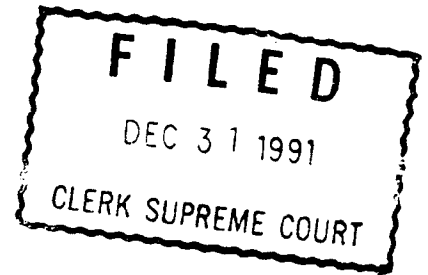


IN THE COURT OF APPEALS OF IOWA

No. 1-377 / 90-1027



STATE OF IOWA,

Appellee,

vs.

DIANE MANLEY,

Appellant.

823

Appeal from the Iowa District Court for Davis County,
Richard J. Vogel, Judge.

Manley appeals from her conviction, following a jury trial, for first-degree arson. She contends the district court should have excluded a confession she made to investigating officers. **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Shari Barron, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Roxann Ryan and Mark Joel Zbieroski, Assistant Attorneys General; and R. Kurt Swaim, County Attorney, for appellee.

Heard by Donielson, P.J., and Sackett and Habhab, JJ.

DONIELSON, P.J.

Diane Manley was convicted of arson in the first degree in violation of Iowa Code sections 712.1 and 712.2 (1989). She was sentenced to serve a term of imprisonment not to exceed twenty-five years. At trial, the State introduced inculpatory statements made by Manley to DCI agents during a postpolygraph interview. Manley had filed a motion to suppress the statements, but the district court, after a hearing, had overruled her motion.

The State charged Manley with intentionally setting the fire which consumed Manley's second floor, one bedroom apartment in Bloomfield, Iowa. At the evidentiary hearing on the suppression motion, Police Chief Bernard Gutz testified that he drove Manley to Des Moines on January 26, 1990, sixteen days after the fire, for a polygraph examination. Robert Hougland, the Bloomfield Fire Chief, also rode with Gutz and the defendant. The three drove in a marked police car with a "cage" between the front and back seats. Manley rode in the back. During the trip, neither Gutz nor Hougland conversed with Manley. Manley testified that when she learned that she would be riding in a marked police car, she became frightened and upset.

When they arrived in Des Moines, they went to the DCI headquarters. Manley was taken to a small room where Dennis Wilbur, a DCI special agent, had her sign a Miranda rights waiver form. Wilbur testified that he read the rights waiver form to Manley and she had no questions about

its contents. Manley testified that he did not read the form word-for-word, but instead told her that "it was a paper for [her] to agree to submit to taking a polygraph test." She also said that Wilbur told her to sign the form. She testified that she signed the form without reading it.

Officer Hiles testified that the polygraph and the subsequent interrogation were not recorded on video or audio tape. His explanation for failing to tape the questioning was:

It's clumsy. It causes for -- If you tape an interview on a tape, it causes you to not take as good as notes as you might. It's just not efficient. It's clumsy. It's hard to find out where on the tape you interviewed somebody and I just -- I prefer not to use tapes.

Houglund testified that prior to the interrogation, Wilbur told him that the process was not being videotaped because "It's against the law." Hiles testified that he had access to a video camera because he had videotaped the fire scene. Additionally, Wilbur said that he could have requested video tape equipment. The examination room was equipped with a closed circuit television system.¹

1. We are troubled by the agents' failure to use audiotape or videotape to create a record of this interrogation. We are indeed puzzled by the reasons offered for the failure. While the process of recording the interview may be clumsy, surely it is no more clumsy than attempting to prove by a preponderance of the evidence that an unrecorded confession made during custodial interrogation is admissible. We find no legal support for the opinion that such a recording would be illegal.

After the polygraph test was completed, Wilbur confronted Manley with what he said were the results. He told her she was not being 100 percent truthful. Manley denied that she had been lying. Wilbur persisted in his assertion that she had been lying; Manley persisted that she had not. Wilbur told Manley that, because of the polygraph results, he felt she was involved in starting the fire.

At some point in the interrogation, the defendant began to cry. Wilbur testified that she was wiping the tears from her face with her hands. They had to stop to get her some tissues. After the interrogation resumed, Wilbur again told Manley that she was not being 100 percent truthful. She persisted in her denials.

Manley testified that she told Wilbur that she wanted to leave, but that Wilbur had made no response. She also testified that in order for her to leave the small room, it was necessary for Wilbur to move his chair. Wilbur did not move or in any way accommodate her request to leave. Hiles, Gutz, and Wilbur testified that they did not hear Manley's request to leave.

