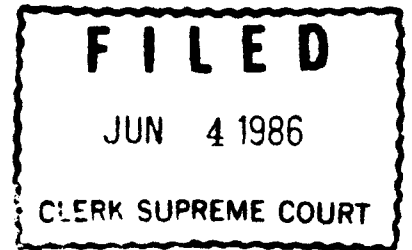


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,

)

Plaintiff-Appellee,

)

FILED JUNE 4, 1986

vs.

)

6-75
85-715

333

JAMES RICHARD CUELLAR,

)

Defendant-Appellant.

)

Appeal from the Iowa District Court for Marshall County, (85A3097) Sandra J. Holien, Associate District Judge.

Defendant appeals from his conviction for theft in the third degree in violation of Iowa Code sections 714.1(4) and 714.2(3), asserting that incriminating statements were obtained in violation of his Miranda rights and therefore should have been suppressed. **AFFIRMED.**

Michael J. Laughlin, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney; Elizabeth E. Ciebell, Assistant Attorney General; and Mark Lindhol, Assistant County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., Snell, and Sackett, JJ., but considered en banc.

PER CURIAM

Defendant appeals from his conviction for theft in the third degree in violation of Iowa Code sections 714.1(4) and 714.2(3), asserting that incriminating statements were obtained in violation of his Miranda rights and therefore should have been suppressed. We affirm.

On January 17, 1985, James Cuellar was arrested and taken to the police department for processing. Cuellar was permitted to telephone his attorney who told defendant not to make any statements or admissions to police. This message was conveyed to the arresting officer, Theo Kamatchus. Kamatchus testified that he did not attempt to question defendant thereafter. He indicated, however, that Cuellar asked several times if he could "work out a deal or get off easier if he would come forth."

During the processing, Officer Darrell Templeton arrived to interrogate the defendant. He was told defendant had been advised not to talk with police. On two occasions, Templeton asked defendant if he wished to be interviewed. On the second occasion, Cuellar consented. He was informed of his Miranda rights, signed a waiver of them, and was specifically informed that he was acting against the advice of his attorney. Cuellar then proceeded to answer questions and make incriminating statements. At no point did he request counsel or ask that the interview be stopped.

A pretrial motion to suppress a tape and transcript of the interview was overruled by the trial court. The incriminating statements were admitted into evidence and, following a jury trial, Cuellar was convicted as charged. This appeal followed.

Defendant contends that the court erred in overruling his motion to suppress the incriminating statements. He argues that the statements were taken in violation of his constitutional rights.

The general rule is that an accused in custody is not subject to further interrogation by the authorities when he has requested counsel, unless he validly waives his earlier request for the assistance of counsel. Smith v. Illinois, ____ U.S. ____, ____ 105 S. Ct. 490, 492, 83 L. Ed. 2d 488, 493 (1984). The court may admit his responses to further questioning only upon a finding that defendant: (1) initiated further discussions with the police, and (2) knowingly and intelligently waived the right he had invoked. Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 1884-85, 68 L. Ed. 2d 378, 386 (1981).

In the present case, defendant clearly asserted his desire to have counsel. The trial court found, however, that Cuellar initiated further discussions with the police and waived the right he had invoked, thus satisfying the Edwards rule. On appeal, it is argued that the police, not the defendant, initiated the discussions.

Because constitutional safeguards are involved, we review the evidence pertaining to this issue de novo. State v. Whitsel, 339 N.W.2d 149, 152 (Iowa 1983). We make an independent evaluation of the totality of the circumstances to determine if Cuellar's statements were illegally obtained. State v. Hodges, 326 N.W.2d 345, 347 (Iowa 1982).

During his discussions with Officer Kamatchus, Cuellar asked several times if some sort of deal could be worked out if he would come forth. Kamatchus also testified that toward the end of the booking process, defendant "told us he would like to speak to Detective Templeton." We agree with the State's assertion that these statements or inquiries initiated further discussions in satisfaction of the Edwards rule.

Oregon v. Bradshaw, 462 U.S. 1309, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983) supports this conclusion. In Bradshaw, the United States Supreme Court held that defendant in asking, "Well, what is going to happen to me now?" initiated

further discussion in the sense that the word was used in Edwards. Id. at 1046, 103 S. Ct. at 2835, 77 L. Ed. 2d at 412-13. The court explained that necessary or routine inquiries arising out of the incidents of the custodial relationship will generally not "initiate" conversation. Id. Defendant's question in Bradshaw, however, was determined to be more than a routine inquiry. Although ambiguous, it evinced a willingness and a desire for a generalized discussion about the investigation." Id. Thus, it was determined that there was no violation of the Edwards rule. Id. at 1046, 103 S. Ct. at 2835, 77 L. Ed. 2d at 413.

Likewise, we find that Cuellar's inquiries evinced a willingness and desire for a generalized discussion about the investigation. His statements are not ambiguous as in Bradshaw. Rather, defendant clearly and unequivocally expressed an interest in discussing whether a deal could be made. Pursuant to Bradshaw, we find this to be constitutionally sufficient. The mere fact that Officer Templeton asked defendant if he wished to be interviewed does not change this result. At that point, defendant had already made the decision to disregard advice of counsel and initiate discussions.

Defendant raises no other error, apparently conceding to the trial court's finding that he knowingly and voluntarily waived his right to counsel. For the aforementioned reasons, we therefore conclude that Cuellar's incriminating statements were properly admitted.

AFFIRMED.