Blue to Gold
LAW ENFORCEMENT TRAINING

CASE LAW

Bulletproof DUI Reports

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104 S.Ct. 3138
Supreme Court of the United States

Harry J. BERKEMER, Sheriff of Franklin County, Ohio, Petitioner
v.
Richard N. McCARTY.

No. 83-710.
|
Argued April 18, 1984.
|
Decided July 2, 1984.

Synopsis

Motorist convicted of misdemeanor of operating a motor vehicle while under the influence of alcohol and/or drugs appealed from an order of the United States District Court for the Southern District of Ohio, Joseph P. Kinneary, J., denying his petition for habeas corpus. The Court of Appeals, 716 F.2d 361, reversed. Certiorari was granted. The Supreme Court, Justice Marshall, held that: (1) motorist's statements made at station house were inadmissible since, at least as of moment he was formally arrested following traffic stop and instructed to get into police car, he was "in custody" and since he had not been informed of his constitutional rights; (2) roadside questioning of motorist detained pursuant to routine traffic stop did not constitute "custodial interrogation" for purposes of Miranda rule, so that prearrest statements motorist made in answer to such questioning were admissible against motorist; and (3) determination of whether improper admission of motorist's postarrest statements constituted "harmless error" would not be made.

Affirmed.

Justice Stevens filed an opinion concurring in part and concurring in the judgment.

Syllabus[a1]

After observing respondent's car weaving in and out of a highway lane, an officer of the Ohio State Highway Patrol forced respondent to stop and asked him to get out of the car. Upon noticing that respondent was having difficulty standing, the officer concluded that respondent would be charged with a traffic offense and would not be allowed to leave the scene, but respondent was not told that he would be taken into custody. When respondent could not perform a field sobriety ****3140** test without falling, the officer asked him if he had been using intoxicants, and he replied that he had consumed two beers and had smoked marihuana a short time before. The officer then formally arrested respondent and drove him to a county jail, where a blood test failed to detect any alcohol in respondent's blood. Questioning was then resumed, and respondent again made incriminating statements, including an admission that he was "barely" under the influence of alcohol. At no point during this sequence was respondent given the warnings prescribed by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. Respondent was charged with the misdemeanor under Ohio law of operating a motor vehicle while under the influence of alcohol and/or drugs, and when the state court denied his motion to exclude the various incriminating statements on the asserted ground that their admission into evidence would violate the Fifth Amendment because respondent had not been informed of his constitutional rights prior to his interrogation, he pleaded "no contest" and was convicted. After the conviction was affirmed on appeal by the Franklin County Court of Appeals and the Ohio Supreme Court denied review, respondent filed an action in Federal District Court for habeas corpus relief. The District Court dismissed the petition, but the Court of Appeals reversed, holding that Miranda warnings must be given to all individuals prior to custodial interrogation, whether the offense investigated is a felony or a misdemeanor traffic offense, and that respondent's postarrest statements, at least, were inadmissible.

Held:

1. A person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in Miranda, regardless of the nature or severity of the offense of which he is suspected or for which ***421** he was arrested. Thus, respondent's statements made at the station house were inadmissible since he was "in custody" at least as of the moment he was formally arrested and instructed to get into the police car, and since he was not informed of his constitutional rights at that time. To create an exception to the Miranda rule when the police arrest a person for allegedly committing a misdemeanor traffic offense and then question him without informing him of his constitutional rights would substantially undermine the rule's simplicity and clarity and would introduce doctrinal complexities, particularly with respect to situations where the police, in

conducting custodial interrogations, do not know whether the person has committed a misdemeanor or a felony. The purposes of the Miranda safeguards as to ensuring that the police do not coerce or trick captive suspects into confessing, relieving the inherently compelling pressures generated by the custodial setting itself, and freeing courts from the task of scrutinizing individual cases to determine, after the fact, whether particular confessions were voluntary, are implicated as much by in-custody questioning of persons suspected of misdemeanors as they are by questioning of persons suspected of felonies. Pp. 3144–3147.

2. The roadside questioning of a motorist detained pursuant to a routine traffic stop does not constitute "custodial interrogation" for the purposes of the Miranda rule. Although an ordinary traffic stop curtails the "freedom of action" of the detained motorist and imposes some pressures on the detainee to answer questions, such pressures do not sufficiently impair the detainee's exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights. A traffic stop is usually brief, and the motorist expects that, while he may be given a citation, in the end he most likely will be allowed to continue on his way. Moreover, the typical traffic stop is conducted in public, and the atmosphere surrounding it is substantially less "police dominated" than that surrounding the kinds of interrogation at issue in Miranda and subsequent cases in which Miranda has been applied. However, if a motorist who has been detained ****3141** pursuant to a traffic stop thereafter is subjected to treatment that renders him "in custody" for practical purposes, he is entitled to the full panoply of protections prescribed by Miranda. In this case, the initial stop of respondent's car, by itself, did not render him "in custody," and respondent has failed to demonstrate that, at any time between the stop and the arrest, he was subjected to restraints comparable to those associated with a formal arrest. Although the arresting officer apparently decided as soon as respondent stepped out of his car that he would be taken into custody and charged with a traffic offense, the officer never communicated his intention to respondent. A policeman's unarticulated plan has no bearing on the question whether a suspect was "in custody" at a particular time; the ***422** only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation. Since respondent was not taken into custody for the purposes of Miranda until he was formally arrested, his statements made prior to that point were admissible against him. Pp. 3147–3152.

3. A determination of whether the improper admission of respondent's postarrest statements constituted "harmless error" will not be made by this Court for the cumulative reasons that (i) the issue was not presented to the Ohio courts or to the federal courts below, (ii) respondent's admissions made at the scene of the traffic stop and the statements he made at the police station were not identical, and (iii) the procedural posture of the case makes the use of harmless-error analysis especially difficult because respondent, while preserving his objection to the denial of his pretrial motion to exclude the evidence, elected not to contest the prosecution's case against him and thus has not yet had an opportunity to try to impeach the State's evidence or to present evidence of his own. Pp. 3152–3153.

716 F.2d 361 (CA 6 1983) affirmed.

Attorneys and Law Firms

Alan C. Travis argued the cause for petitioner. With him on the briefs was *Stephen Michael Miller.*

R. William Meeks argued the cause for respondent. With him on the brief were *Paul D. Cassidy, Lawrence Herman,* and *Joel A. Rosenfeld.**

* *Anthony J. Celebrezze, Jr.,* Attorney General, and *Richard David Drake,* Assistant Attorney General, filed a brief for the State of Ohio as *amicus curiae* urging reversal.

Jacob D. Fuchsberg and *Charles S. Sims* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

Opinion

Justice MARSHALL delivered the opinion of the Court.

This case presents two related questions: First, does our decision in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), govern the admissibility of statements made during custodial interrogation by a suspect accused of a misdemeanor traffic ***423** offense? Second, does the roadside questioning of a motorist detained pursuant to a traffic stop constitute custodial interrogation for the purposes of the doctrine enunciated in Miranda?

I

A

The parties have stipulated to the essential facts. See App. to Pet. for Cert. A–1. On the evening of March 31, 1980, Trooper Williams of the Ohio State Highway Patrol observed respondent's car weaving in and out of a lane on Interstate Highway 270. After following the car for two miles, Williams forced respondent to stop and asked him to get out of the vehicle. When respondent complied, Williams noticed that he was having difficulty standing. At that point, "Williams concluded that [respondent] would be charged with a traffic offense and, therefore, his freedom to leave the scene was terminated." Id., at A–2. However, respondent was not told that he would be taken into custody. Williams then asked respondent to perform a field sobriety test, commonly known as a "balancing test." Respondent could not do so without falling.

While still at the scene of the traffic stop, Williams asked respondent whether he had been using intoxicants. Respondent replied that "he had consumed two beers and had smoked several joints of marijuana a short time before." Ibid. Respondent's speech was slurred, and Williams had difficulty understanding him. Williams thereupon formally placed respondent under arrest ****3142** and transported him in the patrol car to the Franklin County Jail.

At the jail, respondent was given an intoxilyzer test to determine the concentration of alcohol in his blood.[1] The test did not detect any alcohol whatsoever in respondent's system. Williams then resumed questioning respondent ***424** in order to obtain information for inclusion in the State Highway Patrol Alcohol Influence Report. Respondent answered affirmatively a question whether he had been drinking. When then asked if he was under the influence of alcohol, he said, "I guess, barely." Ibid. Williams next asked respondent to indicate on the form whether the marihuana he had smoked had been treated with any chemicals. In the section of the report headed "Remarks," respondent wrote, "No ang[el] dust or PCP in the pot. Rick McCarty." App. 2.

At no point in this sequence of events did Williams or anyone else tell respondent that he had a right to remain silent, to consult with an attorney, and to have an attorney appointed for him if he could not afford one.

B

Respondent was charged with operating a motor vehicle while under the influence of alcohol and/or drugs in violation of Ohio Rev.Code Ann. § 4511.19 (Supp.1983). Under Ohio law, that offense is a first-degree misdemeanor and is punishable by fine or imprisonment for up to six months. § 2929.21 (1982). Incarceration for a minimum of three days is mandatory. § 4511.99 (Supp.1983).

Respondent moved to exclude the various incriminating statements he had made to Trooper Williams on the ground that introduction into evidence of those statements would violate the Fifth Amendment insofar as he had not been informed of his constitutional rights prior to his interrogation. When the trial court denied the motion, respondent pleaded "no contest" and was found guilty.[2] He was sentenced to 90 ***425** days in jail, 80 of which were suspended, and was fined $300, $100 of which were suspended.

