IN THE COURT OF APPEALS OF IOWA

No. 7-025 96-0286

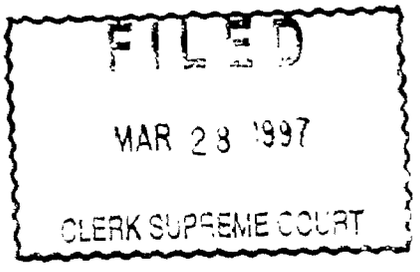
STATE OF IOWA,

Appellee,

vs.

ROBERT JOHN HARKIN,

Appellant.



Appeal from the Iowa District Court for Story County, Carl D. Baker, Judge.

Defendant appeals from the judgment and sentence entered upon his convictions for possession of a schedule II controlled substance (cocaine) with intent to deliver, failure to affix a drug tax stamp, and prohibited acts (using a dwelling for keeping, possessing, or selling drugs). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Mary E. Richards, County Attorney, and James S. Scheetz, Assistant County Attorney, for appellee.

Heard by Habhab, C.J., and Huitink and Vogel, JJ.

HABHAB, C.J.

At approximately 6:30 a.m. on October 18, 1994, emergency personnel were summoned to the home where defendant Robert John Harkin resided. A roommate had called for emergency help after finding Harkin on the floor shaking violently. A firefighter was treating Harkin and directed a police officer to look for any pharmaceutical medication which could have caused Harkin's seizures. In a dresser drawer in Harkin's room, the officer found a piece of glass which had two rows of residue of a white powdery substance and a third full row of the substance. A penicillin bottle and two straws were near the glass. One straw had white powder on it. It was later determined the white powdery substance was cocaine. The county attorney was contacted and the decision to charge Harkin with possession of cocaine was made.

Once stabilized at the hospital, Harkin refused treatment. He was arrested, transported, and booked at the Ames police station. There, he was informed of his *Miranda* rights and he stated that he understood them. He inquired as to whether he should have an attorney. In response, an officer told him it was up to him, officers could not make such recommendations. He was reminded of his *Miranda* rights and agreed to answer questions.

Following this first interview, a search warrant was obtained to search Harkin's bedroom for more controlled substances. Officers used a drug-detecting dog to facilitate the search. Before the search began, Harkin left a message on the

telephone answering machine in his home asking his roommates to hide the toolbox that was under his bed. The search revealed additional drugs in Harkin's room, including in the toolbox. While the search was being conducted, Harkin called his home and learned of the officer's discovery of the toolbox and offered to cooperate with authorities. Harkin again inquired as to whether he would need an attorney and was told it was up to him. During his phone conversations with the officers, Harkin informed them as to the location of other drugs in his bedroom, named other individuals involved in the drug trade, and also informed them he had transported cocaine from Texas to Iowa.

At approximately 2 p.m. Harkin was again reminded of his *Miranda* rights and agreed to talk to the officers. At one point he asked if he should have an attorney and was told he had a right to one.

The next day Harkin voluntarily came to the police department and participated in a monitored call to the alleged source of his drugs in Texas. Officers found the call unproductive and suspicious. Two days later Harkin admitted the call had been "staged." He was again reminded of his *Miranda* rights and continued to talk and admitted his participation in a plan to distribute controlled substances. Due to Harkin's deception with respect to the "staged" call, authorities concluded he would not make a reliable informant and ceased negotiating a deal for his cooperation. Harkin then provided the officers with a written statement setting forth what he had done and how he had obtained the cocaine.

Harkin was charged by trial information with possession of a schedule II controlled substance (cocaine) with intent to deliver in violation of Iowa Code section 124.401(1)(c)(2)(b) (1993), failure to affix a drug tax stamp in violation of section 453B.12, prohibited acts (using a dwelling for keeping, possessing, or selling drugs) in violation of section 124.402(1)(e), and possession of a schedule II controlled substance (cocaine) in violation of section 124.401(3).

