

FILED

APR 29 1980

558

IN THE COURT OF APPEALS OF IOWA

CLERK SUPREME COURT

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed April 29, 1980

vs.

)

ISADORE (NMN) ANDERSON,

)

0-91

Defendant-Appellant.

)

63755

Appeal from Black Hawk District Court - Carroll Engelkes, William G. Klotzbach,
and Joseph Keefe, Judge.

Defendant appeals from conviction of first degree robbery in violation of section
711.2, supplement to the Code 1977. REVERSED AND REMANDED FOR NEW TRIAL.

Thomas M. McIntee of Charles T. Mattson P.C., Waterloo, Iowa, for defendant-
appellant.

Thomas J. Miller, Attorney General of Iowa; and Kathy Krewer, Assistant
Attorney General; for plaintiff-appellee.

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

Defendant appeals from conviction of first degree robbery in violation of section 711.2, supplement to the Code 1977. We reverse his conviction and remand for a new trial.

On May 15, 1978, defendant was charged by information with first degree robbery in connection with the May 12, 1978 hold-up of a Waterloo gas station. Prior to trial, defendant filed motions to suppress: (1) statements he had made during custodial interrogation in the absence of counsel; (2) physical evidence seized; and (3) testimony of witnesses who identified defendant during a show-up conducted in the absence of counsel. He subsequently expanded such motions to include suppression of evidence obtained after being denied access to a telephone in violation of 804.20, supplement to the Code 1977.

The evidence presented at the hearing was sharply contested. Witnesses for the State gave the following account of what happened. On May 12, 1978, defendant was taken into custody at his mother's residence around 8:30 p.m., shortly after the robbery occurred. He was taken to the gas station where the robbery occurred and was exhibited to three witnesses who positively identified him as the perpetrator of the robbery. At that time, he was placed under arrest and advised of his rights. Defendant was then taken to the police station and booked. At approximately 9:00 p.m., he was again advised of his rights and asked to sign a waiver, which he declined to do. One officer testified defendant did not request an attorney during booking but another officer testified that he did request an attorney. The detective who questioned defendant testified he did not ask to speak with an attorney until 11:00 a.m. the next day. The two officers present during booking testified that defendant had asked about a telephone call at that time. Defendant was advised he would be allowed to make a call once he was taken upstairs to jail. The jailers, however, were advised defendant was not to be allowed to make any telephone calls. Sometime between an hour and an hour and one-half later, defendant informed a jailor he would now like the opportunity to speak with police. At 10:20 p.m., after again being advised of his rights, defendant stated that he understood his rights and signed a form waiving them. During the course of the conversation that followed, at approximately 11:00 p.m., defendant admitted his involvement in the robbery and indicated he would show the police where items of incriminating evidence were located, which he did. At this time, a search warrant was being sworn out. The search of defendant's automobile and his mother's residence was

completed around midnight. The next day defendant again discussed the robbery at length with the police. Only after he was asked to sign a written statement did defendant request the opportunity to speak with an attorney.

The witnesses for the defense gave a substantially different version of the facts, which, in relevant part, is as follows. At the hearing, defendant testified that he requested an opportunity to contact an attorney at booking and again when he was initially asked to sign a waiver form. After being taken upstairs to the jail, he repeatedly requested an opportunity to call an attorney, but the jailer refused his requests. The jailer, in response to defendant's numerous requests to make a telephone call, said he would call a detective to talk with him. Instead of dealing with his requests to use a telephone, the detective interrogated him and elicited numerous incriminating statements.

The trial court denied defendant's motions to suppress. The matter was tried to the court commencing March 27, 1979. On April 2, 1979, the trial court issued findings of fact, conclusions of law, and judgment finding defendant guilty of first degree robbery. Defendant was sentenced to twenty-five years in prison with a minimum of five years to be served. This appeal followed.

I. Defendant contends his statutory rights under 804.20 were denied when, despite his repeated requests, he was refused access to a telephone for the purpose of contacting an attorney and various family members. The State does not deny that defendant was not allowed access to a telephone, but rather attempts to justify its actions on the basis of fears that evidence tending to establish defendant's complicity in the robbery would be destroyed if defendant was given the opportunity to alert others of the imminent search.

Section 804.20 provides:

Any peace officer or other person having custody of any person arrested or restrained of his or her liberty for any reason whatever, shall permit that person, without unnecessary delay after arrival at the place of detention, to call, consult, and see a member of his or her family or an attorney of his or her choice, or both. Such person shall be permitted to make a reasonable number of telephone calls as may be required to secure an attorney. If a call is made, it shall be made in the presence of the person having custody of the one arrested or restrained. If such person is intoxicated, or a person under eighteen years of age, the call may be made by the person having custody. An attorney shall be permitted to see and consult confidentially with such person alone and in private at the jail or other place of custody without unreasonable delay. A violation of this section shall constitute a simple misdemeanor.