On appeal to the Franklin County Court of Appeals, respondent renewed his constitutional claim. Relying on a prior decision by the Ohio Supreme Court, which held that the rule announced in Miranda "is not applicable to misdemeanors," State v. Pyle, 19 Ohio St.2d 64, 249 N.E.2d 826 (1969), cert. denied, 396 U.S. 1007 (1970), the Court of Appeals rejected respondent's argument and affirmed his conviction. State v. McCarty, No. 80AP–680 (Mar. 10, 1981). The Ohio Supreme Court dismissed respondent's appeal on the ground that it failed to present a "substantial constitutional question." State v. McCarty, No. 81–710 (July 1, 1981).

Respondent then filed an action for a writ of habeas corpus in the District Court for the Southern District of Ohio.[3] The District Court dismissed the petition, holding that "Miranda warnings do not have to be given prior to in custody interrogation of a suspect arrested for a traffic offense." McCarty v. Herdman, No. C–2–81–1118 (Dec. 11, 1981).

A divided panel of the Court of Appeals for the Sixth Circuit reversed, holding that ****3143** "Miranda warnings must be given to all individuals prior to custodial interrogation, whether the offense investigated be a felony or a misdemeanor traffic offense." McCarty v. Herdman, 716 F.2d 361, 363 (1983) (emphasis in original). In applying this principle to the facts of the case, the Court of Appeals distinguished between the statements made by respondent before and after his formal arrest.[4] The postarrest statements, the court ruled, were ***426** plainly inadmissible; because respondent was not warned of his constitutional rights prior to or "[a]t the point that Trooper Williams took [him] to the police station," his

ensuing admissions could not be used against him. Id., at 364. The court's treatment of respondent's prearrest statements was less clear. It eschewed a holding that "the mere stopping of a motor vehicle triggers Miranda," ibid., but did not expressly rule that the statements made by respondent at the scene of the traffic stop could be used against him. In the penultimate paragraph of its opinion, the court asserted that "[t]he failure to advise [respondent] of his constitutional rights rendered at least some of his statements inadmissible," ibid. (emphasis added), suggesting that the court was uncertain as to the status of the prearrest confessions.[5] "Because [respondent] was convicted on inadmissible evidence," the court deemed it necessary to vacate his conviction and order the District Court to issue a writ of habeas corpus. Ibid.[6] However, the Court of Appeals did not specify which statements, if any, could be used against respondent in a retrial.

We granted certiorari to resolve confusion in the federal and state courts regarding the applicability of our ruling in ***427** Miranda to interrogations involving minor offenses[7] and to questioning of motorists ****3144** detained pursuant to traffic stops.[8] 464 U.S. 1038, 104 S.Ct. 697, 79 L.Ed.2d 163 (1984).

***428** II

The Fifth Amendment provides: "No person ... shall be compelled in any criminal case to be a witness against himself...." It is settled that this provision governs state as well as federal criminal proceedings. Malloy v. Hogan, 378 U.S. 1, 8, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653 (1964).

In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the Court addressed the problem of how the privilege against compelled self-incrimination guaranteed by the Fifth Amendment could be protected from the coercive pressures that can be brought to bear upon a suspect in the context of custodial interrogation. The Court held:
"[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of [a] defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the ***429** following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Id., at 444, 86 S.Ct., at 1612 (footnote omitted).

In the years since the decision in Miranda, we have frequently reaffirmed the central principle established by that case: if the police take a suspect into custody and then ask him questions without informing him of the rights enumerated above, his responses cannot be introduced into evidence to establish his guilt.[9] See, e.g., Estelle v. Smith, 451 U.S. 454, 466–467, 101 S.Ct. 1866, 1875, 68 L.Ed.2d 359 (1981); Rhode Island v. Innis, 446 U.S. 291, 297–298, 100 S.Ct. 1682, 1687–1688, 64 L.Ed.2d 297 (1980) (dictum); ****3145** Orozco v. Texas, 394 U.S. 324, 326–327, 89 S.Ct. 1095, 1096–1097, 22 L.Ed.2d 311 (1969); Mathis v. United States, 391 U.S. 1, 3–5, 88 S.Ct. 1503, 1504–1505, 20 L.Ed.2d 381 (1968).[10]

Petitioner asks us to carve an exception out of the foregoing principle. When the police arrest a person for allegedly committing a misdemeanor traffic offense and then ask him questions without telling him his constitutional rights, petitioner argues, his responses should be admissible against him.[11] We cannot agree.

***430** One of the principal advantages of the doctrine that suspects must be given warnings before being interrogated while in custody is the clarity of that rule.
"Miranda's holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible. This gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in Miranda imposes on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis." Fare v. Michael C., 442 U.S. 707, 718, 99 S.Ct. 2560, 2568, 61 L.Ed.2d 197 (1979).

The exception to Miranda proposed by petitioner would substantially undermine this crucial advantage of the doctrine. The police often are unaware when they arrest a person whether he may have committed a misdemeanor or a felony.

Consider, for example, the reasonably common situation in which the driver of a car involved in an accident is taken into custody. Under Ohio law, both driving while under the influence of intoxicants and negligent vehicular homicide are misdemeanors, Ohio Rev.Code Ann. §§ 2903.07, 4511.99 (Supp.1983), while reckless vehicular homicide is a felony, § 2903.06 (Supp.1983). When arresting a person for causing a collision, the police may not know which of these offenses he may have committed. Indeed, the nature of his offense may depend upon circumstances unknowable to the police, such as whether the suspect has previously committed ***431** a similar offense[12] or has a criminal record of some other kind. It may even turn upon events yet to happen, such as whether a victim of the accident dies. It would be unreasonable to expect the police to make guesses as to the nature of the criminal conduct at issue before deciding how they may interrogate the suspect.[13]

****3146** Equally importantly, the doctrinal complexities that would confront the courts if we accepted petitioner's proposal would be Byzantine. Difficult questions quickly spring to mind: For instance, investigations into seemingly minor offenses sometimes escalate gradually into investigations into more serious matters;[14] at what point in the evolution of an affair of this sort would the police be obliged to give Miranda warnings to a suspect in custody? What evidence would be necessary to establish that an arrest for a misdemeanor offense ***432** was merely a pretext to enable the police to interrogate the suspect (in hopes of obtaining information about a felony) without providing him the safeguards prescribed by Miranda?[15] The litigation necessary to resolve such matters would be time-consuming and disruptive of law enforcement. And the end result would be an elaborate set of rules, interlaced with exceptions and subtle distinctions, discriminating between different kinds of custodial interrogations.[16] Neither the police nor criminal defendants would benefit from such a development.

Absent a compelling justification we surely would be unwilling so seriously to impair the simplicity and clarity of the holding of Miranda. Neither of the two arguments proffered by petitioner constitutes such a justification. Petitioner first contends that Miranda warnings are unnecessary when a suspect is questioned about a misdemeanor traffic offense, because the police have no reason to subject such a suspect to the sort of interrogation that most troubled the Court in Miranda. We cannot agree that the dangers of police abuse are so slight in this context. For example, the offense of driving while intoxicated is increasingly regarded in many jurisdictions as a very serious matter.[17] Especially when the intoxicant at issue is a narcotic drug rather than alcohol, the police sometimes have difficulty obtaining evidence of this crime. Under such circumstances, the incentive for the police to try to induce the defendant to incriminate ***433** himself may well be substantial. Similar incentives are likely to be present when a person is arrested for a minor offense but the police suspect that a more serious crime may have been committed. See supra, at 3146.

We do not suggest that there is any reason to think improper efforts were made in this case to induce respondent to make damaging admissions. More generally, we have no doubt that, in conducting most custodial interrogations of persons arrested for misdemeanor traffic offenses, the police behave responsibly and do not deliberately exert pressures upon the suspect to confess against his will. But the same might be said of custodial interrogations of persons arrested for felonies. The purposes of the safeguards prescribed by Miranda are to ensure that the police do not coerce or trick captive suspects into ****3147** confessing,[18] to relieve the " 'inherently compelling pressures' " generated by the custodial setting itself, " 'which work to undermine the individual's will to resist,' "[19] and as much as possible to free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary.[20] Those purposes are implicated as much by in-custody questioning of persons suspected of misdemeanors as they are by questioning of persons suspected of felonies.

***434** Petitioner's second argument is that law enforcement would be more expeditious and effective in the absence of a requirement that persons arrested for traffic offenses be informed of their rights. Again, we are unpersuaded. The occasions on which the police arrest and then interrogate someone suspected only of a misdemeanor traffic offense are rare. The police are already well accustomed to giving Miranda warnings to persons taken into custody. Adherence to the principle that all suspects must be given such warnings will not significantly hamper the efforts of the police to investigate crimes.

We hold therefore that a person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in Miranda,[21] regardless of the nature or severity of the offense of which he is suspected or for which he was arrested.

The implication of this holding is that the Court of Appeals was correct in ruling that the statements made by respondent at the County Jail were inadmissible. There can be no question that respondent was "in custody" at least as of the moment he was formally placed under arrest and instructed to get into the police car. Because he was not informed of ***435** his constitutional rights at that juncture, respondent's subsequent admissions should not have been used against him.

III

To assess the admissibility of the self-incriminating statements made by respondent prior to his formal arrest, we are obliged to address a second issue concerning the scope of our decision in Miranda: whether the roadside questioning of a motorist detained pursuant to a routine traffic stop should be considered "custodial interrogation." ****3148** Respondent urges that it should,[22] on the ground that Miranda by its terms applies whenever "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way," 384 U.S., at 444, 86 S.Ct., at 1612 (emphasis added); see id., at 467, 86 S.Ct., at 1624.[23] ***436** Petitioner contends that a holding that every detained motorist must be advised of his rights before being questioned would constitute an unwarranted extension of the Miranda doctrine.