Harkin filed a motion to suppress. He sought to exclude from admission into evidence the cocaine found during the warrantless search of his dresser drawer, the cocaine found during the execution of the search warrant, and the statements he made to the police. His motion was denied. Following a bench trial, the court found Harkin guilty on all counts, but dismissed the possession charge since it was a lesser-included offense subject to merger.

On appeal, Harkin argues his confession was obtained in violation of his Sixth Amendment right to counsel and his motion to suppress on this ground should have been granted. He argues there is no signed waiver of his right to counsel and the record does not establish he expressly, intentionally, or voluntarily waived his right to counsel.

As Harkin alleges error involving a constitutional right, we make an independent evaluation of the totality of the relevant circumstances to determine if such an error was made. *State v. King*, 492 N.W.2d 211 (Iowa App. 1992). Our review is de novo. *Id.* The burden is on the State to prove by a preponderance of the

evidence defendant's waiver of his *Miranda* rights was made knowingly, voluntarily, and intelligently. *King*, 492 N.W.2d at 214. *Miranda* holds that a defendant may waive the rights effectuated in the warnings only if the waiver is made voluntarily, knowingly, and intelligently. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1628, 16 L. Ed. 2d 694, 724 (1966).

> There are two dimensions to this inquiry: First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.

Moran v. Burbine, 475 U.S. 412, 421, 106 S. Ct. 1135, 1141, 89 L. Ed. 2d 419, 421 (1986); *King*, 492 N.W.2d at 214.

As in any *Miranda* case, the issue is "whether defendant's waiver and statements were knowing, intelligent, and voluntary, [it is] not a search for a required explicit, specific oral or written waiver." *State v. Mann*, 512 N.W.2d 528, 534 (Iowa 1994)(quoting *State v. Davis*, 304 N.W.2d 432, 435 (Iowa 1981)). A waiver, therefore, need not be express. *Mann*, 512 N.W.2d at 534. The validity of the waiver is based on the particular facts and circumstances surrounding the giving of the *Miranda* warnings.

In our de novo review of the record, we find the totality of the circumstances demonstrate Harkin's waiver of his *Miranda* rights was voluntary, knowing, and intelligent. Harkin was informed and reminded of his *Miranda* rights several times

and each time he knowingly, voluntarily, and intelligently chose to waive them. Harkin clearly stated he understood his rights after being *Mirandized.* Although he made inquiry as to his need for counsel, his voluntary decision to speak with the officers may clearly be implied from the fact he did so after being advised he was not required to. *Mann*, 512 N.W.2d at 534. Moreover, the United States Supreme Court has held, "invocation of the *Miranda* right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.'" *Davis v. United States*, 512 U.S.___, ___, 114 S. Ct. 2350, ____, 129 L. Ed. 2d 362, 371 (1994) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 176, 111 S. Ct. 2204, ___, 115 L. Ed. 2d 158, ___ (1991)). The Court also held:

> [T]he suspect must unambiguously request counsel. As we have observed, "a statement either is such an assertion of the right to counsel or it is not." Although a suspect need not "speak with the discrimination of an Oxford don," he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity [it is] not required that the officers stop questioning the suspect.

Davis, 512 U.S. at ___, 114 S. Ct. at ___, 129 L. Ed. 2d at 371 (citations omitted).[1] The record reflects Harkin never requested that the questioning cease and that he be provided with legal counsel.

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[1] The Supreme Court also stated, "[W]hen a suspect makes an ambiguous or equivocal statement, it will often be good police practice for the interviewing officers to clarify whether or not he [or she] wants an attorney. . . . But we decline to adopt a rule requiring officers to ask clarifying questions. *Davis v. United States*, 512 U.S. ___, ___, 114 S. Ct. 2350, ___, 129 L. Ed. 2d 362, 373 (1994).

We find in light of the totality of the circumstances the State has met its burden of showing Harkin voluntarily, knowingly, and intelligently waived his *Miranda* rights. We find no violation of Harkin's Sixth Amendment right to counsel. The district court did not err in refusing to suppress Harkin's statements.

AFFIRMED.