We believe the State's actions failed to comply with the statutory mandate of allowing defendant to communicate with an attorney or family members "without unnecessary delay."

The record discloses that two police officers had defendant's automobile and his mother's residence, the two places for which a warrant was being procured, under surveillance from the time defendant was apprehended until after the search was conducted. Under the provisions of 804.20, any telephone calls defendant would have elected to make would have had to have been made in the presence of the officer having custody of him. The officers having custody of defendant would have been able to monitor any call made by defendant. If defendant's call suggested evidence was about to be destroyed, the custodial officer could have acted quickly to alert officers on the scene so they could immediately act to prevent such an occurrence. Under these circumstances, we believe the State's fears regarding the possible destruction of evidence were greatly exaggerated.

Additionally, even assuming the State's fears regarding destruction of evidence were well founded, we believe these fears would only be applicable to calls being made to family members located inside the property to be searched. Under these circumstances, the justification for preventing calls to family members located on the premises would be the fear certain items of evidence might be destroyed before officers on the scene could react to prevent it. Calls to persons not located inside the areas to be searched, however, would not present such a problem. In the case at bar, there is no evidence indicating a risk of destruction of evidence would have occurred had defendant been given the opportunity to call individuals not then present in his mother's residence, especially an attorney. With respect to any requests for an opportunity to contact these individuals, the police order requiring defendant to wait until after the search warrant was executed constitutes an "unnecessary delay" contrary to the provisions of 804.20.

The order preventing defendant's use of the telephone was apparently lifted shortly after midnight when the search warrant had been executed. Prior to this time defendant had made an oral confession and assisted police officers in recovering a sawed-off shotgun and stocking cap allegedly used in the robbery. Although the evidence is somewhat in dispute as to defendant's requests for an opportunity to call various individuals, it is apparent he made some inquiry into the possibility of using a telephone. More importantly, we find it clear from our consideration of all the

evidence¹ that defendant was not to be permitted to make any calls to anyone until after the search warrant was executed. The remedy for such a violation of section 804.20 is suppression of the evidence obtained. State v. McAteer, ___ N.W.2d ___, ___ (Iowa 1980); State v. Vietor, 261 N.W.2d 828, 832 (Iowa 1978). We believe the inculpatory statements made by defendant during the period he was illegally denied access to a telephone, as well as the physical evidence that he assisted in recovering, should have been suppressed. Id. Accordingly, defendant's conviction must be reversed and the proceedings remanded for a new trial.

II. Defendant next contends the trial court erred in admitting into evidence statements made in the absence of counsel, while defendant was in custody, after he had repeatedly requested the opportunity to talk with an attorney. He asserts these statements were taken in violation of his constitutional rights under the fifth, sixth and fourteenth amendments to the U.S. constitution and, according to the provisions of Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966), should have been suppressed. We agree.

The evidence indicates defendant requested the opportunity to contact an attorney at booking. Despite this request he was taken into an interview room for questioning. At that time he stated he did not understand his rights and did not wish to speak with the police. He was then taken upstairs to jail where, as previously discussed in division I, he was prevented from using a telephone. Defendant testified that during the next hour and a half, he repeatedly requested an opportunity to contact an attorney. Subsequently, defendant was taken to an interview room where he executed a written waiver of his "Miranda rights."

After the Miranda warnings have been given, if an individual requests the opportunity to speak with an attorney any interrogation must cease until an attorney is present. Miranda, 384 U.S. at 473-74, 16 L.Ed. 2d at 723, 86 S.Ct. at 1627-28. An accused can, however, waive his right to have an attorney present at interrogation. Williams v. Brewer, 509 F.2d 227, 233 (8th Cir. 1974), affirmed 430 U.S. 387, 51 L.Ed. 2d

¹ With respect to the alleged constitutional violations considered in division II of this decision, we must make our own independent evaluation of the totality of circumstances. State v. Hilleshiem, ___ N.W.2d ___, ___ (Iowa 1980). While we find no express authority for conducting a similar review of the facts as to claimed statutory violations, we believe that in those instances where both constitutional and statutory violations are involved, a similar scope of review should be accorded to each.

423, 97 S.Ct. 227, rehearing denied 431 U.S. 925, 53 L.Ed. 2d 240, 97 S.Ct. 220 (1977). In order to establish a valid waiver, the State has the heavy burden of demonstrating that defendant knowingly and voluntarily waived his privilege against self-incrimination and his right to assistance of counsel. North Carolina v. Butler, 441 U.S. 330, 373, 60 L.Ed. 2d 286, 292, 99 S.Ct. 1755, 1757 (1979); State v. Jump, 269 N.W.2d 417, 424 (Iowa 1978). Absent an effective waiver, statements made by defendant after expressing a wish to confer with an attorney are not admissible in evidence. State v. Moon, 183 N.W.2d 644, 646 (Iowa 1971).