Robert Hougland, who was watching the interrogation on closed circuit television, testified regarding the questioning at his deposition. Hougland testified that Manley had made a request to leave. He also said that he did not remember how Wilbur responded. However, at the suppression hearing, Hougland's recollection had changed

significantly. He said that Manley had not made the request to leave while Wilbur was in the room with her. When asked if he heard Manley make a request to leave, he responded, "I thought I did at one time when she was in the room alone, but it was mumbled up, and I thought I heard it. That's as far as it goes." Nonetheless, he acknowledged that, at the deposition, he had testified she made the request to Wilbur. At trial, Hougland explained the change in his story. He said that on the day of the deposition, Kurt Swaim, the county attorney, told him that the question about her request was important and that he should think about it. He also said that prior to the suppression hearing, he spoke with both Gutz and Hiles. Apparently both men told him that they did not hear Manley's request to leave. In explaining the change in his testimony, Hougland testified:

Q. Now, will you explain to the jury how you came to remember a little bit more and that really [Manley] was just talking to herself: A. I knew I'd heard it up there sometime. But during my deposition I was nervous and all, and I couldn't think of where I heard it, when I heard it and who she said it to. Later on that week it come to me out of my sleep. I got up and wrote it down.

Q. And what did you recall in your sleep? A. That I was sitting there watching her on TV by herself when she said, "I want to go home." It was barely audible, but she said a lot of things that were not audible.

Q. But on March 24th you remembered clearly, didn't you, that she had said it to somebody? A. I thought I did, yes.

At his deposition, Hougland also said that he thought Manley was under a lot of pressure during the questioning.

However, at the suppression hearing, he had apparently reassessed this conclusion. He characterized it as "a little pressure." At trial, Hougland changed his testimony once again. He said he thought that she was under a lot of pressure.

Wilbur testified that he confronted Manley with the allegations that an accelerant was used, the location of the fire, and that the fire was not caused by the furnace or any electrical problem. At the suppression hearing, Manley testified that at one point during Wilbur's questioning, she stopped denying that she started the fire. She said that she became extremely upset and confused and, "in my . . . way of thinking they didn't believe the truth so I concocted a lie and they believed me." She said that she wanted them to believe her. "[b]ecause I wanted to get out of there."

Manley testified that during the interrogation she told Wilbur she "had a couple of plastic milk jugs in [her] closet that [she] used for weights to exercise with and that there may have been some gasoline fumes in those bottles, that we filled them with dirt and [she] may have dropped a cigarette in one of the jugs." Wilbur testified that she told him that there was some gasoline in the closet and that she had a cigarette. According to Gutz, Manley covered her face and said, "Oh my God. I believe I may have dropped a cigarette." Hiles testified that Manley

said she "might have thrown a cigarette," and "Oh my God. I don't want to go to jail. What's going to happen to me?"

Once Manley had made this statement, Wilbur left the room. Manley testified that Wilbur told her to stay there. According to Wilbur, he told her he would be right back. Both Hougland and Gutz testified on deposition that Wilbur had told her to stay there.

When he returned to the room, Wilbur brought agent Hiles with him. Hiles sat down across from Manley. Hiles told Manley that an accelerant or fuel had been poured in the closet and lit. Manley then said that she had a cup of gasoline, which was either the size of a coffee cup or smaller. She said she poured it in the closet and lit it. Hiles told Manley that it would have taken more than a cup of gasoline. Manley testified that Hiles suggested that it was a two liter pop bottle of gasoline. Manley then told Hiles that maybe it was a half full two liter pop bottle. She said to him that she threw a cigarette behind the furnace. After a few more moments, the questioning ended. Manley was arrested a few days later.

Manley appeals her conviction and asserts two arguments for reversal. First, she argues the district court erred in refusing to suppress her incriminating statements. Second, Manley asserts that she was denied her right to effective assistance of counsel. Because we are able to dispose of this matter on Manley's first assignment of

error, we need not address the issues of the effectiveness of counsel.

When the defendant alleges error involving a constitutional right, we make an independent evaluation of the totality of the relevant circumstances to determine if such an error was made. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975); State v. Jeffries, 417 N.W.2d 237, 239 (Iowa App. 1987). Our standard of review is de novo. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

I. Postwaiver Invocation of Miranda Rights. Manley argues that the district court should have suppressed her inculpatory statements because the statements were made during a custodial interrogation after she had invoked her right to remain silent. We agree.

