IN THE COURT OF APPEALS OF IOWA

No. 1-346 / 90-1436

FILED
OCT 29 1991
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

FRANK RAY CHEWNING,

Appellant.

Appeal from the Iowa District Court for Johnson County, Lynne E. Brady and William R. Eads, Judges.

Chewning appeals his conviction, following a jury trial, for second-degree murder. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and B. John Burns, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Richard J. Bennett, Assistant Attorney General, and J. Patrick White, County Attorney, for appellee.

Heard by Oxberger, C.J., and Schlegel and Hayden, JJ.

OXBERGER, C.J.

Diane Chewning and her husband Frank had been sharing a motel room in Coralville. Motel employees discovered Diane in the room, strangled to death. Suspicion focused on Frank, who could not be located.

A few days later Chewning was apprehended in Utah. The morning after his arrest, the Utah Public Defender was routinely visiting the jail. The public defender's visit was to see new arrestees, discover if they are represented by counsel, and to determine if they are eligible for representation by the public defender office. Chewning consulted with the attorney in advance of his extradition proceeding. The Utah attorney later testified that extradition was the only subject Chewning and he discussed, and that the merits of the criminal charge against him were not addressed at all.

Two law enforcement officers from Iowa, Koehn and Kisner, went to Utah to interview Chewning, and ultimately to transport him back to Iowa. Chewning signed a written waiver of his Miranda rights. While in Utah, and also during the trip back to Iowa, Chewning made certain incriminating statements to these officers. No attorney was present when he made the statements.

Chewning was charged with murder in the second degree. A jury found him guilty of that charge, and he has appealed from the resulting conviction.

Chewning contends the district court should have suppressed the incriminating statements he made to officers Koehn and Kisner in Utah and during the trip back to Iowa. He argues the use of the incriminating statements violated his fifth amendment right to counsel because the statements were made in response to police-initiated questioning after he had asserted his right to counsel.

The State responds that Chewning had asserted his right to counsel only for the limited purpose of advice concerning extradition. The State asserts that he had not asserted a right to counsel and that he had in fact executed a valid waiver of his Miranda rights. The State argues that under these circumstances, Chewning's assertion of his right to counsel for limited purposes relating to extradition does not invalidate his incriminating statements to officers Koehn and Kisner.

Chewning also asserts his sixth amendment right to counsel was violated. He argues that his right to counsel vested at the time of the filing of the complaint and was properly invoked when he asked for an attorney prior to the extradition proceeding. Because we consider the deprivation of a constitutional right we conduct an independent de novo review of the totality of the circumstances. State v. Hillesheim, 291 N.W.2d 314, 316 (Iowa 1980); State v. Johnston, 406 N.W.2d 794, 796 (Iowa App. 1987).

FIFTH AMENDMENT RIGHT TO COUNSEL: We first consider whether Chewning's constitutional right to counsel under the fifth amendment was violated. The purpose underlying the right to counsel in the fifth amendment is to protect an accused's privilege against self-incrimination. United States v. Gouveia, 467 U.S. 180, 188-89, 104 S. Ct. 2292, 81 L.Ed.2d 146, 154 (1984). The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the fifth amendment privilege. Miranda v. Arizona, 384 U.S. 436, 469-470, 86 S. Ct. 1612, 16 L. Ed. 2d 694 (1966).

The fifth amendment right to counsel vests when the individual is taken into custody. Id. at 478. This right however is not self-executing and must be invoked by the defendant. See Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 1885, 68 L. Ed. 2d 378, 386 (1981).

If police propose to interrogate a person, they must make known to him he is entitled to a lawyer. Miranda, at 474. (emphasis added). Inherent within this directive, is the premise that the fifth amendment right to counsel arises when the interrogation of a defendant begins or is about to begin. Were the right to arise sooner, the duty to inform of that right would also arise sooner as well and

would not be contingent on whether the police "propose to interrogate."

The attorney for the Public Defender's Association in Utah testified that he went to Chewning's jail cell on November 3, 1990. The visit was pursuant to a standard policy of going to the jail each day to visit new arrestees to see if they were represented by counsel. The attorney inquired and elicited from Chewning that he wanted to talk to an attorney. Chewning and the attorney spoke to each other for ten to fifteen minutes before the extradition hearing. The public defender testified he and the defendant agreed that counsel would represent the defendant on the "extradition matter." Counsel reviewed with the defendant his rights as to the extradition, and explained to him the extradition forms counsel already possessed by which the defendant could waive extradition.

