyses, polygraph or handwriting examinations, etc.; (4) conduct any line-ups or other identifications procedures. I do not agree to submit to or participate in any of the foregoing without my lawyer present, and I hereby refuse to waive any of my constitutional rights.

³ 451 U.S. 477, 68 L. Ed. 2d 378, 101 S. Ct. 1880, (1981).

authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.”⁴ Under Edwards, the valid invocation of a suspect’s Miranda rights creates a presumption “that any subsequent waiver [of those rights] that has come at the authorities’ behest, and not at the suspect’s own instigation, is itself the product of the ‘inherently compelling pressures [of custodial interrogation]’ and not the purely voluntary choice of the suspect.”⁵

If Barker validly invoked his Miranda right to counsel at the courthouse, therefore, his subsequent uncounseled waiver of his rights at the police station, at the behest of the detective, must be deemed involuntary. The confession elicited pursuant to that waiver would then be inadmissible. The trial court found that Barker’s courthouse invocation of his rights was effective. We agree.

The Commonwealth contends that the public defender, who was appointed only to represent Barker on the unrelated drug charge, was not authorized to represent Barker on the then nascent burglary charge. His attempt to invoke Barker’s Miranda rights, therefore, according to the Commonwealth, was

⁴ 451 U.S. at 484-485, 68 L. Ed. 2d at 386.

⁵ Arizona v. Roberson, 486 U.S. 675, 681, 100 L. Ed. 2d 704, 713, 108 S. Ct. 2093 (1988).

essentially meaningless. The Commonwealth raises an interesting question. Arguably, under West v. Commonwealth⁶ and CR 2.14, the public defender was authorized to assist Barker on an emergency basis in this situation. We decline to address the issue, however, because the trial court found that Barker asserted his right to counsel directly, not merely vicariously, and, although we disagree with the trial court's reasoning, we agree with that conclusion.

The trial court found that Barker's execution of the "assertion of rights" form could be deemed an effective invocation of Miranda notwithstanding the fact that apparently neither Barker nor the attorney ever showed the executed form to the detective. Obviously, however, to be effective an assertion of one's Miranda rights must be communicated to one's interrogator. "Invocation of the Miranda right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.'"⁷ The undisclosed rights form cannot be deemed such an expression. To be sure, constructive knowledge of a suspect's Miranda request communicated to one investigator may

⁶ Ky., 887 S.W.2d 338 (1994).

⁷ Davis v. United States, 512 U.S. 452, 459, 129 L. Ed. 2d 362, 371, 114 S. Ct. 2350 (1994) (citing McNeil v. Wisconsin, 501 U.S. at 178).

sometimes be imputed to a fellow investigator.⁸ But there is no basis in this case to impute knowledge of Barker's "assertion of rights" form to the detective.

Nor is there any need to do so. Under Miranda, there can be no questioning if the suspect "indicates in any manner and at any stage of the process that he wishes to consult with an attorney."⁹ We believe that in the circumstances of this case, where the detective observed the exchange between Barker and the attorney and where Barker might understandably think that the attorney represented him, Barker's acquiescence, before the detective, in the attorney's statement that Barker desired counsel during interrogation can reasonably be construed as Barker's adoption of that statement. The detective, therefore, was obliged to understand it as such.

The Commonwealth also contends that suspects are not entitled to make blanket assertions of their Miranda rights with reference to future police action. We agree. Although the Supreme Court has yet to address the question directly, several courts have held that Miranda rights may not be invoked

⁸ Arizona v. Roberson, *supra*.

⁹ Miranda v. Arizona, 384 U.S. 436, 444-445, 16 L. Ed. 2d 694, 707, 86 S. Ct. 1602 (1966).

anticipatorily, outside the context of interrogation.¹⁰ In particular, courts have rejected rights forms, such as the one involved here, as vehicles for the anticipatory assertion of Miranda rights.¹¹

On the other hand, a suspect facing custodial interrogation need not wait for questioning to start or for the Miranda warnings to be given before invoking his right to silence or to counsel. He may do so as soon as interrogation is imminent.¹² When Barker asserted his Miranda right to counsel, custodial interrogation was imminent. The detective had arrested him with the announced purpose of taking him immediately in for questioning. Questioning actually commenced less than an hour later. We thus agree with the trial court that Barker's courthouse assertion of his Miranda rights was not anticipatory and was effective. We further agree with the trial court, therefore, that the statements obtained in violation of those rights may not be used as evidence at Barker's trial.

¹⁰ United States v. Grimes, 142 F.3d 1342 (11th Cir. 1998); United States v. LaGrone, 43 F.3d 332 (7th Cir. 1994).

¹¹ People v. Villalobos, 737 N.E.2d 639 (Ill. 2000); People v. Avila, 89 Cal. Rptr. 2d 320 (Cal. App. 1999); Sapp v. State, 690 So. 2d 581 (Fla. 1997).

¹² United States v. Grimes, *supra*; Alston v. Redman, 34 F.3d 1237 (3rd Cir. 1994); State v. Torres, 412 S.E.2d 20 (N.C. 1992); United States v. Kelsey, 951 F.2d 1196 (10th Cir. 1991).

Accordingly, we affirm the April 3, 2002, order of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

A. B. Chandler III
Attorney General of Kentucky

Jeanne Anderson
Special Assistant Attorney
General
Louisville, Kentucky

BRIEF FOR APPELLEE:

Michael C. Lemke
Louisville, Kentucky