

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DEJUAN MCCOY,

Defendant-Appellee.

UNPUBLISHED

August 26, 2004

No. 251675

Wayne Circuit Court

LC No. 03-006728

Before: Smolenski, P.J., and White and Kelly, JJ.

PER CURIAM.

Defendant was charged with carjacking, MCL 750.529a, two counts of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. Following a *Walker*¹ hearing, the trial court granted defendant's motion to suppress statements made to the police. The prosecution appeals by leave granted the suppression of one of the statements. We affirm.

I

An accused's statements during custodial interrogation are inadmissible unless the accused voluntarily, knowingly and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). The prosecution must establish a valid waiver by a preponderance of the evidence. *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004).

"[W]here there is a custodial interrogation--that is, where *Miranda* warnings must be given--the failure to give *Miranda* warnings requires suppression of the statement." *People v Anderson*, 209 Mich App 527, 531; 531 NW2d 780 (1995). Whether a suspect has knowingly and intelligently waived his *Miranda* rights depends in each case on the totality of the circumstances, including the defendant's intelligence and capacity to understand the warnings given. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). The advice of rights may be made orally or in written form. *People v Brannon*, 194 Mich App 121, 130-131; 486 NW2d 83 (1992).

¹ *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).

Whether a waiver was voluntary and whether an otherwise voluntary waiver was knowingly and intelligently tendered form separate prongs of a two-part test for a valid waiver of *Miranda* rights. Both inquiries must proceed through examination of the totality of the circumstances surrounding the interrogation. The state has the burden of proving by a preponderance of the evidence that there was a valid waiver of the suspect's rights. [*Abraham, supra*, 234 Mich App at 644-645. Citations omitted.]

“[T]he voluntariness prong is determined solely by examining police conduct.” *Howard, supra*, 226 Mich App at 538.

We review de novo a trial court's ultimate decision on a motion to suppress evidence. *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). Although our review is de novo, “this Court will not disturb a trial court's factual findings with respect to a *Walker* hearing unless those findings are clearly erroneous.” *Id.* at 563-564. “[I]f resolution of a disputed factual question turns on the credibility of witnesses or the weight of the evidence, we will defer to the trial court, which had a superior opportunity to evaluate these matters.” *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

A

The prosecution maintains that the circuit court erred in suppressing the statement, asserting that Officer Miller properly advised defendant of his constitutional rights, and then took a statement from defendant² while he was hospitalized at Sinai-Grace Hospital. We do not agree. The court did not err in concluding that the prosecution did not establish a valid waiver by a preponderance of the evidence. The prosecution’s case hinged on the interrogating officer, JoAnn Miller, but Miller’s version of events regarding advice of rights and the taking of defendant’s statement was not in accord with the testimony of two independent witnesses--nurses under whose care defendant was at the hospital’s ICU and CCU, and who were present at most of the crucial times during Miller’s three visits to defendant on May 20 and May 21, 2003.

The prosecution contends that the trial court misapplied the law to the facts and reached the wrong result where its holding that defendant did not voluntarily waive his rights was based partly on a finding that the interrogating officer did not advise defendant of the subject matter of the interrogation, and partly on a finding that the interrogating officer knew that defendant had been shot, knew he was in pain and requesting medication, but did not present defendant with his constitutional rights before questioning him, and did not have an independent witness sign the rights form. We disagree. The trial court’s findings and decision to suppress defendant’s statement, quoted *infra*, went far beyond alluding to these two factors, and neither of these factors was necessary to support the trial court’s determination.

B

² Defendant was being held as a “prisoner/patient” at Sinai-Grace Hospital.

The carjacking and armed robbery that gave rise to the instant charges occurred on May 19, 2003, between 9:30 p.m. and 10:30 p.m. The police were called and came upon the vehicle at issue. The other person involved in the carjacking and robbery fled, and as defendant emerged from the vehicle, he was shot five times by a police officer. Defendant was taken by ambulance to Sinai-Grace Hospital, where he underwent two surgeries, the first shortly after arriving at the hospital, from 12:10 a.m. to 3:40 a.m. on May 20, and the second from 9:45 a.m. to 2:00 p.m. on May 20. Defendant was in the intensive-care unit at Sinai-Grace Hospital when the interrogating officer, JoAnn Miller, first spoke with him at around 6:30 p.m. on May 20.