In light of the evidence establishing defendant's initial request to contact an attorney at the time of booking, defendant's uncontroverted testimony of subsequent repeated requests to call an attorney, and the existence of the order denying defendant access to a telephone, we find the State has failed to carry its burden of showing an effective waiver. At the time the written waiver of rights form was executed by defendant, the order denying him access to a telephone was still in effect. Nowhere in the record can we find where, at the time he signed the waiver, defendant had been informed as to the reason why he was not allowed to call an attorney, or when he would be allowed to do so. Under these circumstances, defendant would have no reason to believe that again exercising his right to the assistance of counsel, which he had been informed he had the right to do, would be anymore meaningful or effective than it had been already. See e.g. State v. Hilpipe, 242 N.W.2d 306, 310 (Iowa 1976). We believe, therefore, defendant's written waiver of his "Miranda rights" was tainted by his inability to contact counsel and, accordingly, we hold any statements made by defendant after signing such waiver to be inadmissible in evidence.

III. Defendant contends the trial court erred in admitting certain tainted physical evidence, consisting of a sawed-off shotgun and a stocking cap, which were obtained as a result of statements made by defendant in violation of his fifth and sixth amendment rights. He does not, however, challenge the admission of items of physical evidence obtained by the State as a result of its execution of a search warrant for his automobile and his mother's residence.

Although in this division defendant attempts to now pursue a different ground for challenging the admissibility of these items of evidence than was urged below, we need not deal with this issue as a result of our ruling in division I of this opinion, which excluded the sawed-off shotgun and stocking cap from evidence on retrial. Neither

defendant's claims on this issue, nor those in division I, reach the evidence obtained by the State as a result of its execution of a search warrant for defendant's automobile and his mother's residence, and our decision today in no way affects its admissibility.

IV. Lastly, defendant contends the trial court erred in admitting evidence of a pre-trial in-custody identification made in the absence of counsel. We find no merit in this contention.

Defendant argues counsel should have been present before he was exhibited to the witnesses. Although counsel may have been helpful to defendant, the right-to-counsel constitutional guarantee of United States v. Wade, 383 U.S. 218, 18 L.Ed. 2d 1149, 87 S.Ct. 1926 (1967) and Gilbert v. California, 388 U.S. 263, 18 L.Ed. 2d 1178, 87 S.Ct. 1951 (1967), is not applicable to this type of on-the-scene preindictment identification procedure. Kirby v. Illinois, 406 U.S. 682, 688-90, 32 L.Ed. 2d 411, 417-18, 92 S.Ct. 1877, 1881-83 (1972); State v. Salazar, 213 N.W.2d 490, 493 (Iowa 1973). The trial court did not err in failing to exclude evidence of the pre-trial identification on this basis.

Defendant also argues the pre-trial identification procedure used violated the due process standards of the fifth and fourteenth amendments. The test for such assertions is whether the "confrontation conducted is 'unnecessarily suggestive and conducive to irreparable mistaken identification.'" Salazar, 213 N.W.2d at 493, quoting from Stovall v. Denno, 388 U.S. 293, 302, 18 L.Ed. 2d 1199, 1206, 87 S.Ct. 1967, 1972 (1967). Although on-the-scene, one-on-one confrontations are inherently suggestive, Stovall, 388 U.S. at 302, 18 L.Ed. 2d at 1199, 87 S.Ct. at 1472; Salazar, 213 N.W.2d at 493, such procedures "are not violative of due process unless the confrontation is unnecessarily suggestive." Id. at 494 (emphasis original).

Defendant, in the case at bar, was returned to the scene of the crime shortly after the robbery had occurred. The evidence, although somewhat disputed, indicates that two police officers were standing in the vicinity of defendant. The area where the identifications were made was well lighted and the witnesses were only short distances from defendant. Although all three witnesses were assembled together when the identification took place, the record indicates each witness, without hesitation, positively identified defendant as the perpetrator of the robbery.

The Salazar case recognized that some aspects of the ordinary identification confrontation were usual and not unnecessarily suggestive. Salazar, 213 N.W.2d at 494. These aspects included: the presence of police officers; handcuffs on defendant; and the proximity to a police car. Id. Additionally, Salazar recognized the advantages of

prompt identification procedures, quoting from Russell v. United States, 408 F.2d 1280, 1284, cert. denied, 395 U.S. 928, 23 L.Ed. 2d 345, 89 S.Ct. 1786 (1969), which stated: "[b]alancing all the doubts left by the mysteries of human perception and recognition, it appears that prompt confrontation in circumstances like those of this case will 'if anything promote fairness by assuring reliability . . .'" Id. at 494-95.

In light of the totality of circumstances surrounding the pre-trial identification of defendant, we believe defendant's due process rights were not violated and the trial court was correct in refusing to suppress the use of this identification.

For a new trial, this cause is REVERSED AND REMANDED.