IN THE COURT OF APPEALS OF IOWA

No. 0-564 / 89-1776

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

458

LARRY GREEN,

Appellant.

Appeal from the Iowa District Court for Buena Vista County, Charles H. Barlow, Judge.

Defendant appeals his conviction for lascivious acts with a child. He contends his statement made to a polygraph examiner was used in violation of his Miranda rights. **AFFIRMED.**

Linda Del Gallo, Acting State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Mark Joel Zbieroski, Assistant Attorney General; and Corwin R. Ritchie, County Attorney, for appellee.

Considered by Donielson, P.J., and Schlegel and Habhab, JJ.

HABHAB, J.

This is an appeal by Larry Green from judgment and sentence entered upon his conviction of lascivious acts with a child in violation of Iowa Code section 709.8 (1987). We affirm.

The defendant, Larry Green, was accused of fondling the genitals of a twelve-year-old girl. During the investigation of this incident, Green agreed to take a polygraph examination. Prior to the examination he was given the Miranda warnings and was told that he was not in custody and was free to leave at any time.

After the polygraph examination had been completed and the equipment disconnected, the examiner told Green that the results revealed he was not telling the truth; the examiner also advised Green that if he had made a mistake it would be best to clear it up. At this point Green voluntarily stated that the incident might have happened but he could not remember it; Green also allegedly inquired whether a psychiatrist or psychologist could help him remember.

Green was subsequently charged with lascivious acts with a child. At his jury trial, the polygraph examiner testified as to the comments made by Green after the examination had concluded. The jury found Green guilty of the crime as charged. He appeals from the resulting conviction.

Green contends the district court erred by allowing the polygraph examiner to testify about his statement that the incident might have happened but he could not remember it. He first argues this was error because he claims he was in custody at the time of the polygraph. The State counters by arguing the defendant was not in custody. We agree with the State's position.

At the time the defendant was originally questioned, he volunteered to take a polygraph examination. The examination date was set, and on that date the defendant, on his own, drove to the Buena Vista County Sheriff's Department and from there rode with a deputy sheriff to the highway patrol office in Spencer for the examination. There is no evidence the defendant was ever arrested or taken into custody. Prior to the examination, Dennis Wilbur, the polygraph examiner, advised the defendant of his Miranda rights and explained the polygraph procedure. The defendant was informed he was not under arrest and was free to leave or discontinue the examination at any time.

The State submits, and we agree, that the polygraph examination in the instant case is not in itself a police-dominated atmosphere. The defendant was informed he was not under arrest, and he testified that he volunteered to go to Spencer for the polygraph examination. The defendant contends he believed he was in custody because the officers had a superior attitude towards him and because the officers asked him "snappy type" questions.

The mere fact that he felt the officers were acting superior is not sufficient to establish custody. No charges had been filed against the defendant at the time of the examination, and he was informed he was free to leave at any time. Miranda is limited to a "coercive environment" of being "in custody". Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

We need not address the question of whether the defendant waived his rights for we find the defendant was not in custody at the time the incriminating statement was made.

AFFIRMED.