It must be acknowledged at the outset that a traffic stop significantly curtails the "freedom of action" of the driver and the passengers, if any, of the detained vehicle. Under the law of most States, it is a crime either to ignore a policeman's signal to stop one's car or, once having stopped, to drive away without permission. E.g., Ohio Rev.Code Ann. § 4511.02 (1982).[24] Certainly few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so.[25] Partly for these reasons, we have long acknowledged that "stopping an automobile and detaining its occupants constitute a 'seizure' ***437** within the meaning of [the Fourth] Amendmen[t], even though the purpose of the stop is limited and the resulting detention quite brief." Delaware v. Prouse, 440 U.S. 648, 653, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979) (citations omitted).

However, we decline to accord talismanic power to the phrase in the Miranda opinion emphasized by respondent. Fidelity to the doctrine announced in Miranda requires that it be enforced strictly, but only ****3149** in those types of situations in which the concerns that powered the decision are implicated. Thus, we must decide whether a traffic stop exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights.

Two features of an ordinary traffic stop mitigate the danger that a person questioned will be induced "to speak where he would not otherwise do so freely," Miranda v. Arizona, 384 U.S., at 467, 86 S.Ct., at 1624. First, detention of a motorist pursuant to a traffic stop is presumptively temporary and brief. The vast majority of roadside detentions last only a few minutes. A motorist's expectations, when he sees a policeman's light flashing behind him, are that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may then be given a citation, but that in the end he most likely will be allowed to continue on his way.[26] In this respect, ***438** questioning incident to an ordinary traffic stop is quite different from stationhouse interrogation, which frequently is prolonged, and in which the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek. See id., at 451, 86 S.Ct., at 1615.[27]

Second, circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police. To be sure, the aura of authority surrounding an armed, uniformed officer and the knowledge that the officer has some discretion in deciding whether to issue a citation, in combination, exert some pressure on the detainee to respond to questions. But other aspects of the situation substantially offset these forces. Perhaps most importantly, the typical traffic stop is public, at least to some degree. Passersby, on foot or in other cars, witness the interaction of officer and motorist. This exposure to public view both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the motorist's fear that, if he does not cooperate, he will be subjected to abuse. The fact that the detained motorist typically is confronted by only one or at most two policemen further mutes his sense of vulnerability. In short, the atmosphere ***439** surrounding an ordinary traffic stop is substantially less "police dominated" than that surrounding the kinds of interrogation at issue in Miranda itself, see 384 U.S., at 445, 491–498, 86 S.Ct., at 1612, 1636–1640, ****3150** and in the subsequent cases in which we have applied Miranda.[28]

In both of these respects, the usual traffic stop is more analogous to a so-called "Terry stop," see Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), than to a formal arrest.[29] Under the Fourth Amendment, we have held, a policeman who lacks probable cause but whose "observations lead him reasonably to suspect" that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly[30] in order to "investigate the circumstances that provoke suspicion." United States v. Brignoni–Ponce, 422 U.S. 873, 881, 95 S.Ct. 2574, 2580, 45 L.Ed.2d 607 (1975). "[T]he stop and inquiry must be 'reasonably related in scope to the justification for their initiation.' " Ibid. (quoting Terry v. Ohio, supra, 392 U.S., at 29, 88 S.Ct., at 1884.) Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him,[31] he must then be ***440** released.[32] The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that Terry stops are subject to the dictates of Miranda. The similarly noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not "in custody" for the purposes of Miranda.

Respondent contends that to "exempt" traffic stops from the coverage of Miranda will open the way to widespread abuse. Policemen will simply delay formally arresting detained motorists, and will subject them to sustained and intimidating interrogation at the scene of their initial detention. Cf. State v. Roberti, 293 Or. 59, 95, 644 P.2d 1104, 1125 (1982) (Linde, J., dissenting) (predicting the emergence of a rule that "a person has not been significantly deprived of freedom of action for Miranda purposes as long as he is in his own car, even if it is surrounded by several patrol cars and officers with drawn weapons"), withdrawn on rehearing, 293 Or. 236, 646 P.2d 1341 (1982), cert. pending, No. 82–315. The net result, respondent contends, will be a serious threat to the rights that the Miranda doctrine is designed to protect.

We are confident that the state of affairs projected by respondent will not come to pass. It is settled that the safeguards prescribed by Miranda become applicable as soon as a suspect's freedom of action is curtailed to a "degree associated with formal arrest." California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983) (per curiam). If a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him "in custody" for practical purposes, he will be entitled to the full panoply of protections prescribed by Miranda. See Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977) (per curiam).

****3151** ***441** Admittedly, our adherence to the doctrine just recounted will mean that the police and lower courts will continue occasionally to have difficulty deciding exactly when a suspect has been taken into custody. Either a rule that Miranda applies to all traffic stops or a rule that a suspect need not be advised of his rights until he is formally placed under arrest would provide a clearer, more easily administered line. However, each of these two alternatives has drawbacks that make it unacceptable. The first would substantially impede the enforcement of the Nation's traffic laws—by compelling the police either to take the time to warn all detained motorists of their constitutional rights or to forgo use of self-incriminating statements made by those motorists—while doing little to protect citizens' Fifth Amendment rights.[33] The second would enable the police to circumvent the constraints on custodial interrogations established by Miranda.

Turning to the case before us, we find nothing in the record that indicates that respondent should have been given Miranda warnings at any point prior to the time Trooper Williams placed him under arrest. For the reasons indicated above, we reject the contention that the initial stop of respondent's car, by itself, rendered him "in custody." And respondent has failed to demonstrate that, at any time between the initial stop and the arrest, he was subjected to restraints comparable to those associated with a formal arrest. Only a short period of time elapsed between the stop and the arrest.[34] At no point during that interval was respondent ***442** informed that his detention would not be temporary. Although Trooper Williams apparently decided as soon as respondent stepped out of his car that respondent would be taken into custody and charged with a traffic offense, Williams never communicated his intention to respondent. A policeman's unarticulated plan has no bearing on the question whether a suspect was "in custody" at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.[35] Nor do other aspects of the interaction of Williams and respondent support the contention that respondent was exposed to "custodial interrogation" at the scene of the stop. From aught that appears in the stipulation of facts, a single police officer asked respondent a modest number of questions and requested him

to perform a simple balancing test at a location visible to passing motorists.[36] Treatment of this sort cannot fairly be characterized as the functional equivalent of formal arrest.

We conclude, in short, that respondent was not taken into custody for the purposes of Miranda until Williams arrested **3152 him. Consequently, the statements respondent made prior to that point were admissible against him.

IV

We are left with the question of the appropriate remedy. In his brief, petitioner contends that, if we agree with the *443 Court of Appeals that respondent's post-arrest statements should have been suppressed but conclude that respondent's pre-arrest statements were admissible, we should reverse the Court of Appeals' judgment on the ground that the state trial court's erroneous refusal to exclude the postarrest admissions constituted "harmless error" within the meaning of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Relying on Milton v. Wainwright, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972), petitioner argues that the statements made by respondent at the police station "were merely recitations of what respondent had already admitted at the scene of the traffic arrest" and therefore were unnecessary to his conviction. Brief for Petitioner 25. We reject this proposed disposition of the case for three cumulative reasons. First, the issue of harmless error was not presented to any of the Ohio courts, to the District Court, or to the Court of Appeals.[37] Though, when reviewing a judgment of a federal court, we have jurisdiction to consider an issue not raised below, see Carlson v. Green, 446 U.S. 14, 17, n. 2, 100 S.Ct. 1468, 1470 n. 2, 64 L.Ed.2d 15 (1980), we are generally reluctant to do so, Adickes v. S.H. Kress & Co., 398 U.S. 144, 147, n. 2, 90 S.Ct. 1598, 1603 n. 2, 26 L.Ed.2d 142 (1970).[38]

Second, the admissions respondent made at the scene of the traffic stop and the statements he made at the police station were not identical. Most importantly, though respondent at the scene admitted having recently drunk beer and smoked marihuana, not until questioned at the station did he *444 acknowledge being under the influence of intoxicants, an essential element of the crime for which he was convicted.[39] This fact assumes significance in view of the failure of the intoxilyzer test to discern any alcohol in his blood.

Third, the case arises in a procedural posture that makes the use of harmless-error analysis especially difficult.[40] This is not a case in which a defendant, after denial of a suppression motion, is given a full trial resulting in his conviction. Rather, after the trial court ruled that all of respondent's self-incriminating statements were admissible, respondent elected not to contest the prosecution's case against him, while preserving his objection to the denial of his pretrial motion.[41] As a result, respondent has not yet had an opportunity to try to impeach the State's evidence or to present evidence of his own. For example, respondent alleges that, at the time of his arrest, he had an injured back and a limp[42] and that those ailments **3153 accounted for his difficulty getting out of the car and performing the balancing test; because he pleaded "no contest," he never had a chance to make that argument to a jury. It is difficult enough, on the basis of a complete record of a trial and the parties' contentions regarding the relative importance of each portion of the evidence presented, to determine whether the erroneous admission of particular material affected the outcome. Without the benefit of such a record in this case, we decline to rule that *445 the trial court's refusal to suppress respondent's postarrest statements "was harmless beyond a reasonable doubt." See Chapman v. California, 386 U.S., at 24, 87 S.Ct., at 828.

Accordingly, the judgment of the Court of Appeals is

Affirmed.

Justice STEVENS, concurring in part and concurring in the judgment.