The State bears the burden of establishing, by a preponderance of the evidence, the admissibility of any confession resulting from custodial interrogation. Cullison, 227 N.W.2d at 127. We conclude the State has failed to satisfy its burden.

The fifth and fourteenth amendment privilege against self-incrimination is safeguarded by the following mandate applicable to custodial interrogation:

Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney either retained or appointed.

Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706-07 (1966).

We believe Manley knowingly, intelligently and voluntarily waived her Miranda rights. We find she signed a waiver form after agent Wilbur had read Manley her rights from the form. Nevertheless, Manley asserts that her statement to agent Wilbur, in which she requested to leave, constituted a postwaiver invocation of her right to remain silent. She argues that Wilbur failed to curtail his questioning once she had invoked that right. Because her inculpatory statements were made in response to questioning initiated by the interrogators after the invocation of her right to remain silent, she contends the statements are inadmissible. We agree.

Clearly Manley's statements were elicited during an interrogation, within the meaning of the Miranda rule. See Rhode Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 1690, 64 L. Ed. 2d 297, 308 (1980)(interrogation includes direct questioning or any practice reasonably likely to evoke an incriminating response from a suspect). We must, therefore, determine whether the interrogation was custodial.

We start our analysis with the fundamental premise that a suspect is "in custody" when formally arrested or when placed under any other circumstances where the suspect is deprived of his or her freedom of action in any significant way. See Miranda, 384 U.S. at 444, 86 S. Ct. at 1612, 16 L. Ed. 2d at 706. Our analysis focuses on the extent of the physical or psychological restraints placed on the

suspect during the interrogation to determine whether a "reasonable person in the suspect's position would have understood his situation" to be custodial. See Berkemer v. McCarty, 468 U.S. 420, 442, 104 S. Ct. 3138, 3151, 82 L. Ed. 2d 317, 336 (1984). If Manley subjectively believed her freedom of action had been curtailed to a "degree associated with formal arrest," and her belief was objectively reasonable, then the interrogation was custodial within the meaning of the Miranda rule. See California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 3520, 77 L. Ed. 2d 1275, 1279 (1983).

In our analysis of whether the interrogation was custodial, we are aided by the Eighth Circuit Court of Appeals decision in United States v. Griffin, 922 F.2d 1343 (8th Cir. 1990). In Griffin the court of appeals formulated a test comprised of six "indicia of custody." See id. at 1349. In this regard, the court stated:

A consistent line of inquiry has developed . . . which has identified several common indicia of custody. These indicia of custody relate to the specific police practices employed during questioning which tend to either mitigate or aggravate an atmosphere of custodial interrogation. This inquiry into the indicia of custody has generally focused on an examination of (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police

dominated; or, (6) whether the suspect was placed under arrest at the termination of the questioning.

While the foregoing list is decidedly non-exhaustive, the presence or absence of these particular indicia of custody have been influential in this court's assessment of the totality of the circumstances surrounding an official interrogation.

Id.

Explaining the manner in which the indicia are applied, the court of appeals stated:

The first three of these factors may be fairly characterized as mitigating factors, that is to say the affirmative presence of one or more of these factors during questioning would tend to mitigate the existence of custody at the time of the questioning. Conversely, the remaining three factors may be characterized as coercive factors, which is to say that the affirmative presence of one or more of these factors during questioning would tend to aggravate the existence of custody. It is not necessary to a finding of custody that all of the foregoing indicia be presented by the factual circumstances of a case, . . . and a particularly strong showing with respect to one factor may compensate for a deficiency with respect to other factors.

Id.(citations omitted).

A. First Indicium. We first examine whether Manley was informed at the time of the questioning that her cooperation was voluntary, that she was free to leave, or that she was not under arrest. We believe it is necessary for the purposes of our analysis to draw a distinction between the period of questioning during the polygraph test and the posttest "interview". The reason for such a distinction lies in the difference between the nature and character of the two types of questioning. Clearly the

type and manner of the questions posed during a properly administered polygraph examination differ significantly from the interrogation tactics used by the agents during the posttest period of questioning. Therefore, for application in the instant case, we interpret the phrase "at the time of questioning" to mean at the the time of the posttest questioning.

Nothing in the record suggests Manley was told that her cooperation in answering questions was voluntary. In fact, the record suggests the contrary was true. While Wilbur may have generally reminded Manley of her rights, he apparently did not tell her that she was free to leave. We find that Manley was, at one point during the interrogation, told to stay in the room while agent Wilbur left. Such a command would not be consistent with an atmosphere in which Manley's presence was voluntary.

