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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed November 24, 1981
vs.	)	
TYRONE STARKS,	)	1-340/65877
Defendnat-Appellant.	)	

Appeal from Black Hawk District Court - Roger F. Peterson, Judge.

Defendant appeals from his conviction of theft in the third degree in violation of section 714.2(3), The Code 1979, asserting that his fifth amendment right not to incriminate himself and his sixth amendment right to effective assistance of counsel were violated. AFFIRMED.

Thomas M. McIntee of Schweiger, Parrish & McIntee, Waterloo, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa and Thomas N. Martin, Assistant Attorney General, for plaintiff-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant, Tyrone Starks, appeals from his conviction of theft in the third degree in violation of section 714.2(3), The Code 1979. He asserts that his fifth amendment right not to incriminate himself and his sixth amendment right to effective assistance of counsel were violated when questioning by a department store security officer took place without his waiver of his rights to counsel and continued after he asserted his right to remain silent. Further, he contends that inculpatory statements and evidence derived therefrom were not voluntarily given but were a product of coercion. We affirm.

On Monday, March 31, 1980, at 9 a.m., an employee of the Montgomery Ward's automotive center in Cedar Falls, Iowa, reported for work and went into the office to get a bag of money from the safe. He discovered that the bag was gone. Later that day, Jack Legorreta, a regional field security officer and safety supervisor for Montgomery Ward & Co., was contacted by the manager of the Cedar Falls store about excessive cash shortages at the automotive center. Legorreta came to Cedar Falls from Chicago and began his investigation. After checking certain records and charting the cash variances, he determined that a former employee, Tyrone Starks, defendant in this case, was present during the time of the shortages. He contacted defendant on April 2, 1980, and asked defendant to meet with him at the store that afternoon. During the course of the interview, defendant signed a form stating that Mr. Legorreta had permission to conduct the interview and that defendant was free to leave at any time. Defendant discussed the cash shortages at the store and admitted taking money from the center and the safe. Mr. Legorreta asked the defendant what he had done with the money to which the defendant replied that he had approximately $200 of the money on his person. Defendant, however, gave Mr. Legorreta only $120. Defendant related to Mr. Legorreta how he had walked into the office of the automotive center on the morning of March 31st and removed the money bags from the safe while his friend distracted another employee. Mr. Legorreta asked defendant if he would write a statement about the theft of the money bag. Defendant agreed, wrote the statement himself, and signed it. Mr. Legorreta then called the Cedar Falls police, who arrived at the store, placed defendant under arrest, and informed him of his Miranda rights. Later, at the station, a police officer interviewed defendant after he had signed a waiver of his rights. Defendant then related the details of the theft to the officer and signed the statement.

On April 8, 1980, defendant was charged by information with the aggravated misdemeanor offense of theft in the third degree. On June 6, 1980, defendant filed a motion to suppress oral and written statements made to the Montgomery Ward & Co. security officer, Jack Legorreta, and to suppress certain physical evidence obtained by the State. This motion was overruled on July 15, 1980, on the limited ground that Mr. Legoretta was not required to advise defendant of his Miranda rights. Defendant thereafter filed a motion to reconsider the ruling on his motion to suppress but trial court orally overruled this motion prior to trial.

Defendant was found guilty of theft in the third degree and sentenced to a term of two years, but the sentence was suspended. This appeal followed.

I. Scope of Review. Generally, our review of criminal cases is on assigned error only, not de novo. Iowa R. App. P. 4. However, since a constitutional issue is raised, we make an independent examination to determine the facts. State v. Farrell, 242 N.W.2d 327, 329 (Iowa 1976).

II. Voluntary Statements. Defendant argues on appeal that the State has failed to show that defendant's inculpatory statements were voluntarily made. He further argues that the evidence clearly indicates that they were a product of the Montgomery Ward investigating officer's coercive conduct. In support of his position, he relies on the fact that defendant attempted to assert his fifth and sixth amendment rights, but the security officer continued his interrogation. The State, however, asserts that defendant has failed to preserve error on this issue because it was not raised in the trial court. We will address this challenge first because we believe it is dispositive of the case.