The only question presented by the petition for certiorari reads as follows:
"Whether law enforcement officers must give 'Miranda warnings' to individuals arrested for misdemeanor traffic offenses."

In Parts I, II, and IV of its opinion, the Court answers that question in the affirmative and explains why that answer requires that the judgment of the Court of Appeals be affirmed. Part III of the Court's opinion is written for the purpose of discussing the admissibility of statements made by respondent "prior to his formal arrest," see ante, at 3147. That discussion is not necessary to the disposition of the case, nor necessary to answer the only question presented by the certiorari petition. Indeed, the Court of Appeals quite properly did not pass on the question answered in Part III since it was entirely unnecessary to the judgment in this case.

It thus wisely followed the cardinal rule that a court should not pass on a constitutional question in advance of the necessity of deciding it. See, e.g., Ashwander v. TVA, 297 U.S. 288, 346, 56 S.Ct. 466, 482, 80 L.Ed. 688 (1936) (Brandeis, J., concurring).

Lamentably, this Court fails to follow the course of judicial restraint that we have set for the entire federal judiciary. In this case, it appears the reason for reaching out to decide a question not passed upon below and unnecessary to the judgment is that the answer to the question upon which we granted review is so clear under our settled precedents that the majority—its appetite for deciding constitutional questions ***446** only whetted—is driven to serve up a more delectable issue to satiate it. I had thought it clear, however, that no matter how interesting or potentially important a determination on a question of constitutional law may be, "broad considerations of the appropriate exercise of judicial power prevent such determinations unless actually compelled by the litigation before the Court." Barr v. Matteo, 355 U.S. 171, 172, 78 S.Ct. 204, 205, 2 L.Ed.2d 179 (1957) (per curiam). Indeed, this principle of restraint grows in importance the more problematic the constitutional issue is. See New York v. Uplinger, 467 U.S. 246, 251, 104 S.Ct. 2332, 2334, 81 L.Ed.2d 201 (1984) (STEVENS, J., concurring).

Because I remain convinced that the Court should abjure the practice of reaching out to decide cases on the broadest grounds possible, e.g., United States v. Doe, 465 U.S. 605, 619–620, 104 S.Ct. 1237, 1246, 79 L.Ed.2d 552 (STEVENS, J., concurring in part and dissenting in part); Grove City College v. Bell, 465 U.S. 555, 579, 104 S.Ct. 1211, 1225, 79 L.Ed.2d 516 (STEVENS, J., concurring in part and concurring in result); Colorado v. Nunez, 465 U.S. 324, 327–328, 104 S.Ct. 1257, 1259, 79 L.Ed.2d 338 (1984) (STEVENS, J., concurring); United States v. Gouveia, 467 U.S. 180, 193, 104 S.Ct. 2292, 2300, 81 L.Ed.2d 146 (1984) (STEVENS, J., concurring in judgment); Firefighters v. Stotts, 467 U.S. 561, 590–591, 104 S.Ct. 2576, 2594, 81 L.Ed.2d 483 (1984) (STEVENS, J., concurring in judgment); see also, ****3154** University of California Regents v. Bakke, 438 U.S. 265, 411–412, 98 S.Ct. 2733, 2809–2810, 57 L.Ed.2d 750 (1978) (STEVENS, J., concurring in judgment in part and dissenting in part); Monell v. New York City Dept. of Social Services, 436 U.S. 658, 714, 98 S.Ct. 2018, 2047, 56 L.Ed.2d 611 (1978) (STEVENS, J., concurring in part); cf. Snepp v. United States, 444 U.S. 507, 524–525, 100 S.Ct. 763, 773–774, 62 L.Ed.2d 704 (1980) (STEVENS, J., dissenting), I do not join Part III of the Court's opinion.

All Citations

468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317

Footnotes

a1 The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 For a description of the technology associated with the intoxilyzer test, see California v. Trombetta, 467 U.S. 479, 481–482, 104 S.Ct. 2528, 2530–2531, 81 L.Ed.2d 413 (1984).

2 Ohio Rev.Code Ann. § 2937.07 (1982) provides, in pertinent part: "If the plea be 'no contest' or words of similar import in pleading to a misdemeanor, it shall constitute a stipulation that the judge or magistrate may make [a] finding of guilty or not guilty from the explanation of circumstances, and if guilt be found, impose or continue for sentence accordingly."

Ohio Rule of Criminal Procedure 12(H) provides: "The plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence."

3 On respondent's motion, the state trial court stayed execution of respondent's sentence pending the outcome of his application for a writ of habeas corpus. State v. McCarty, No. 80–TF–C–123915 (Franklin County Mun.Ct., July 28, 1981).

4 In differentiating respondent's various admissions, the Court of Appeals accorded no significance to the parties' stipulation that respondent's "freedom to leave the scene was terminated" at the moment Trooper Williams formed an intent to arrest respondent. The court reasoned that a " 'reasonable man' test," not a subjective standard, should control the

determination of when a suspect is taken into custody for the purposes of Miranda. McCarty v. Herdman, 716 F.2d, at 362, n. 1 (quoting Lowe v. United States, 407 F.2d 1391, 1397 (CA9 1969)).

5 Judge Wellford, dissenting, observed: "As I read the opinion, the majority finds that McCarty was not in custody until he was formally placed under arrest." 716 F.2d, at 364. The majority neither accepted nor disavowed this interpretation of its ruling.

6 Judge Wellford's dissent was premised on his view that the incriminating statements made by respondent after he was formally taken into custody were "essentially repetitious" of the statements he made before his arrest. Reasoning that the prearrest statements were admissible, Judge Wellford argued that the trial court's failure to suppress the postarrest statements was "harmless error." Id., at 365.

7 In Clay v. Riddle, 541 F.2d 456 (1976), the Court of Appeals for the Fourth Circuit held that persons arrested for traffic offenses need not be given Miranda warnings. Id., at 457. Several state courts have taken similar positions. See State v. Bliss, 238 A.2d 848, 850 (Del.1968); County of Dade v. Callahan, 259 So.2d 504, 507 (Fla.App.1971), cert. denied, 265 So.2d 50 (Fla.1972); State v. Gabrielson, 192 N.W.2d 792, 796 (Iowa 1971), cert. denied, 409 U.S. 912, 93 S.Ct. 239, 34 L.Ed.2d 173 (1972); State v. Angelo, 251 La. 250, 254–255, 203 So.2d 710, 711–717 (1967); State v. Neal, 476 S.W.2d 547, 553 (Mo.1972); State v. Macuk, 57 N.J. 1, 15–16, 268 A.2d 1, 9 (1970). Other state courts have refused to limit in this fashion the reach of Miranda. See Campbell v. Superior Court, 106 Ariz. 542, 552, 479 P.2d 685, 695 (1971); Commonwealth v. Brennan, 386 Mass. 772, 775, 438 N.E.2d 60, 63 (1982); State v. Kinn, 288 Minn. 31, 35, 178 N.W.2d 888, 891 (1970); State v. Lawson, 285 N.C. 320, 327–328, 204 S.E.2d 843, 848 (1974); State v. Fields, 294 N.W.2d 404, 409 (N.D.1980) (Miranda applicable at least to "more serious [traffic] offense[s] such as driving while intoxicated"); State v. Buchholz, 11 Ohio St.3d 24, 28, 462 N.E.2d 1222, 1226 (1984) (overruling State v. Pyle, 19 Ohio St.2d 64, 249 N.E.2d 826 (1969), cert. denied, 396 U.S. 1007, 90 S.Ct. 560, 24 L.Ed.2d 498 (1970), and holding that "Miranda warnings must be given prior to any custodial interrogation regardless of whether the individual is suspected of committing a felony or misdemeanor"); State v. Roberti, 293 Or. 59, 644 P.2d 1104, on rehearing, 293 Ore. 236, 646 P.2d 1341 (1982), cert. pending, No. 82–315; Commonwealth v. Meyer, 488 Pa. 297, 305–306, 412 A.2d 517, 521 (1980); Holman v. Cox, 598 P.2d 1331, 1333 (Utah 1979); State v. Darnell, 8 Wash.App. 627, 628, 508 P.2d 613, 615, cert. denied, 414 U.S. 1112, 94 S.Ct. 842, 38 L.Ed.2d 739 (1973).

8 The lower courts have dealt with the problem of roadside questioning in a wide variety of ways. For a spectrum of positions, see State v. Tellez, 6 Ariz.App. 251, 256, 431 P.2d 691, 696 (1967) (Miranda warnings must be given as soon as the policeman has "reasonable grounds" to believe the detained motorist has committed an offense); Newberry v. State, 552 S.W.2d 457, 461 (Tex.Crim.App.1977) (Miranda applies when there is probable cause to arrest the driver and the policeman "consider[s the driver] to be in custody and would not ... let him leave"); State v. Roberti, 293 Or., at 236, 646 P.2d, at 1341 (Miranda applies as soon as the officer forms an intention to arrest the motorist); People v. Ramirez, 199 Colo. 367, 372, n. 5, 609 P.2d 616, 618, n. 5 (1980) (en banc); State v. Darnell, supra, 8 Wash.App. at 629–630, 508 P.2d, at 615 (driver is "in custody" for Miranda purposes at least by the time he is asked to take a field sobriety test); Commonwealth v. Meyer, supra, 488 Pa. at 307, 412 A.2d, at 521–522 (warnings are required as soon as the motorist "reasonably believes his freedom of action is being restricted"); Lowe v. United States, supra, at 1394, 1396; State v. Sykes, 285 N.C. 202, 205–206, 203 S.E.2d 849, 850 (1974) (Miranda is inapplicable to a traffic stop until the motorist is subjected to formal arrest or the functional equivalent thereof); Allen v. United States, 129 U.S.App.D.C. 61, 63–64, 390 F.2d 476, 478–479 ("[S] ome inquiry can be made [without giving Miranda warnings] as part of an investigation notwithstanding limited and brief restraints by the police in their effort to screen crimes from relatively routine mishaps"), modified, 131 U.S.App.D.C. 358, 404 F.2d 1335 (1968); Holman v. Cox, supra, at 1333 (Miranda applies upon formal arrest).