Officer Miller testified at the *Walker* hearing that she first spoke with defendant at the hospital on May 20, 2003, around 6:30 p.m., advised defendant of his constitutional rights from an advice of rights form [admitted as Exhibit 1] while nurse Deborah Watkins was present, and that defendant “indicated that he did understand his rights, and he did want to make a statement.” Officer Miller testified that there was no indication that defendant wanted an attorney present or that he was exercising his right to remain silent. Miller testified that immediately after she read defendant his rights, nursing staff came to his room to “administer some type of medical treatment,” and that she stepped out of the room for around five minutes. After the nurses finished, Officer Miller went back in defendant’s room and noticed that defendant’s voice was very coarse and low, and she said to the nurse that “it would probably be better” if she came back the following day. The nurse agreed, and explained to Officer Miller that “they had put something down his throat, and it was a little more difficult for him to talk.” Officer Miller testified she did not interview defendant on May 20, 2003 and that defendant made no markings on the advice of rights form.

Dr. Stanton, an anesthesiologist who performed defendant’s second surgery and reviewed the records of the first surgery, testified that defendant would have been experiencing pain around 6:30 p.m. on May 20, when the police questioned him.

Dr. Stanton also testified that defendant complained of pain on May 21 at 7:45 a.m. and 11:30 a.m. and was given 4 mg of morphine each time, was given 5 mg at 5:20 p.m. and another 5 mg at 8:40 p.m. The medical record indicated the police were present at 10:50 a.m. on May 21, and that defendant complained of pain at a level 9 (out of 10) at 11:30 a.m. and was given morphine, as noted.

Officer Miller testified at the *Walker* hearing that her second visit to defendant was on the morning of May 21, 2003, around 9:55 a.m. Miller testified that a nurse said it was okay for Miller to see defendant, that defendant “appeared to be okay and coherent,” and that his “voice was stronger and clearer.” Miller testified that she again advised defendant of his rights at this visit, reading from another advice of rights form [admitted as Exh 2]. She took a statement from defendant and was there roughly an hour.

Miller testified that she returned to the hospital at 5:00 or 5:30 p.m. on May 21, 2003, and at that point obtained defendant’s signature on the statement and the two advice of rights forms.

On cross-examination, Officer Miller was impeached with testimony she gave at the June 3, 2003 preliminary examination, as follows:

Q. At the preliminary examination you said that you did conduct an interview with him on the 20th at 6:30 p.m.

A. A very brief interview that I wrote nothing down.

Q. I see.

And isn't it true that you testified that the statement that was admitted into evidence was the one that you had taken on the 20th at 6:30 p.m.?

A. The statement was taken on the 21st.

Q. You never said that at the preliminary examination; did you?

A. I don't know, sir.

* * *

Q. You will agree that no where [sic] in the transcript does it indicate that you interviewed him or took a statement from him on the 21st; does it?

A. Not the date, no.

Q. You will agree that what has been admitted into Exhibit today as Exhibit 3 was the exhibit admitted into the exam as People's Exhibit 2 on 6/3?

A. I'm sorry.

Q. The same statement that was admitted today was admitted at the exam on 6/3 as People's Exhibit 2; was it not?

A. Yes.

Q. That's the statement about which you testified on June 3rd?

A. Yes.

Q. And you testified on June 3rd that you interviewed him on May 20th; didn't you?

A. That was my first contact with him.

Q. And there was nothing in that transcript that said first contact, is it?

A. No.

Q. There is nothing in that transcript that says that you say [sic saw] him again on the 21st; is there?

A. No, there isn't.

Q. There's your statement that you interviewed him on the 20th, and then that document is admitted into evidence—the statement itself is admitted into evidence. Isn't that what the transcript says?

A. I didn't see that part.

* * *

Q. Now would you agree that you never anywhere in this transcript say specifically that you talked to the Defendant on the 21st – May 21st?

A. That I talked to the Defendant specifically?

Q. Yes, on the 21st.

A. It has:

“Question: And did you question any suspect – that would be your Defendant – or any witness with respect to that matter?”

I answered yes, I did.

MR. TRZCINSKI: Your Honor, in trying to speed things up a little bit, I would direct counsel's attention to testimony of this witness at page 39 of the same exam transcript.

BY MR. CUNNINGHAM:

Q. Did you testify truthfully at the exam?

A. Yes.

Q. All right.

What I'm going to do, your Honor, since she has adopted her testimony under oath at the exam, is to have it marked and admitted in this proceeding.

MR. TRZCINSKI: No objection.

THE COURT: This would be Defense Exhibit A?

* * *

BY MR. CUNNINGHAM:

Q. I'm going to show you or direct your attention to what has been admitted into evidence during this proceeding as People's No. 3, and there is a date that appears in the upper left-hand corner: does it not?

