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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellant,	)	Filed April 20, 1988
vs.	)	7-455 87-467
GARY DAVID FIELDS,	)	293
Defendant-Appellee.	)	

Appeal from the Iowa District Court for Jackson County (No. 5368), Max Werling, Judge.

State appeals trial court's suppression of videotape in OWI prosecution. **REVERSED AND REMANDED.**

Thomas J. Miller, Attorney General; Julie Halligan, Assistant Attorney General; and Michael Kane, County Attorney, for plaintiff-appellant.

Mark Lawson of Peckosh & Lawson, Maquoketa, for defendant-appellee.

Heard by Oxberger, C.J., Donielson and Schlegel, JJ.

OXBERGER, C.J.

This is a discretionary review action, brought by the State, to review the trial court order suppressing a videotape in an OWI prosecution on the grounds the defendant's fifth amendment right to counsel was violated. We reverse the trial court's ruling and remand for further proceedings.

Defendant Gary Fields was arrested for OWI in the early morning of February 1, 1987. Fields was taken to the Maquoketa police station by Officer Brooks where his actions were videotaped. At the station, Brooks began completing the necessary paperwork charging Fields. Fields was continually pleading with Brooks to let him walk home or to charge him with a different offense.

Brooks then gave Fields his Miranda warnings and asked Fields if he wanted an attorney. Fields responded that he did and an attorney was called. While this was happening, Fields continued to plead with Brooks to charge him with something else.

Brooks called Fields' attorney and briefly explained what had happened. Brooks then informed Fields his attorney would be there in twenty minutes. He also told Fields he could no longer talk with him because he had exercised his right to counsel. Fields, however, persisted in asking questions and begging for leniency by arguing he was only one block away from home. Brooks explained his car lights were malfunctioning and that is why it took so long to get him pulled over. He again told Fields he could not speak to him without an attorney.

Brooks began preparing some more paperwork. He received a call and discussed the amount of videotape that remained. Fields then asked if he was being taped. Brooks told him that he was and Fields fell silent.

A few minutes later, Fields asked Brooks if he would go to jail and what the penalties were. Brooks answered that he did not know and that the penalties varied depending on the circumstances. He also asked Fields if he were staying

with anyone. He told Fields he could probably be released to his parents. Brooks then left the room for a short time.

Upon his return, Brooks continued to work on paperwork. Fields asked again what the costs of the charge would be. Brooks answered it varied depending on the circumstances and that it helped to have a good record. Fields said he had a good record. Brooks, while filling out a form, asked Fields what year his car was. Fields answered.

The tape was then turned off. The taping resumed when Fields' attorney arrived a few minutes later. The remainder of the tape shows Fields refusing the implied consent procedure and the parties making arrangements to get Fields home.

The trial court suppressed the videotape because it determined Brooks was interrogating Fields after Fields had requested an attorney. The trial court found that Brooks was "visiting" with Fields and that this constituted in-custody interrogation.

As the issue raises constitutional questions, we review de novo. State v. Newsom, 414 N.W.2d 354, 357 (Iowa 1987); State v. Jackson, 380 N.W.2d 420, 421 (Iowa 1986). We examine the totality of the circumstances. Jackson, 380 N.W.2d at 421.

The fifth amendment guarantees a criminal suspect the right to counsel. See Miranda v. Arizona, 384 U.S. 436, 469-470, 86 S.Ct. 1602, 1625-26, 16 L.Ed.2d 694, 721 (1966). The fifth amendment protection against self-incrimination requires the police to notify a suspect of the right to counsel and to cut off interrogation once the suspect invokes the right. Id. at 471-74, 86 S.Ct. at 1626-28, 16 L.Ed.2d at 722-23. The invocation of the right to counsel in a fifth amendment setting is significant; absent counsel, further interrogation may not occur unless the accused initiates the subsequent conversation. Edwards

v. Arizona, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 1884-85, 68 L.Ed.2d 378, 386 (1981). In the event the police initiate subsequent interrogation, there can be no valid waiver of counsel even though the accused is advised of his constitutional rights and acquiesces in the questioning. Id. at 484, 101 S.Ct. at 1884-85, 68 L.Ed.2d at 386; Oregon v. Bradshaw, 462 U.S. 1039, 1043, 103 S.Ct. 2830, 2833-34, 77 L.Ed.2d 405, 411 (1983). An accused initiates further interrogation by manifesting "a willingness and a desire for a generalized discussion about the investigation." Bradshaw, 462 U.S. at 1045-46, 103 S.Ct. at 2835, 77 L.Ed.2d at 412. The State has a heavy burden to prove the defendant initiated further conversations, and knowingly and intelligently relinquished the traditional benefits associated with the right to counsel. Newsom, 414 N.W.2d at 359.

Upon our de novo review and examination of the videotape, we hold Fields' fifth amendment rights were not violated. The crux of Fields' appeal is the conversation that occurred while waiting for Fields' attorney. Fields argues Brooks' explanation of why he could not let him go, his inquiry into how much tape was remaining, and his explanation of the possible penalties were designed to elicit further incriminating responses.

We conclude the defendant initiated the entire conversation. Fields was continually pleading with Brooks to let him go. Time after time Fields asked Brooks to show some leniency. This continued even after Fields requested an attorney, despite Brooks telling him he couldn't speak to him. It even occurred after he was told of the videotaping. All of Brooks' statements were made in response to direct questioning by Fields.

Brooks did not expressly question Fields about the incident. The only questions he asked about the car and who he was staying with related to identification. This type of questioning does not amount to interrogation. State v. Beatty, 305 N.W.2d 496, 498-99 (Iowa 1981). Fields clearly indicated a willing-

ness to enter into a generalized discussion of the investigation. Brooks, as shown in the videotape, was very careful not to converse with the defendant, and only responded when Fields addressed him. Brooks' efforts were an attempt to silence Fields. They were not designed to elicit incriminating statements.

Because Fields initiated the conversation with Brooks, and because Brooks' responses were not designed to elicit further incriminating statements, we hold the trial court erred in suppressing the videotape. We therefore reverse the ruling of the trial court and remand the case for further proceedings.

REVERSED AND REMANDED.