9 In Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), the Court did sanction use of statements obtained in violation of Miranda to impeach the defendant who had made them. The Court was careful to note, however, that the jury had been instructed to consider the statements "only in passing on [the defendant's] credibility and not as evidence of guilt." 401 U.S., at 223, 91 S.Ct., at 644.

10 The one exception to this consistent line of decisions is New York v. Quarles, 467 U.S. 649, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984). The Court held in that case that, when the police arrest a suspect under circumstances presenting an imminent

danger to the public safety, they may without informing him of his constitutional rights ask questions essential to elicit information necessary to neutralize the threat to the public. Once such information has been obtained, the suspect must be given the standard warnings.

11 Not all of petitioner's formulations of his proposal are consistent. At some points in his brief and at oral argument, petitioner appeared to advocate an exception solely for drunken-driving charges; at other points, he seemed to favor a line between felonies and misdemeanors. Because all of these suggestions suffer from similar infirmities, we do not differentiate among them in the ensuing discussion.

12 Thus, under Ohio law, while a first offense of negligent vehicular homicide is a misdemeanor, a second offense is a felony. Ohio Rev.Code Ann. § 2903.07 (Supp.1983). In some jurisdictions, a certain number of convictions for drunken driving triggers a quantum jump in the status of the crime. In South Dakota, for instance, first and second offenses for driving while intoxicated are misdemeanors, but a third offense is a felony. See Solem v. Helm, 463 U.S. 277, 280, n. 4, 103 S.Ct. 3001, 3005, n. 4, 77 L.Ed.2d 637 (1983).

13 Cf. Welsh v. Wisconsin, 466 U.S. 740, 761, 104 S.Ct. 2091, 2103, 80 L.Ed.2d 732 (1984) (WHITE, J., dissenting) (observing that officers in the field frequently "have neither the time nor the competence to determine" the severity of the offense for which they are considering arresting a person).

It might be argued that the police would not need to make such guesses; whenever in doubt, they could ensure compliance with the law by giving the full Miranda warnings. It cannot be doubted, however, that in some cases a desire to induce a suspect to reveal information he might withhold if informed of his rights would induce the police not to take the cautious course.

14 See, e.g., United States v. Schultz, 442 F.Supp. 176 (Md.1977) (investigation of erratic driving developed into inquiry into narcotics offenses and terminated in a charge of possession of a sawed-off shotgun); United States v. Hatchel, 329 F.Supp. 113 (Mass.1971) (investigation into offense of driving the wrong way on a one-way street yielded a charge of possession of a stolen car).

15 Cf. United States v. Robinson, 414 U.S. 218, 221, n. 1, 94 S.Ct. 467, 470, n. 1, 38 L.Ed.2d 427 (1973); id., at 238, n. 2, 94 S.Ct., at 494, n. 2 (POWELL, J., concurring) (discussing the problem of determining if a traffic arrest was used as a pretext to legitimate a warrantless search for narcotics).

16 Cf. New York v. Quarles, 467 U.S., at 663–664, 104 S.Ct., at 2636 (O'CONNOR, J., concurring in judgment in part and dissenting in part).

17 See Brief for State of Ohio as Amicus Curiae 18–21 (discussing the "National Epidemic Of Impaired Drivers" and the importance of stemming it); cf. South Dakota v. Neville, 459 U.S. 553, 558–559, 103 S.Ct. 916, 920–921, 74 L.Ed.2d 748 (1983); Perez v. Campbell, 402 U.S. 637, 657, 672, 91 S.Ct. 1704, 1715–1722, 29 L.Ed.2d 233 (1971) (BLACKMUN, J., concurring in part and dissenting in part).

18 See Rhode Island v. Innis, 446 U.S. 291, 299, 301, 100 S.Ct. 1682, 1688–1689, 64 L.Ed.2d 297 (1980); Miranda v. Arizona, 384 U.S. 436, 445–458, 86 S.Ct. 1602, 1612–1619, 16 L.Ed.2d 694 (1966).

19 Minnesota v. Murphy, 465 U.S. 420, 430, 104 S.Ct. 1136, 1143, 79 L.Ed.2d 409 (1984) (quoting Miranda v. Arizona, supra, 384 U.S., at 467, 86 S.Ct., at 1624); see Estelle v. Smith, 451 U.S. 454, 467, 101 S.Ct. 1866, 1875, 68 L.Ed.2d 359 (1981); United States v. Washington, 431 U.S. 181, 187, n. 5, 97 S.Ct. 1814, 1819, n. 5, 52 L.Ed.2d 238 (1977).

20 Cf. Developments in the Law—Confessions, 79 Harv.L.Rev. 935, 954–984 (1966) (describing the difficulties encountered by state and federal courts, during the period preceding the decision in Miranda, in trying to distinguish voluntary from involuntary confessions).

We do not suggest that compliance with Miranda conclusively establishes the voluntariness of a subsequent confession. But cases in which a defendant can make a colorable argument that a self-incriminating statement was "compelled" despite the fact that the law enforcement authorities adhered to the dictates of Miranda are rare.

21 The parties urge us to answer two questions concerning the precise scope of the safeguards required in circumstances of the sort involved in this case. First, we are asked to consider what a State must do in order to demonstrate that a suspect who might have been under the influence of drugs or alcohol when subjected to custodial interrogation nevertheless understood and freely waived his constitutional rights. Second, it is suggested that we decide whether an indigent suspect has a right, under the Fifth Amendment, to have an attorney appointed to advise him regarding his responses to custodial interrogation when the alleged offense about which he is being questioned is sufficiently minor that he would not have a right, under the Sixth Amendment, to the assistance of appointed counsel at trial, see Scott v. Illinois, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979). We prefer to defer resolution of such matters to a case in which law enforcement authorities have at least attempted to inform the suspect of rights to which he is indisputably entitled.

22 In his brief, respondent hesitates to embrace this proposition fully, advocating instead a more limited rule under which questioning of a suspect detained pursuant to a traffic stop would be deemed "custodial interrogation" if and only if the police officer had probable cause to arrest the motorist for a crime. See Brief for Respondent 39–40, 46. This ostensibly more modest proposal has little to recommend it. The threat to a citizen's Fifth Amendment rights that Miranda was designed to neutralize has little to do with the strength of an interrogating officer's suspicions. And, by requiring a policeman conversing with a motorist constantly to monitor the information available to him to determine when it becomes sufficient to establish probable cause, the rule proposed by respondent would be extremely difficult to administer. Accordingly, we confine our attention below to respondent's stronger argument: that all traffic stops are subject to the dictates of Miranda.

23 It might be argued that, insofar as the Court of Appeals expressly held inadmissible only the statements made by respondent after his formal arrest, and respondent has not filed a cross-petition, respondent is disentitled at this juncture to assert that Miranda warnings must be given to a detained motorist who has not been arrested. See, e.g., United States v. Reliable Transfer Co., 421 U.S. 397, 401, n. 2, 95 S.Ct. 1708, 1711 n. 2, 44 L.Ed.2d 251 (1975). However, three considerations, in combination, prompt us to consider the question highlighted by respondent. First, as indicated above, the Court of Appeals' judgment regarding the time at which Miranda became applicable is ambiguous; some of the court's statements cast doubt upon the admissibility of respondent's prearrest statements. See supra, at 3142–3143. Without undue strain, the position taken by respondent before this Court thus might be characterized as an argument in support of the judgment below, which respondent is entitled to make. Second, the relevance of Miranda to the questioning of a motorist detained pursuant to a traffic stop is an issue that plainly warrants our attention, and with regard to which the lower courts are in need of guidance. Third and perhaps most importantly, both parties have briefed and argued the question. Under these circumstances, we decline to interpret and apply strictly the rule that we will not address an argument advanced by a respondent that would enlarge his rights under a judgment, unless he has filed a cross-petition for certiorari.

24 Examples of similar provisions in other States are: Ariz.Rev.Stat.Ann. §§ 28–622, 28–622.01 (1976 and Supp.1983–1984); Cal.Veh.Code Ann. §§ 2800, 2800.1 (West Supp.1984); Del.Code Ann., Tit. 21, § 4103 (1979); Fla.Stat. § 316.1935 (Supp.1984); Ill.Rev.Stat., ch. 95 ½, ¶ 11–204 (1983); N.Y.Veh. & Traf.Law § 1102 (McKinney Supp.1983–1984); Nev.Rev.Stat. § 484.348(1) (1983); 75 Pa.Cons.Stat. § 3733(a) (1977); Wash.Rev.Code § 46.61.020 (1983).

25 Indeed, petitioner frankly admits that "[n]o reasonable person would feel that he was free to ignore the visible and audible signal of a traffic safety enforcement officer.... Moreover, it is nothing short of sophistic to state that a motorist ordered by a police officer to step out of his vehicle would reasonabl[y] or prudently believe that he was at liberty to ignore that command." Brief for Petitioner 16–17.

