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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,) Filed January 26, 1982 151
vs.)
RONALD L. SPENCE,) 1-327/65185
Defendant-Appellant.)

Appeal from Linn District Court - William R. Eads and Robert Osmundson, Judges.

Defendant appeals from his conviction of robbery in the first degree in violation of sections 711.1 and 711.2, The Code 1979, asserting that trial court erred 1) in failing to suppress evidence of an allegedly illegally obtained confession, 2) in failing to grant his motion for continuance after he waived his right to a speedy trial, 3) in failing to grant his motion for directed verdict on the ground that there was insufficient corroboration of his confession, and 4) in failing to grant his motion for new trial. AFFIRMED.

J. R. Norris of J. R. Norris & Associates, Cedar Rapids, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Thomas N. Martin, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

CARTER, J.

Defendant, Ronald L. Spence, appeals from his conviction of robbery in the first degree in violation of sections 711.1 and 711.2, The Code 1979. He asserts that trial court erred 1) in failing to suppress evidence of an allegedly illegally obtained confession, 2) in failing to grant his motion for continuance after he waived his right to a speedy trial, 3) in failing to grant his motion for a directed verdict on the ground that there was insufficient corroboration of his confession, and 4) in failing to grant his motion for new trial. We affirm the judgment of the trial court.

On February 18, 1980, a robbery occurred at the J. C. Penney's store in Cedar Rapids, Iowa. An investigation by the Cedar Rapids Police Department into the circumstances of that robbery led the officers to defendant. After locating defendant, the police officers asked him to accompany them to the station for questioning about the robbery. Defendant complied and was questioned at the police station. Prior to questioning he was informed of his constitutional rights both orally and in written form. When asked if he understood his rights, he acknowledged he did; he asked no questions about those rights, and signed a waiver form. The interrogation, which began about 1:00 a.m. on February 20th, lasted until approximately 4:30 a.m. that morning. Defendant claims that he made several requests to see an attorney during the interrogation. The testimony of the police officers present at that interrogation contradicts defendant's claim in this regard. However, it is undisputed that after completing this interrogation, defendant was "booked" and made a phone call to his attorney at that time. The record also indicates that the arresting officers were aware that defendant called his attorney. At about 9:00 a.m. or shortly afterwards that same morning, defendant was questioned again by police officers assigned to the morning shift. This was prior to any court appearance or appointment of counsel for defendant. He was again advised of his rights and signed a waiver form as before. During this

second interrogation, defendant made certain inculpatory statements, including a confession. He signed a statement concerning the robbery at 10:10 a.m., February 20th.

As a result of the foregoing events, a trial information was filed in the district court accusing the defendant of the crime of robbery in the first degree in violation of sections 711.1 and 711.2, The Code 1979. On February 29th defendant was arraigned and waived his right to a speedy trial. He then moved for a continuance which was overruled by trial court. The case proceeded to trial before a jury and defendant was convicted. Defendant thereafter filed a motion in arrest of judgment or, in the alternative, for a new trial alleging erroneous rulings by the court on the issues of defendant's motion for a continuance, suppression of the confession and lack of proof required for corroboration of the confession. Trial court overruled these motions and sentenced defendant to a term of not more than 25 years. This appeal followed.

I. Scope of Review. Generally, our review of criminal proceedings is at law for correction of errors only, and not de novo. Iowa R. App. P. 4. "However, when, as here, issues as to violation of constitutional safeguards are raised this court is obliged to make an independent evaluation of the totality of the relevant circumstances shown by the entire record under which ruling on those constitutional rights were made. That is, when a constitutional issue is presented, the evidence relevant to the issue is reviewed **de novo.**" Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975).

II. Admissibility of Defendant's Confession. Defendant first contends trial court erred in determining that his confession had not been illegally obtained and thus erred in failing to suppress that confession. His arguments on this point are based on three separate legal theories: (1) that his sixth amendment right to counsel was violated in securing his confession; (2) that said confession was not voluntarily made; and (3) that said confession was obtained in violation of his Miranda rights. We consider these claims separately.

A. Sixth Amendment Rights. Defendant claims that in obtaining his confession police officers violated his sixth amendment right to counsel as expressed in Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964). We find no authority for holding that the sixth amendment right to counsel had attached at the time of defendant's interrogation and believe the correct rule to be that such right does not attach prior to formal charge. See Kirby v. Illinois, 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972); Williamson v. State, 201 N.W.2d 490, 491 (Iowa 1972). Defendant suggests in this regard that the time of his initial court appearance wherein formal proceedings might have been commenced and counsel appointed would have triggered his sixth amendment rights prior to his confession but for the fact that the police had removed him from the jail for questioning at about the same time his initial court appearance was scheduled. This claim was not urged in the trial court and on the present record is conjectural. We find that defendant's sixth amendment rights had not attached prior to his confession.

B. Voluntariness. The general issue of voluntariness of a confession is separate and distinct from Miranda rules. See State v. Washington, 257 N.W.2d 890, 895 (Iowa 1977). On the facts of the present case, this issue becomes whether, considering the totality of the circumstances, defendant's confession was the product of a rational and free will. State v. Hilpipre, 242 N.W.2d 306, 309 (Iowa 1976). Our review of the record suggests no basis for finding that the defendant's confession was involuntary under this test.

C. Miranda Rights. Defendant's claim that his Miranda rights were violated turns on his own testimony that at various times during his two interrogations he advised the interrogating officers that he wished to consult a lawyer. This assertion is denied in the testimony of the interrogating officers. These witnesses testified that defendant's only request for counsel was a request to telephone a lawyer after his first interrogation was completed and before the

second interrogation commenced. This request was granted. The trial court resolved the credibility issues thus presented in favor of the State and we find no ground to disturb this ruling.