B. Second Indicium. We next look to whether Manley possessed unrestrained freedom of movement during the posttest questioning. We find that she did not possess such freedom.

As discussed above, Manley was told by agent Wilbur to stay in the room while he left once for a short period of time. Additionally, we find that Manley, at one point during the questioning, stated that she desired to leave. Agent Wilbur did not respond to Manley's request and failed to accommodate her desire to end the questioning. Wilbur was apparently sitting between Manley and the door to the

ten by twelve foot room and would have had to move his chair for her to leave. He did not do so.

Furthermore, Manley had been transported from Bloomfield to Des Moines for the test in a police car. She would not have been able to simply drive herself home. None of the agents apparently offered to drive her home in response to her request to leave.

C. Third Indicium. We next examine whether Manley initiated contact with the authorities or voluntarily acquiesced to official requests to respond to questions. We find she did not.

We find that Manley consented to a polygraph examination. Therefore, we believe she should have expected to be informed of and questioned about the results. However, we do not believe Manley initiated the posttest questioning. We do not believe that Manley consented to the intensity of the posttest questioning in this case, merely by operation of her initial consent to the polygraph test itself.

D. Fourth Indicium. We next consider whether strong arm tactics or deceptive stratagems were used during the interrogation. We find they were.

We believe that to confront a suspect with unfavorable polygraph test results is, without question, a strong arm tactic. We find no evidence of deception on the part of the interrogators.

E. Fifth Indicium. We next consider whether the atmosphere in which Manley was questioned was police dominated. We find it was.

Manley was questioned in a small room at DCI headquarters by police officers while being watched on closed-circuit television. She was not in familiar environs, nor did she have friends or family present for moral support. She had been transported approximately one hundred miles from her home to the Wallace Building in Des Moines, and she was without means of personal transportation. We believe the atmosphere was police dominated.

F. Sixth Indicium. Finally, we look to whether Manley was placed under arrest at the termination of the questioning. She was not. Manley was questioned on Friday; she was arrested the following Monday.

In balancing the mitigating and aggravating nature of our findings on each of the six indicia, we conclude that a reasonable person would have believed his or her freedom of action had been curtailed to a degree associated with formal arrest during the Manley postpolygraph interrogation. We also find that Manley possessed such a belief. Therefore, we conclude that Manley was in custody within the meaning of the Miranda rule and, accordingly, was entitled to the protections provided by the rule.

In the Miranda case [the Supreme Court] promulgated a set of safeguards to protect the there-delineated constitutional rights of persons subjected to custodial police interrogation. In

sum, the Court held . . . that unless law enforcement officers give certain specified warnings before questioning a person in custody, and follow certain specified procedures during the course of any subsequent interrogation, any statement made by the person in custody cannot over his objection be admitted in evidence against him

Michigan v. Mosely, 423 U.S. 96, 99-100, 96 S. Ct. 321, 324-25, 46 L. Ed. 2d 313, 319 (1975) (emphasis added).

The Supreme Court, in Miranda, stated:

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.

Miranda, 384 U.S. at 473-74, 86 S. Ct. at 1627, 16 L. Ed. 2d at 723.

"This passage states that 'the interrogation must cease' when the person in custody indicates that 'he wishes to remain silent.' It does not state under what circumstances, if any, a resumption of questioning is permissible." Mosely, 423 U.S. at 101, 96 S. Ct. at 325, 46 L. Ed. 2d at 320. The Mosely Court held "the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his 'right to cut off questioning' was

'scrupulously honored.'" Id. 423 U.S. at 104, 96 S. Ct. at 326, 46 L. Ed. 2d at 321.

We determined, in our discussion of the first and second indicia of custody, that Manley, at one point during the questioning, told agent Wilbur that she wanted to leave. We believe that such a request is sufficient to constitute an invocation of the right to remain silent. The questioning should have been suspended in response to Manley's request, but it was not. Manley's right to cut off questioning was not scrupulously honored.

Accordingly, we find that all statements made by Manley after she requested to leave are inadmissible. From our review of the record, we believe Manley's inculpatory statements were made well after her request to leave. As such, those statements are inadmissible.

Therefore, we reverse the district court's ruling on Manley's suppression motion, and we reverse the judgment of conviction. The case is remanded to the district court for a new trial.

The costs of this appeal are taxed to the State.

For all the reasons stated, the judgment of the district court is reversed and remanded.

REVERSED AND REMANDED.