26 State laws governing when a motorist detained pursuant to a traffic stop may or must be issued a citation instead of taken into custody vary significantly, see Y. Kamisar, W. LaFave, & J. Israel, Modern Criminal Procedure 402, n. a (5th ed. 1980), but no State requires that a detained motorist be arrested unless he is accused of a specified serious crime, refuses to promise to appear in court, or demands to be taken before a magistrate. For a representative sample of these provisions, see Ariz.Rev.Stat.Ann. §§ 28–1053, 28–1054 (1976); Ga.Code Ann. § 40–13–53 (Supp.1983); Kan.Stat.Ann. §§ 8–2105, 8–2106 (1982); Nev.Rev.Stat. §§ 484.793, 484.795, 484.797, 484.799, 484.805 (1983); Ore.Rev.Stat. § 484.353 (1983); S.D. Codified Laws § 32–33–2 (Supp.1983); Tex.Rev.Civ.Stat.Ann., Art. 6701d, §§ 147, 148 (Vernon 1977); Va.Code § 46.1–178 (Supp.1983). Cf. National Committee on Uniform Traffic Laws and Ordinances, Uniform Vehicle Code and Model Traffic Ordinance §§ 16–203–16–206 (Supp.1979) (advocating mandatory release on citation of all drivers except

those charged with specified offenses, those who fail to furnish satisfactory self-identification, and those as to whom the officer has "reasonable and probable grounds to believe ... will disregard a written promise to appear in court").

27 The brevity and spontaneity of an ordinary traffic stop also reduces the danger that the driver through subterfuge will be made to incriminate himself. One of the investigative techniques that Miranda was designed to guard against was the use by police of various kinds of trickery—such as "Mutt and Jeff" routines—to elicit confessions from suspects. See 384 U.S., at 448–455, 86 S.Ct., at 1614–1617. A police officer who stops a suspect on the highway has little chance to develop or implement a plan of this sort. Cf. LaFave, "Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond, 67 Mich.L.Rev. 39, 99 (1968).

28 See Orozco v. Texas, 394 U.S. 324, 325, 89 S.Ct. 1095, 1096, 22 L.Ed.2d 311 (1969) (suspect arrested and questioned in his bedroom by four police officers); Mathis v. United States, 391 U.S. 1, 2–3, 88 S.Ct. 1503, 1503–1504, 20 L.Ed.2d 381 (1968) (defendant questioned by a Government agent while in jail).

29 No more is implied by this analogy than that most traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized in Terry. We of course do not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a Terry stop.

30 Nothing in this opinion is intended to refine the constraints imposed by the Fourth Amendment on the duration of such detentions. Cf. Sharpe v. United States, 712 F.2d 65 (CA4 1983), cert. granted, 467 U.S. 1250, 104 S.Ct. 3531, 82 L.Ed.2d 837 (1984).

31 Cf. Adams v. Williams, 407 U.S. 143, 148, 92 S.Ct. 1921, 1924, 32 L.Ed.2d 612 (1972).

32 Cf. Terry v. Ohio, 392 U.S., at 34, 88 S.Ct., at 1886 (WHITE, J., concurring).

33 Contrast the minor burdens on law enforcement and significant protection of citizens' rights effected by our holding that Miranda governs custodial interrogation of persons accused of misdemeanor traffic offenses. See supra, at 3147–3148.

34 Cf. Commonwealth v. Meyer, 488 Pa., at 301, 307, 412 A.2d, at 518–519, 522 (driver who was detained for over one-half hour, part of the time in a patrol car, held to have been in custody for the purposes of Miranda by the time he was questioned concerning the circumstances of an accident).

35 Cf. Beckwith v. United States, 425 U.S. 341, 346–347, 96 S.Ct. 1612, 1616–1617, 48 L.Ed.2d 1 (1976) (" 'It was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the Court to impose the Miranda requirements with regard to custodial questioning' ") (quoting United States v. Caiello, 420 F.2d 471, 473 (CA2 1969)); People v. P., 21 N.Y.2d 1, 9–10, 286 N.Y.S.2d 225, 232, 233 N.E.2d 255, 260 (1967) (an objective, reasonable-man test is appropriate because, unlike a subjective test, it "is not solely dependent either on the self-serving declarations of the police officers or the defendant nor does it place upon the police the burden of anticipating the frailties or idiosyncracies of every person whom they question").

36 Cf. United States v. Schultz, 442 F.Supp., at 180 (suspect who was stopped for erratic driving, subjected to persistent questioning in the squad car about drinking alcohol and smoking marihuana, and denied permission to contact his mother held to have been in custody for the purposes of Miranda by the time he confessed to possession of a sawed-off shotgun).

37 Judge Wellford, dissenting in the Court of Appeals, did address the issue of harmless error, see n. 6, supra, but without the benefit of briefing by the parties. The majority of the panel of the Court of Appeals did not consider the question.

38 Nor did petitioner mention harmless error in his petition to this Court. Absent unusual circumstances, cf. n. 23, supra, we are chary of considering issues not presented in petitions for certiorari. See this Court's Rule 21.1(a) ("Only the questions set forth in the petition or fairly included therein will be considered by the Court").

39 This case is thus not comparable to Milton v. Wainwright, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972), in which a confession presumed to be inadmissible contained no information not already provided by three admissible confessions. See id., at 375–376, 92 S.Ct., at 2177.

40 Because we do not rule that the trial court's error was harmless, we need not decide whether harmless-error analysis is even applicable to a case of this sort.

41 Under Ohio law, respondent had a right to pursue such a course. See n. 2, supra.

42 Indeed, respondent points out that he told Trooper Williams of these ailments at the time of his arrest, and their existence was duly noted in the Alcohol Influence Report. See App. 2.

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79 Ohio App.3d 234
Court of Appeals of Ohio, Tenth District, Franklin County.

CITY OF COLUMBUS, Appellee,

v.

SEABOLT, Appellant.

No. 91AP-1169.
|
Decided April 14, 1992.

Synopsis

Defendant was convicted in the Municipal Court, Franklin County, of driving under the influence of alcohol, and she appealed. The Court of Appeals, McCormac, J., held that defendant who, while intoxicated, was seated in driver's seat of vehicle that was totally immobile could not be convicted of driving while intoxicated.

Reversed and remanded.

Attorneys and Law Firms

***235** ****61** Ronald J. O'Brien, City Atty., Marcee C. McCreary, City Prosecutor, and Brenda J. Keltner, Columbus, for appellee.

John D. Hobday Co., L.P.A., and John D. Hobday, Columbus, for appellant.

Opinion

McCORMAC, Judge.

Janice D. Seabolt, defendant-appellant, was convicted by the court of operating a motor vehicle under the influence of alcohol, having a concentration of blood alcohol of .10 percent or more. She appeals, asserting the following assignments of error:

***236** "*Assignment of Error No. 1*

"There was insufficient evidence in the court below to establish that the defendant was operating a motor vehicle in violation of the Columbus City Code.

"*Assignment of Error No. 2*

"A mere running of an engine of a totally immobile vehicle is not operation within the meaning of Section 2133.01(B)(2) of the Columbus Municipal Code.

"*Assignment of Error No. 3*

"The state of Ohio and city of Columbus lack a valid legislative interest in precluding the running of an engine of a motor vehicle which is totally immobile."

The case was submitted to the court upon the following stipulation of facts, there being no oral testimony:

****62** " * * * On March 24, 1991, at approximately 3:46 a.m., the defendant, Janice D. Seabolt, was found sitting behind the wheel of a 1986 Nissan pickup truck with the key in the ignition and the motor running.

"The truck was totally immobile, stuck in the mud, with two tires blown out.

"Officer T.L. Moore arrived first at the scene while the defendant was sitting behind the steering wheel with the motor running. Officer Moore asked the defendant to get out of the vehicle, whereupon he noticed an odor of alcohol.

"The defendant was requested to submit to a breath test, which she complied to at 4:34 a.m. The result of that breath test was .235.

"The defendant was subsequently arrested for operating a motor vehicle while under the influence of alcohol with a blood alcohol level above .10, as well as failure to control and other tickets.

"On the following date, the vehicle was removed from the mud by a tow truck."

After inquiry by the court, the parties further stipulated that the result of ".235" meant a concentration of .235 of one gram by weight of alcohol per two hundred ten liters of breath and that the alleged offense occurred within the city of Columbus, county of Franklin, and the state of Ohio.

Defendant was convicted of a violation of Section 2133.01(b)(2) of the Columbus City Code, which reads as follows:

"(b) No person shall operate a vehicle within this City when:

" * * *

"(2) That person has a concentration of ten hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath[.] * * * "

***237** Section 2101.10 of the Columbus City Code defines "driver" or "operator" as follows:

" 'Driver' or 'operator' means every person who drives or is in actual physical control of a vehicle."

The key issue is whether there was evidence that defendant drove or was in actual physical control of the vehicle while she had the requisite concentration of alcohol in her system.

Under the stipulated facts, there was insufficient evidence to prove beyond a reasonable doubt that defendant drove the vehicle into its place of immobility while under the influence of alcohol. While one might speculate that she had driven the vehicle into the mud where it became mired and immobile, there was no direct evidence that she did so and no circumstantial evidence sufficient to allow that finding beyond a reasonable doubt. There was no evidence of how long the motor vehicle had been in that position, as is frequently the case where defendant is found in a vehicle shortly after it becomes immobile following an accident. See *State v. Keeney* (Apr. 13, 1989), Franklin App. No. 88AP-645, unreported, 1989 WL 35878. As stated before, in this case all that is known is that defendant, while intoxicated, was seated in the driver's seat of an immobile vehicle with the motor running.

The next issue is whether a person can be found guilty of a violation of the laws prohibiting driving while under the influence of alcohol when seated in the driver's seat of a totally immobile vehicle, which cannot be moved to present a hazard to anyone else on the highway.