As grounds for his motion to suppress defendant asserted, inter alia:

> 3. That said security investigator failed to advise the Defendant of his constitutional rights under the Fifth and Sixth Amendment per miranda. [sic]
>
> 4. That said investigator continued to question and illisit [sic] incriminating statements from the Defendant, as well as obtaining items of physical evidence to be used against the Defendant, all in violation of the Defendant's constitutional rights under the Fifth and Sixth Amendment to the United States Constitution.
>
> 5. That the Defendant did not knowingly, intelligently, and voluntarily waive his right to counsel under the Sixth Amendment, nor his right against self-incrimination under the Fifth Amendment.

In defendant's trial brief and argument in support of his motion to suppress, he asserted 1) that his fifth amendment rights were violated when he asserted his right to remain

silent but the security officer continued to question him by engaging in coercive threats designed to elicit incriminating statements and 2) that the voluntariness requirements apply to statements made to private individuals and the facts in this case show defendant's statements were not given voluntarily. Trial court's ruling on defendant's motion to suppress stated in pertinent part:

> However, it is now generally accepted that the voluntariness requirements do apply to statements made to private individuals as well as those made to police officers. State vs. Cullison, 215 N.W.2d 309.
>
> A review of the motion indicates that the defendant sought to suppress the statement only because of the failure to give the Miranda Warnings. Accordingly the Court concludes that the motion should be denied, however, it should not be construed to mean that this motion does not place the burden upon the State to show that the statement was voluntarily given by the defendant.

Thereafter defendant filed a motion asking trial court to reconsider its ruling on the motion to suppress. In this motion defendant urged:

> 2. That the Defendant contended that his constitutional rights under the Fifth and Sixth Amendments were violated.
>
> 3. Furthermore, that the Defendant specifically contended that he did not knowingly, intelligently, and voluntarily waive his right to counsel under the Sixth Amendment, nor his right against self-incrimination under the Fifth Amendment.
>
> 4. In addition, the Defendant also alleged that the Montgomery Wards security officer failed to advise the Defendant or his constitutional rights under the Fifth and Sixth Amendments per Miranda.
>
> 5. That in its ruling on July 15, 1980, the Court stated that the Defendant sought to suppress the statement only because of the failure to give the Miranda warnings.
>
> 6. That the Court failed to address the Defendant's Fifth and Sixth Amendments constitutional arguments concerning the absence of a knowing, intelligent, and voluntary waiver of his constitutional rights.
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> 7. That the Court also failed to address the arguments raised by the Defendant at the hearing on his Motion to Suppress evidence, that he did in fact assert his Fifth Amendment constitutional right to remain silent.
>
> 8. That said argument was also explained fully to the Court in his Brief and Argument in support of said Motion to Suppress evidence.
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> WHEREFORE, the Defendant respectfully prays the Court to enter its findings and conclusions with respect to the Defendant's constitutional arguments, his argument concerning the absence of a knowing, intelligent and volun-

> tary waiver of said constitutional rights, based on the record made at the hearing on Defendant's Motion to Suppress, including the Brief and Authorities requested by the Court.

Finally, on the day of trial the following colloquy regarding the motion to reconsider took place between defendant's counsel and the court:

> [THE COURT]: Counsel in the Motion to Reconsider contends that the defendant did not knowlingly [sic], intelligently, and voluntarily waive his right to counsel under the Sixth Amendment or his right against self-incrimination under the Fifth Amendment. It may be that you can read that motion to indicate that I did not rule on those, however, I found that the Miranda Warnings need not be given and accordingly the State does not have to show that he waived his right to counsel because he was not entitled to counsel at that time. Nor does the State need to show that he waived his right against self-incrimination because the protections of the Fifth Amendment did not apply to the defendant at the time he gave the alleged statement to Jack L. Legorreta. Accordingly I am going to overrule the Motion to Reconsider the ruling at this time.
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> Mr. McIntee, do you believe that satisfactorily covers your motion?
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> MR. MCINTEE: Your Honor, in addition to those issues that the Court has just ruled on, there was an additional question which was raised during the hearing and which is also touched on in the defendant's brief in support of the motion.
>
> This is the fact that the defendant asserted his Fifth Amendment Right to remain silent which was not respected.
>
> THE COURT: You did allude to that, Mr. McIntee. I think what you're making reference to the proposition of law that says when a person is being interrogated by police officers if he asserts his Fifth Amendment Right to remain silent, that officer must then immediately cease questioning him and any further action on their part in the line of questioning, if it leads to inculpatory statements, should be suppressed.
>
> I believe, also, that that right does not apply to the interrogation that was made by Mr. Legorreta because he was not an enforcement—he was a private investigator and, in essence, what we refer to as a civilian and not a police officer. Accordingly I'm going to overrule that aspect of your motion.
>
> Mr. McIntee, anything further in connection with those motions?
>
> MR. MCINTEE: No, your Honor.

From this record, we conclude defendant failed to preserve error enabling him to challenge the voluntariness of his statements on appeal, even though we agree with defendant's assertion that the State ordinarily must show defendant's inculpatory statements were voluntarily made and that the coercive atmosphere, whether induced

by a private citizen or a public official, bears on that question. Whether defendant acted voluntarily is a separate issue from whether he effectively waived his Miranda rights. State v. Snethen, 245 N.W.2d 308, 311 (Iowa 1976). The law in this regard was succinctly stated in State v. Washington, 257 N.W.2d 890 (Iowa 1977), as follows:

> Of course, proof of Miranda admissibility and voluntariness comprises an appropriate foundation for introduction into evidence of statements like those before us. But if this evidence is sought to be elicited without laying proper foundation, it is the obligation of defendant to assert such defect, specifically pointing out the fatal flaw. The state is obligated to assume its burden to prove voluntariness only when the statements or confessions are challenged as involuntary.

257 N.W.2d at 895. We note that in Washington defendant's motion asserting that the alleged statements involved were made in violation of the defendant's rights under the fourth, fifth, sixth and fourteenth amendments of the constitution of the United States, was held insufficient to preserve the issue of voluntariness. In the instant case, defendant's motion to trial court merely argued that statements made and the money given to the security officer should be suppressed because he was not advised and did not waive his Miranda rights. Trial court's original ruling on the motion to suppress clearly reveals this limited focus, despite defendant's arguments in his trial brief. Further, the colloquy engendered by defendant's request for reconsideration also shows trial court did not address the separate voluntariness question at that time either. Defendant, having thereafter failed to request trial court's ruling on that specific issue, waived any right to argue it on appeal. Stuart v. State ex rel Jannings, 253 N.W.2d 910, 914 (Iowa 1977); State v. Pelelo, 247 N.W.2d 221, 226 (Iowa 1977); State v. Schiernbeck, 203 N.W.2d 546, 547 (Iowa 1973).

III. Miranda Rights. Defendant also argues that the interrogation carried on by the company's security officer was in a custodial setting, thereby requiring the company security officer to advise defendant of his Miranda rights and to seek waiver of those rights prior to the interrogation. Defendant further argues that his right to effective assistance of counsel under the sixth amendment was denied when questioning continued after defendant attempted to assert his right to remain silent. We find no merit to these allegations.

Our analysis is guided by the principle set out in State v. Hansen, 286 N.W.2d 163, 168 (Iowa 1979), wherein our supreme court stated:

> We have held that Miranda warnings must be given when an individual is subjected to "custodial interrogation", which has been 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." Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 694, 706 (1966); Bizzett v. Brewer, 262 N.W.2d 273, 277 (Iowa 1978); State v. Kyseth, 240 N.W.2d 671, 673 (Iowa 1976). (emphasis added)

Having reviewed the facts of the instant case anew, we conclude that the questioning by the company security officer was not a custodial interrogation since the interrogator was neither a law enforcement officer nor under such authority. See State v. Cullison, 215 N.W.2d 309 (Iowa 1974). Finding no error in trial court's ruling on defendant's motion, we affirm his conviction.

AFFIRMED.