A. Yes.

Q. And that date appears to be 5/21/03; is that correct?

A. That's 5/21/03.

* * *

Q. And underneath there, there's some initials; is that right?

A. Yes.

Q. Now that 21, that "1" that's on there, that looks a little different from the other numbers.

A. Yes. That was updated by me.

Q. I see. So when did you update it?

A. On the 21st right after I took the statement.

Q. Well, why did you have any other date on it if you took his statement on the 21st?

A. Well, because it was a mistake on my part that I put the 20th, and when I gave it to my boss to review at the hospital, he informed me that that's the wrong date.

Q. I see. So you originally the [sic] the put the date of the 20th on that statement?

A. That's correct.

Q. And that's the date that appeared on it when it was shown to the nurse?

A. No, I believe it was the 21st when the nurse got it.

Q. I see. So you had the nurse then initial her initials up there to show the change?

A. No. That's my initials.

Q. Your initials. Okay.

You didn't have the Defendant make any initials by the change, the obvious changed [sic] in the date; did you?

A. No. At the time of he his [sic] statement, he couldn't write right or left handed.

THE COURT: But you took it in for him later to sign?

THE WITNESS: Yes. Yes.

BY MR. CUNNINGHAM:

Q. But then later you never had him make any changes or acknowledge the change in the date on that form; is that right?

A. That's correct.

Q. So what you're telling us is even though the statement was really taken on the 21st, it was an error that led to it being dated the 20th; is that right?

A. That's correct. That's my error.

Q. And that's because you didn't know the date at that time. You were confused as to the date.

A. Right.

Q. Okay. Now Exhibit No. 1 clearly has a date of May 20th on it; is that right, at 6:30 p.m.?

A. That's correct.

Q. On the very bottom of it?

A. That's correct.

Q. So at 6:30 p.m. on 5/20, you were aware of the time and time [sic]?

A. Yes.

Q. And on May 21st at 9:55, you were aware of the time and time [sic]?

A. Yes.

Q. Well, if you were aware of the date and time, you did give him the constitutional rights before you took that statement; didn't you?

A. Yes.

* * *

Q. . . . isn't it true that the statement was actually taken before the Advice of Rights form was filled in ?

A. No.

Q. And you did admit that the statement was taken before Mr. McCoy signed the Advice of Rights?

A. That's true.

Q. I see. No there's [sic] no signature at all on the May 20th '03 statement; is that right?

A. That's correct.

Q. Okay. But there is what purports to be a signature on the May 21st statement; is that right?

A. That's correct.

Q. And there is what purports to be a signature on each page of the alleged statement; is that right?

A. The Defendants [sic], yes.

Q. Okay. So he signs, you're saying, this statement on one, two, three, four different places; is that right?

A. Right.

Q. And the Advice of Rights form all at the same time; is that right?

A. Yes.

Q. Several hours after he actually gave the statement?

A. About four or five hours, yes.

Debra Watkins, a registered nurse in Sinai-Grace's ICU who cared for defendant beginning at 7:00 a.m. on May 20, 2003, testified at the *Walker* hearing that she was present at about 6:30 p.m. on May 20, when Officer Miller tried to interview defendant in the ICU. Watkins testified that Officer Miller asked defendant questions and took notes before Miller advised defendant of his rights. Watkins also testified that Miller asked her to witness that she (Miller) had verbally given defendant instructions of some kind, and that Watkins signed that sheet of paper. However, that document was not presented at the *Walker* hearing.

Watkins testified that her shift ended on 7:30 p.m. She testified that the only date she had contact with Officer Miller was on May 20.

Shelley Ynclan, also a registered nurse at Sinai-Grace, testified that she treated defendant starting at 7:00 a.m. on May 21, and that defendant complained of pain and she gave him 1 mg of morphine at 9:30 a.m. Ynclan testified that Officer Miller arrived just before 10:00 a.m. on May 21. Ynclan testified that she asked defendant about his pain level at 10:00 a.m., and he said it had diminished from a level 8 (out of 10) to a level 6. Ynclan then went on a break for about fifteen minutes, and when she returned at 10:15 or 10:20, Officer Miller had already committed to writing defendant's statement, and was putting the finishing touches on it. Miller asked Ynclan to read the statement to defendant. Miller asked her to sign the statement in two areas, on the last page, which she did, around 10:30 a.m. Per Miller's instruction, Ynclan asked defendant whether that was his statement, and defendant answered affirmatively. Ynclan

testified that no advice of rights was given during her presence, and that she never saw an advice of rights form while treating defendant. At 11:00 a.m., defendant again complained of pain, and Ynclan gave him 4 mg of morphine.³