The Supreme Court has held that an intoxicated person who is in the driver's seat of a motor vehicle with the key in the ignition is operating the vehicle. *State v. McGlone* (1991), 59 Ohio St.3d 122, 570 N.E.2d 1115. However, in that case the court held that the car was under the driver's control because he could have moved the car whenever he wanted. Similarly, in *State v. Cleary* (1986), 22 Ohio St.3d 198, 22 OBR 351, 490 N.E.2d 574, the Supreme Court found that a stationary vehicle is being operated within the contemplation of the statutes where a person is seated behind the steering wheel of the vehicle with the ignition key in the ignition and the motor running. However, once again, in *Cleary,* the car was operable. The court pointed out that the statutes were aimed at intoxicated persons with impaired faculties ****63** who were behind the wheel of an automobile which could be put into motion to cause a hazard to another person who is using a highway.

In this case, while defendant was behind the wheel of an automobile with the ignition key in the ignition and the motor running, by the stipulated facts defendant had no capability of moving the motor vehicle to cause a hazard to ***238** another person using the highway. She was not in control of the car within the definition of Section 2101.10 of the Columbus City Code because she had no ability to drive or control the vehicle other than to turn the ignition key. The automobile could not be moved or controlled to cause a hazard to another person. There was no actual physical control of the vehicle as required by Section 2101.10 of the Columbus City Code.

Defendant's first assignment of error is sustained. There was insufficient evidence to establish that defendant was operating a motor vehicle in violation of the Columbus City Code.

Defendant's second assignment of error is overruled. While a mere running of an engine of a totally immobile vehicle is not operation within the physical control part of the section, there still may be conviction of driving while under the influence of alcohol if there is sufficient direct or circumstantial evidence that defendant, while under the influence of alcohol, drove the automobile into the place where it became immobile.

Defendant's second assignment of error is overruled.

Defendant's third assignment of error presents a question that is not pertinent to the issues in this case and the court declines to issue an advisory opinion concerning the authority to legislate against the running of an engine of a motor vehicle which is totally immobile.

Defendant's third assignment of error is overruled.

Defendant's first assignment of error is sustained and defendant's second and third assignments of error are overruled. The judgment of the trial court is reversed and the case is remanded to the trial court for further procedure consistent with this opinion.

Judgment reversed and cause remanded.

BOWMAN and DESHLER, JJ., concur.

All Citations

79 Ohio App.3d 234, 607 N.E.2d 61

End of Document

190 Wash. 145
Supreme Court of Washington.

DEPARTMENT OF LABOR AND INDUSTRIES et al.

v.

STONE, Judge.

No. 26478.
|
April 22, 1937.

Synopsis

Original proceeding by the Department of Labor and Industries and others against the Honorable J. E. Stone, Judge of the Superior Court, Department 1, Cowlitz County, for a writ of prohibition to restrain and prohibit further proceedings in the matter of the claim of Joe Puliz under the Workmen's Compensation Act.

Writ issued in accordance with opinion.

See, also, Puliz v. Department of Labor and Industries, 184 Wash. 585, 52 P.(2d) 347.

Attorneys and Law Firms

****320** G. W. Hamilton, ***146** Atty. Gen., and J. A. Kavaney, Asst. Atty. Gen., for relators.

Wm. H. Sibbald, of Kelso, for respondent.

Opinion

TOLMAN, Justice.

By this proceeding the relators seek a writ of prohibition directed to the Honorable J. E. Stone, judge of the superior court for Cowlitz county, restraining and prohibiting further proceedings in the matter hereinafter detailed.

In July, 1936, in a cause then pending on appeal from the joint board of the Department of Labor and Industries, entitled Joe Puliz v. Department of Labor and Industries of the State of Washington, the ****321** respondent judge, after a hearing on the merits, made findings of fact and conclusions of law and thereupon entered a judgment dated July 6, 1936, as follows:

'The above entitled matter, having been appealed from the department of labor and industries, and coming on for hearing on the 17th day of June, 1936, the plaintiff appearing in person and by his attorney, W. H. Sibbald, the Department of labor and industries appearing by the attorney general, G. W. Hamilton and J. A. Kavaney, assistant attorney general, at which time the case was tried entirely on the record, no additional evidence having been adduced, the only evidence before the court being the same as that which was before the court on the previous trial and the court having reconsidered said evidence and the argument of counsel, and the court having made findings of fact and arrived at conclusions of law thereon;

***147** 'Now, therefore, in accordance with such findings of fact and conclusion, it is ordered, adjudged and decreed that the department of labor and industries pay to the plaintiff a further award of fifteen degrees, being the amount of $450.00 and time loss beginning November 3, 1933, the date of the first operation since the last final closing order, which has not been appealed from, at the rate of $40.00 per month up to and including the 18th day of July, 1934, less such time loss as has been paid during such time and the further sum of $175.00 as attorneys fees and for his costs and disbursements herein.'

In due time the plaintiff in that cause gave notice of appeal from that judgment and the whole thereof to this court and, so far as here appears, has perfected that appeal in a timely manner. The Department of Labor and Industries took no appeal from that judgment.

On September 5, 1936, and after his appeal to this court had been perfected, the plaintiff in that cause procured the issuance by the superior court of an order to show cause, directed to the department as judgment debtor, requiring it to show cause, at a time fixed, why the judgment should not be paid forthwith. A motion to quash the show cause order was interposed and granted, but thereupon the trial court treated the application for the order as an application for a writ of execution and ordered execution to issue. A special writ of execution was issued to the sheriff of Thurston county, who apparently made proper demand, but the demand was not complied with and the judgment was not paid. Thereupon the plaintiff (appellant) in the original cause obtained an order from the court directed to the official head of the Department of Labor and Industries requiring him to show cause why he should not be adjudged in contempt of court because of his refusal to comply with the execution ***148** and pay the

judgment. Upon the service of that order the relators instituted this proceeding.

In his brief on the appeal to this court the appellant assigns error upon the denial to him of a finding of total permanent disability, which finding would carry with it not a lump sum award, as provided for in the judgment appealed from, but a monthly pension, as provided for in Rem.Rev.Stat. § 7679. Manifestly, if the injured workman accepts payment of the award for partial permanent disability allowed him by the judgment, his action in so doing would be inconsistent with his claim on appeal for total permanent disability and would necessarily work a dismissal of his appeal because if by or through the appeal he succeeds in obtaining an award of total permanent disability and the consequent pension, that award would absolutely annul and supersede the award for partial permanent disability allowed him by the judgment which he now seeks to enforce. The law is well settled in that respect.

'Subject to the exceptions and qualifications hereafter stated, the general rule is that a party who enforces, or otherwise accepts the benefit of, a judgment, order, or decree cannot afterward maintain an appeal or writ of error to review the same or deny the authority which granted it. A party cannot avail himself of that portion of an indivisible judgment, order, or decree which is favorable to him, and secure its fruits, while prosecuting an appeal to reverse in the appellate court such portions as militate against him. Nor can a party appeal from an order after he has obtained the benefit of a subsequent order made at his request and based upon the order from which he attempts to appeal.' 3 C.J. 679, § 552.

'It is quite generally conceded that one cannot ordinarily accept or secure a benefit under a judgment or decree and then appeal from it or sue out a writ of error, ****322** when the effect of his appeal or writ of error may be to annul the judgment.' 2 R.C.L. 61, § 44.

***149** 'Applying the general principle announced in the preceding paragraph, it is settled that after a party receives payment of a judgment or decree he cannot appeal therefrom or prosecute an appeal theretofore taken.' 2 R.C.L. 63, § 45.

See, also, the extensive note following the case of McKain v. Mullen, 29 L.R.A.(N.S.) 1.

This rule, like all good rules, must work both ways. If one may not prosecute an appeal after accepting the fruits of the judgment, then, by the same token, he may not force payment of the judgment while he is prosecuting an appeal therefrom.

There are, of course, well-recognized exceptions to the rule, but this case falls within none of them. Had the department complied with the execution and paid the judgment, it would thereupon have been entitled to a dismissal of the appeal, but the judgment has not been paid, the judgment creditor has not yet accepted payment, and it is, perhaps, questionable whether he has yet gone so far that he cannot recede. In any event, we cannot here consider or direct the dismissal of the appeal in the original cause.

In view of the whole situation, as here disclosed, and the pendency of the appeal, we are of the opinion that the writ should issue to maintain the status quo until the appeal is dismissed or is heard and disposed of on the merits by this court.

Let the writ issue.

STEINERT, C. J., and BEALS, BLAKE, and ROBINSON, JJ., concur.

MILLARD, Justice (dissenting).

While in his appeal (No. 26448) Joe Puliz insists that he is permanently disabled and therefore entitled to a pension, and also seeks recovery of time loss compensation for the period from July 18, 1934, to the date of the judgment, ***150** it should be borne in mind that he was awarded by the trial court time loss to July 18, 1934, and that the department did not appeal from that judgment. In other words, the department concedes that the claimant is entitled to time loss compensation to July 18, 1934. So far as that award is concerned, we may not diminish same.

In the absence of a bond superseding the judgment-in view of Rem.Rev.Stat. § 7697, the judgment in the case at bar cannot be superseded; the claimant may enforce payment. To the amount awarded by the trial court, tome loss compensation to July 18, 1934, the claimant is entitled absolutely. The reversal of the judgment cannot impair his right to that amount. If the department had tendered to him that sum, and he had accepted it, such acceptance would not be inconsistent with his attempt to reverse the judgment on the grounds constituting the basis of his appeal. Those two grounds, it will be remembered, are that he is entitled to time loss compensation from July 18, 1934, to the date of the judgment, and that he is permanently disabled, therefore, as a pensionable status.

