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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Plaintiff-Appellee,

vs.

GORDON LEE MYERS,

Defendant-Appellant.

Filed December 30, 1981

1-353
65186

Appeal from Linn District Court - Thomas M. Horan, Judge.

Defendant appeals from his conviction of willful injury in violation of section 708.4, The Code, asserting that trial court erred in overruling his motion to suppress evidence of his inculpatory statements made during a custodial interrogation. AFFIRMED.

Ralph W. Koons, Cedar Rapids, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Michael Jordon, Assistant Attorney General, for plaintiff-appellee.

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

PER CURIAM

Defendant, Gordon Lee Myers, appeals from his conviction of willful injury in violation of section 708.4, The Code. He asserts that trial court erred in overruling his motion to suppress evidence of his inculpatory statements made during a custodial interrogation. He argues that the State failed to prove by a preponderance of the evidence that he made an effective waiver of his constitutional rights or that his statements were voluntarily made. We affirm.

On October 5, 1979, defendant was charged by county attorney information with willful injury in violation of section 708.4, The Code. On January 8, 1980, defendant filed a motion to suppress evidence of oral and written statements made during a custodial interrogation, asserting that the statements were in violation of his constitutional rights against self-incrimination and right to counsel. Trial court denied this motion and the case proceeded to trial before a jury. Defendant was found guilty and thereafter sentenced to a term not to exceed ten years. This appeal followed.

At the suppression hearing, the following evidence was introduced: Cedar Rapids Police Detective Roland Achey, while investigating a possible willful injury of a three-month-old child, learned that defendant had been living with the child's mother. Detective Achey approached defendant for questioning at his place of employment. Defendant voluntarily accompanied the investigating officers to the police station. At the station, Detective Achey began the interview by asking defendant his name, age, address, and occupation. Achey then began to fill out a form evidencing defendant's waiver of his constitutional rights. He explained defendant's rights to him, and had the defendant read aloud those rights from the statement. Defendant then signed the form after reading it and acknowledged he understood what it meant. Detective Achey further advised defendant that he had the right to remain silent, did not have to talk to the detective, and that he had the right to an attorney. Detective Achey testified that the defendant did not ask to talk to an attorney; or ask to have the proceedings stop or the questioning cease. Prior to questioning, Detective Achey informed defendant that the questioning concerned an allegation of child abuse. Detective Achey testified that the defendant did not appear to exhibit any characteristics of intoxication such that he would not be able to understand the nature of the proceedings. He also testified that there were no threats or promises of leniency made to defendant. During questioning defendant made oral incriminating statements which Detective Achey took down in longhand. Detective Achey subsequently called in his secretary and dictated the

defendant's statement to her. Defendant then read the typed statement and signed it. After signing the statement, defendant asked, and was allowed, to call an attorney.

Defendant's testimony corresponds with the State's version of the proceedings in most respects. Defendant, however, alleges that he did not understand his rights under the constitution, although he specifically recalled that he was told that he had the right to remain silent. He stated that he understood that he did not have to say anything to the detective. He testified that the statement was read back to him by Detective Achey and that he signed it. He stated that he never asked Detective Achey to stop the questioning and never asked to call a lawyer during the interview. It was only after the interview was completed and he had signed the statement that he asked to make a phone call. He stated that he knew he had a right to talk to a lawyer prior to questioning, but that at the time he was not thinking.

I. Scope of Review. Generally, our review of criminal proceedings are for correction of errors and not de novo. Iowa R. App. P. 4. However, where constitutional questions are raised, we make an independent evaluation of the totality of the circumstances surrounding the alleged violations. State v. Fisher, 279 N.W.2d 265, 266 (Iowa 1979). Thus, relative to the given issue, our review is **de novo.** State v. Hilpipre, 242 N.W.2d 306, 309 (Iowa 1976). See also Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975), and citations.

II. Waiver. "When the State contends an individual has waived his or her constitutional rights, it is required to show by a preponderance of the evidence that the waiver was knowing, intelligent and voluntary. [citations]" Fisher, 279 N.W.2d at 266. Even though there is an effective waiver of rights by the accused, the State must also establish by a preponderance of the evidence that the accused's subsequent incriminatory statements were voluntarily made. Hilpipre, 242 N.W.2d at 309. That is, the State must prove that the statements were a product of a rational and free will. Id.

> "* * *. To be admissible, a confession must be " 'free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.' " * * *. " "

State v. Ware, 205 N.W.2d 700, 703 (Iowa 1973), quoting from Brady v. United States, 397 U.S. 742, 753, 90 S. Ct. 1463, 1471-1472, 25 L. Ed. 2d 747, 759 (1970), as quoted in Hilpipre, 242 N.W.2d at 309. An express waiver is not required by either the federal or the Iowa constitution,[1] State v. Davis, 304 N.W.2d 432, 435 (Iowa 1981). We thus must

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[1] Edwards v. Arizona, ___ U.S. ___, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), however, holds that once an accused involves his or her right to counsel, additional safeguards are necessary. These additional safeguards require no further interrogation by the

examine defendant's words and actions, after he was informed of his Miranda rights, to determine if a waiver, in fact, occurred. Id.

We conclude the State did show, by a preponderance of the evidence, a knowing and voluntary waiver of defendant's right to remain silent and right to counsel. Defendant was orally informed of his Miranda rights and given an opportunity to read the waiver form. He read the waiver form, had part of it read to him, and stated that he understood his rights. He signed the form. Although he claims that he did not understand his constitutional rights, defendant nonetheless stated, at the suppression hearing, that he knew that he did not have to make any statements and could speak to an attorney if that was his desire. He further testified that the reason he did not assert those rights was that he was not thinking at the time. We believe this evidence shows that the defendant understood and waived his rights and that, although his waiver may not have been prudent, it was unquestionably voluntarily and knowingly made.

We also believe that the evidence substantiates the State's burden of proving by a preponderance of the evidence that the defendant's statements were voluntarily made. The State offered evidence to show that there were no oppressive circumstances and that no improper promises were made to defendant to elicit the statements. Further, the interview was short in duration and the statements were almost immediately made. We conclude that this record is sufficient to meet the State's burden to prove that the statements were an act of free will.

Finally, defendant did not request counsel during the interrogation. It was only after the entire questioning had ended that he requested and was given an opportunity to call an attorney. Under this state of the record, defendant can claim no deprivation of his constitutional right to counsel. We thus affirm trial court's ruling on defendant's motion to suppress.

AFFIRMED.

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authorities "until counsel has been made available, unless the accused himself initiates further communication, exchanges or conversations with the police." Id. at ___, 101 S. Ct. at 1884-85, 68 L. Ed. 2d at 386.