An extradition hearing is by nature a summary executive procedure for returning an accused to the demanding state to stand trial, and it does not concern guilt or innocence of the crime charged by the demanding state. Judd v. Vose, 813 F.2d 494, 497 (1st Cir. 1987)(no constitutional right to counsel at extradition hearing). The mere mechanics of extradition do not involve police interrogation likely to illicit an incriminating response from the defendant.

We find, in the absence of any procedure involving such interrogation, Chewning's right to invoke his fifth

amendment right to counsel was not triggered. The trial court determined, and we agree, that Chewning's request for the attorney was to assist him with the extradition process and not the murder charge. In a fifth amendment context it has been stated that where it is clear that the defendant's request is for something other than the presence of an attorney during interrogation, the request should be so construed. Boles v. Fultz, 816 F.2d 1132 (6th Cir.) cert. denied, 484 U.S. 587 (1987). Chewning's request for an attorney was not for the purpose of invoking his right to have counsel present during interrogation. We find Chewning's fifth amendment right to counsel was not violated.

SIXTH AMENDMENT RIGHT TO COUNSEL: We next consider whether Chewning's constitutional right to counsel under the sixth amendment was violated. While the concern of the fifth amendment right to counsel is government coercion, the purpose of the sixth amendment right is to ensure the criminal defendant a fair trial. United States v. Gouveia, at 188-89, 104 S. Ct. 2292, 2298, 81 L. Ed. 2d 146, 154 (1984).

There is no dispute in this case that Chewning's sixth amendment right to counsel "vested" at the time the criminal complaint was filed on October 27, 1989. Once a defendant's sixth amendment right to counsel arises and the defendant requests counsel, subsequent statements by the

defendant are admissible only if the defendant initiates the communication with the police and makes a knowing, intelligent waiver of the right to counsel. Michigan v. Jackson, 475 U.S. 624, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986).

After the sixth amendment right to counsel arises, if the defendant has not exercised that right by requesting counsel, statements made by the defendant after a knowing, intelligent waiver of his right to counsel are admissible, and in that context the admonishment of the accused with the Miranda warnings is normally sufficient to find that a waiver is knowing and intelligent. Patterson v. Illinois, 108 S. Ct. 2389, 101 L. Ed 2d 261 (1988).

The trial court considered whether Chewning had invoked his sixth amendment right to counsel. The court concluded he had not invoked the right. We agree. The defendant was approached by the Utah Public Defender who asked him if he wanted to speak to an attorney. Chewning said yes. Not every reference to an attorney constitutes an invocation of the right to counsel. See Henderson v. Florida, 473 U.S. 916, 105 S. Ct. 3542, 87 L. Ed. 2d 665 (1985) (defendant unambiguously asserted right to counsel and desire to have no discussions with police outside the presence of counsel); see also People v. Farrell, 181 Ill. App. 3rd 446, 536 N.E.2nd 476, cert. denied, 126 Ill.2d 562, 541 N.E.2d 1110, cert. denied, 110 S. Ct. 202 (1989) (an

invocation of the right to counsel arises only upon an unambiguous assertion that the defendant desires counsel to act as a medium in dealing with the police).

The trial court found and we agree, there is no unambiguous assertion under the facts in this case by Chewning. At the point at which this response was given, Chewning faced an extradition hearing. The conversation between Chewning and the attorney was limited to that hearing. Chewning asked no questions nor was any advice given in respect to interrogation. Chewning knew he was returning to Iowa. He did not request counsel during any of the interrogation by either the Utah or the Iowa authorities. We find Chewning's response for an attorney was limited to the purpose of the extradition hearing. An extradition hearing is not a "criminal proceeding." See State v. Zylstra, at 532. It is simply not a proceeding which is a critical stage of a prosecution. Judd v. Boss, 813 F.2d 494 (1st Circuit 1987). We find, therefore, Chewning had not invoked his sixth amendment right to counsel and that upon receiving his Miranda warning, knowingly and intelligently waived his right. Mr. Chewning's sixth amendment right to counsel was not violated. We affirm the trial court.

AFFIRMED.