Defendant testified that he was shot five times by a police officer on the late evening of May 19th, in the chest, stomach and right arm, taken to Sinai-Grace Hospital and that he underwent two surgeries there. Defendant testified that when Officer Miller came to talk to him on May 20, she told him that she was there to investigate defendant's having been shot by a police officer. Defendant testified that he would not have talked to Miller otherwise, given that he had just been shot five times by a police officer. Defendant testified that Miller promised him that the police officer that had shot defendant would be dealt with. Defendant further testified that on May 20, he talked to Miller a bit about how he had been shot, but stopped at some point, saying to Miller that he was in too much pain to talk. Miller left. Defendant testified that Miller returned on the morning of May 21st, and that it was then that she advised him of his constitutional rights. Defendant testified that he thought he signed an advice of rights form, but did not recall signing a statement.

The trial court suppressed defendant's statement.

C

There is no dispute that defendant was subjected to custodial interrogation at the hospital. The trial court found that Officer Miller advised defendant of his constitutional rights only after she had begun interrogating him at the hospital, and concluded that his statement "[w]as not freely, voluntarily, knowingly given." Having examined the record, and deferring to the trial court's assessment of credibility, *Sexton (After Remand)*, *supra*, 461 Mich 752, we conclude that the court's finding of fact was not clearly erroneous.

The trial court's decision depended largely on the witnesses' credibility, since Miller's testimony regarding advising defendant of his rights, and a number of other details, conflicted with that of the independent witnesses. Officer Miller claims to have read defendant his rights on her first visit to the hospital on the evening of May 20, and again on the morning of May 21.

³ The chief of anesthesia and medical director of the operating room at Sinai-Grace Hospital, Dr. Theresa Stanton, testified as an expert witness at the *Walker* hearing that she is board-certified in anesthesia, that she was the anesthesiologist during defendant's second surgery and that she had reviewed the anesthetic record regarding his first surgery as well. She testified that defendant underwent two surgeries on May 20, the first from 12:10 a.m. to 3:40 a.m., and the second from 9:45 a.m. to 2:00 p.m., and for each surgery he received 15 mg of morphine. At 2:00 p.m. defendant was given Fentanyl in the operating room, a narcotic Dr. Stanton described as 50 times more potent than morphine, but shorter lasting. She testified that the records indicated that defendant was given morphine twice between the two surgeries, and it was not clear from the record all the medications defendant received at other times, because nurse's notes stated that they administered meds "as ordered," and at several points in the record there are notations saying "hold sedation."

She claims that she did not get a statement from defendant on that first visit (May 20), and that she re-advised defendant of his rights the next day.

Defendant testified that on May 20, the first time he saw Miller, Miller asked him questions and took notes, and that Miller advised him of his rights **the next day**, i.e., on the morning of May 21. Nurse Watkins stated unequivocally that on May 20, Officer Miller asked defendant questions and was taking notes about the shooting *before* advising him of his constitutional rights. Moreover, the paper Officer Miller had Nurse Watkins sign on May 20 was not presented at the *Walker* hearing.

The statement from defendant that Officer Miller claimed she wrote down on May 21, 2003, had two page threes, and the date on the statement had been changed from May 20, 2003, to May 21, 2003. Miler claimed this was the result of an error, yet she correctly wrote May 21, 2003, on a constitutional rights form. Nurse Watkins stated that the officer had more than one paper with her on the first visit, yet she remembered signing only one paper, and that document was never presented at the *Walker* hearing. Officer Miller's testimony at the preliminary examination was regarding interviewing defendant on May 20, 2003, seemingly in contradiction to her testimony during the *Walker* hearing that no interrogation took place that day.

The trial court concluded that Officer Miller interrogated defendant and took notes on May 20, before advising him of his rights. The court did not believe that defendant was properly advised of his rights before he made the statement, and apparently had doubts that the statement Miller purported to have obtained on May 21, was indeed obtained on May 21. Nurse Watkins' testimony contradicted Officer Miller's testimony regarding what transpired on May 20. The trial court resolved this conflict against the officer, and its finding is amply supported by the record. Having determined that the officer did not advise defendant of his constitutional rights before the custodial interrogation, the court did not err in finding his statement inadmissible. *Anderson, supra*, 209 Mich App 531. Given this conclusion, we need not address the court's rulings regarding whether the statement was voluntary.

Affirmed.

/s/ Michael R. Smolenski

/s/ Helene N. White

/s/ Kirsten Frank Kelly