With respect to the telephone call which was made to an attorney, we believe that a request to telephone a lawyer made by a subject of police interrogation is not the equivalent of a request to have counsel present during any further interrogation. These two acts are clearly not the same and do not carry the same legal significance. The key words in Edwards v. Arizona, ___ U.S. ___, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), which delineate the act which effectively terminates a prior waiver of Miranda rights, is an expression of the subject's "desire to deal with the police only through counsel." The right conferred upon the subjects of police interrogation under the Miranda decision is a right to terminate the interrogation at will. The record in the present case fails to reflect that such right was not observed by the officers.

The sequence of events in the present case indicates an explanation to defendant of his Miranda rights followed by a written waiver thereof. This was followed by a period of defendant freely answering the officers' questions, followed by a telephone call by defendant to his attorney, followed by additional questioning by police without objection from defendant. Logic dictates that if one can waive his Miranda rights without talking to an attorney (which is a well-accepted legal principle), then certainly he can continue such waiver after he has had the benefit of legal counsel. On the present record, the officers were fully justified in treating defendant's actions after he had talked to his lawyer as a decision on his part to continue his previous cooperation in the interrogation. We find the trial court properly denied the motion to suppress evidence.

III. Denial of Continuance. We next consider defendant's claim that the trial court erred in denying two motions to continue the date of his trial. A trial court should grant a continuance only when substantial justice will be more nearly

obtained. State v. Sheffey, 234 N.W.2d 92, 96 (Iowa 1975). The granting or denial of a continuance is discretionary and the trial court will be reviewed only for abuse of that discretion. State v. Kyle, 271 N.W.2d 689, 691 (Iowa 1978). Defendant was informed against on February 28, 1980, and his trial was scheduled for May 12, 1980. Two intervening motions to continue this trial date were denied. On appeal, defendant urges that in exchange for his waiver of his 90-day speedy trial right under Iowa R. Crim. P. 27, he should have been accorded more than 90 days to prepare for trial. No factual basis for a claim of prejudice has been established. Under such circumstances, the denial of the motion for continuance was well within the trial court's discretion.

IV. Corroboration of Defendant's Confession. Next we consider defendant's assertion that (1) he cannot be convicted on his confession alone absent corroborative evidence, and (2) that such corroborative evidence is lacking in the present record. We have recently considered the requirements for corroboration of confessions under Iowa R. Crim. P. 20(4) in State v. Hill, ___ N.W.2d ___, ___ (Iowa App. 1981). Applying the principles stated there, we find that sufficient corroboration of defendant's confession in the present case is to be found in (a) the fact that the details of the crime, as described by the victim, match the description of events contained in defendant's confession, and (b) a voice identification of defendant was made by the victim of the crime. We therefore reject defendant's claim based on lack of corroborative evidence.

V. New Trial. Defendant also asserts that the trial court erred in denying his motion for new trial. The grounds of that motion were similar to the matters unsuccessfully urged on this appeal. There was no error in denying the motion for new trial.

We have considered all issues presented and find no basis for reversal.

AFFIRMED.

Oxberger, C.J., and Donielson, J., concur. Johnson and Snell, JJ., dissent.

JOHNSON, J. (dissenting)

I dissent. The State failed to prove defendant's knowing, voluntary, and intelligent waiver of his constitutional right to have the presence of counsel during questioning.

The State has a heavy burden to prove defendant knowingly, intelligently, and voluntarily waived his privilege against self-incrimination. Miranda v. Arizona, 384 U.S. 436, 475, 86 S. Ct. 1602, 1628, 16 L. Ed. 2d 694, 724 (1966). In analyzing this burden the Court in Miranda stated:

> The Court has always set high standards for the waiver of constitutional rights, ...
>
> * * *
>
> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

Id., quoting Carnley v. Cochran, 369 U.S. 506, 516, 82 S. Ct. 884, 890, 8 L. Ed. 2d 70, 77 (1962). While the record in the instant case is not silent on the issue of defendant's request for counsel, it does not meet the burden imposed, by Miranda, on the State to prove effective waiver. The defendant testified that he asked to see an attorney; the State disputes this contention. The record made concerning these allegations is cursory at best. However, the record reveals that the defendant, only a few hours before the second session of questioning, requested and was able to speak to his attorney over the telephone, and the attorney spoke with one of the investigating officers. I believe the fact that defendant consulted an attorney after the first session of interrogation is a crucial fact in determining whether defendant waived his right to the presence of counsel during the second interrogation. This court, of course, is obliged to make its own evaluation of the totality of the relevant circumstances in deciding this constitutional issue. State v. Davis, 304 N.W.2d 432, 435 (Iowa 1981). Thus, I cannot ignore the fact that,

while defendant initially voluntarily accompanied the detectives to the police station and answered questions, it was only after he had been arrested and "booked" that he decided to consult counsel. It is evident that the circumstances had substantially changed from defendant's initial compliance with the police investigation. The fact that he contacted an attorney evidences defendant's response to these changed circumstances and demonstrates he desired the protection of counsel. The State's evidence that defendant understood the statement he signed and responded to the interrogation fails to prove he voluntarily, knowingly, and intelligently waived his right to have counsel present. I would require a much more extensive record concerning these conflicting allegations before concluding that the State had met its burden of proof. As the court said in Miranda:

> Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.

384 U.S. at 475, 86 S. Ct. at 1628, 16 L. Ed. 2d at 724.

In view of the totality of the circumstances under which defendant was interrogated the second time, I believe the State has failed to prove that his waiver of counsel was voluntary. Trial court, thus, should have suppressed defendant's confession.

Snell, J., joins in this dissent.