I note the quotation in the majority opinion from 3 C.J. 679, § 552. The remainder of that section reads as follows:

'*The rule does not apply*, unless appellant has accepted a substantial benefit; nor does it apply where the parts of the judgment or decree are separate and independent, and the receipt of a benefit from one part is not inconsistent with an appeal from another, or *where the right to the benefit* received *is conceded by the opposite party or appellant is entitled thereto in any event*, so that it could not be denied if the portions of the judgment or decree granting it should be reversed, or in other cases in which the acceptance of the benefit or partial enforcement of the judgment is not inconsistent with an appeal and reversal. 'The ***151** acceptance of benefits must be voluntary, in the sense that the party is not required by the decree to do the act relied upon as a release of errors.'

'Reservation of right. As a rule a party cannot reserve the right of appeal while accepting payment or otherwise taking a benefit under the judgment; but this rule does not prevent his entering into an agreement by which, with a view of saving expenses, the parties come together as far as they can agree, but reserve the right to contest the points upon which they cannot agree.'

'*The rule that a party cannot maintain an appeal* or writ of error *to reverse a judgment* or decree *after he has accepted payment of the same in whole or in part has no application*, as a rule, *where appellant is shown to be so absolutely entitled to the sum collected or accepted that reversal of the judgment* or decree *will not affect his right to it*, as in the case of ****323** the collection of an admitted or uncontroverted part of his demand, and in other like cases, for, 'in cases of this character, there can be no injustice, or vexatious oppression to the defendant, in allowing the plaintiff to receive that to which he is unquestionably entitled, and to confine future litigation only to so much of plaintiff's claim as may be bona fide disputed.'' 2 C.J. 682, § 556. (Italics are mine).

Volume 2, R.C.L. 63, § 45, in restating the general rule enunciated in 2 R.C.L. 61, § 44, that, after a party receives payment of a judgment or a decree, he cannot appeal therefrom or prosecute an appeal theretofore taken, stresses the application of the rule to a situation where the party coerces payment by execution. It is well, however, to quote 2 R.C.L. 61, § 44, as follows, which clearly shows that Puliz, the appellant in cause No. 26448, is outside the rule invoked by the majority:

'It is quite generally conceded that one cannot ordinarily accept or secure a benefit under a judgment or decree and then appeal from it or sue out a writ of error, when the effect of his appeal or writ of error may be to annul the judgment. Thus the defendant ***152** in a suit by which his tax deed is set aside cannot unreservedly accept the taxes, interest, and charges tendered by the bill and ordered by the decree to be paid him, and then appeal from the decree, since his acceptance is a positively implied waiver of his right of appeal, nor will an offer to return the money, made long after its acceptance, avail to prevent the dismissal of an appeal in such case. Also compelling the surrender of the parcel awarded the plaintiff in an action of ejectment and payment of taxed costs, by threat of executing the writ of restitution which had been issued, prevents him from attempting to reverse the judgment on appeal although he was denied relief as to a large parcel of land upon which he claimed that the defendant had wrongfully encroached. The rule as to the waiver of the right of review by accepting benefits under the judgment or decree has been applied in many kinds of actions, including both real nd personal actions, and in some jurisdictions it has been embodied in the statutes. The rule just stated is subject to the exception, that where the reversal of a judgment cannot possibly affect an appellant's right to the benefit secured under a judgment, then an appeal may be taken, and will be sustained, despite the fact that the appellant has sought and secured such benefit. A good illustration of this doctrine is the case of an action to recover one thousand dollars, in which the only defense defense is a counterclaim for five hundred dollars. It is obvious that five hundred dollars of the plaintiff's claim is admitted. If the defendant succeeds in establishing his counterclaim, thus reducing the plaintiff's recovery to five hundred dollars, the plaintiff may collect the five hundred dollars awarded to him by the judgment, and still appeal from such judgment to secure a reversal, to the end that he may defeat the counterclaim and recover judgment for his entire demand on a new trial. The five hundred dollars he is entitled to absolutely. The reversal of the judgment and the second trial of the case cannot impair his right to it. Accepting this sum is, therefore, not inconsistent with his attempt to reverse the judgment, that he may on a new trial recover more. He can never recover less. It is the ***153** possibility that his appeal may lead to a result showing that he was not entitled to what he has received under the judgment appealed from, that defeats his right to appeal. Where there is no such possibility, the right to appeal is unimpaired by the acceptance of benefits under the judgment appealed from. So, also, in the case of an order discontinuing an action over the objection of the defendant instead of dismissing it, the acceptance of the

costs taxed on the discontinuance, when they were such that he would have been entitled to them whether the judgment was one of discontinuance or dismissal, does not operate to waive the defendant's right of appeal from the judgment of discontinuance. This branch of or exception to, the general rule that a party who has taken advantage of a decree may not afterwards question its validity has also been applied in the case of a decree consisting of two separate, distinct, and unrelated parts, the disposition of either of which can in no wise affect the decision as to the other. If it is possible for the appellant to obtain a more favorable judgment in the appellate court without the risk of a less favorable judgment from a new trial of the whole case there or in the lower court, then the acceptance of what the judgment gives him is not inconsistent with an appeal for the sole purpose of securing, without retrial of the whole case, a decision more advantageous to him.'

The reversal of the judgment cannot possibly affect appellant Puliz's right to ****324** the award of time loss compensation to July 18, 1934. Therefore, he may compel payment of, and also prosecute an appeal from, that judgment on the two grounds above stated.

'The general rule, enacted into statute in at least one jurisdiction, is that a litigant who has, voluntarily and with knowledge of all the material facts, accepted the benefits of an order, decree, or judgment of a court, cannot afterwards take or prosecute an appeal or error proceeding to reverse it. Although some courts have intimated that there might be a distinction between judgments at law and decrees in equity, on the ***154** ground that a judgment at law is an entirety and cannot be reversed in part, while this is not true of a decree in equity, it seems that no distinction is generally made. The reason for this rule is that a party cannot proceed to enforce and have the benefit of such portions of a judgment as are in his favor, and appeal from those against him-in other words, that the right to proceed on a judgment and enjoy its fruits and the right to appeal therefrom are totally inconsistent positions, and the election to pursue one course must be deemed an abandonment of the other.

'A mere tender of the benefits of a judgment, which is refused, does not operate as an estoppel.

'The general rule stated in the preceding section is subject to an exception which has been recognized and allowed in specific instances and a great variety of cases, enough, perhaps, to give rise to a new rule that where the reversal of a judgment cannot possibly affect an appellant's right to the benefit secured under a judgment, then an appeal may be taken, and will be sustained, despite the fact that the appellant has sought and secured such benefit. Thus, it is possible for the appellant to obtain a more favorable judgment in the appellate court without the risk of a less favorable judgment from a new trial of the whole case there or in the lower court, then the acceptance of what the judgment gives him is not inconsistent with an appeal for the sole purpose of securing, without retrial of the whole case, a decision more advantageous to him. And in some jurisdictions it is provided by statute that when a party recovers judgment for only part of his demand, the enforcement of such judgment shall not prevent him from prosecuting an appeal therefrom as to so much of the demand or property sued for as he did not recover.

'Another exception to the general rule has also been applied in the case of a decree consisting of two separate, distinct, and unrelated parts, the disposition of either of which can in no wise affect the decision as to the other. So, also, in the case of an order discontinuing an action over the objection of the defendant instead of dismissing it, the acceptance of the costs taxed ***155** on the discontinuance, when they were such that he would have been entitled to them whether the judgment was one of discontinuance or dismissal, does not operate to waive the defendant's right of appeal from the judgment of discontinuance.

'In accordance with the general principles announced in the preceding sections, it is settled in most, though not all, jurisdictions that after a party receives payment of a judgment or decree he cannot appeal therefrom or prosecute an appeal theretofore taken. This is especially true where the party coerces payment by execution. Likewise, a plaintiff who accepts money deposited in court, for the purpose of satisfying the judgment which he has recovered, is precluded from taking and prosecuting an appeal from such judgment. Where, however, a judgment or decree was rendered in favor of the plaintiff for only the uncontroverted part of his claim, it has been held that his acceptance of payment did not preclude him from appealing to determine whether he should not have been allowed more. * * *' 2 American Jurisprudence, §§ 214, 215, 216, pp. 975 to 979.

The writ should be denied.

MAIN, HOLCOMB, and GERAGHTY, JJ., concur.

All Citations

190 Wash. 145, 67 P.2d 320

67 P.2d 320

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251 Ga.App. 68
Court of Appeals of Georgia.

HIBBARD

v.

P.G.A., INC.

No. A01A0994.
|
Aug. 2, 2001.

Synopsis

After failing to obtain writ of possession for excavation equipment in magistrate's court, lessor appealed. After bench trial, the State Court, Henry County, Studdard, J., denied writ. Lessor appealed. The Court of Appeals, Miller, J., held that agreement between lessor and lessee was lease-purchase agreement, not option agreement.

Affirmed.

Attorneys and Law Firms

****371** ***72** George C. Creal, Jr., Jonesboro, for appellant.

Harrison & Harrison, Stephen P. Harrison, Brunswick, for appellee.

Opinion

***68** MILLER, Judge.

The question on appeal is whether a certain equipment agreement is a lease purchase or a lease with an option to purchase agreement. As the agreement is ambiguous, we employ the applicable rules of construction to conclude that it is a lease-purchase agreement. Since evidence showed the purchase ****372** was accomplished, we affirm the trial court's refusal to award possession of the equipment to the lessor/seller.

Pursuant to an agreement drafted by Scott Hibbard, P.G.A., Inc. (PGA) leased an excavator from Hibbard for $4500 per month, payable in advance of each monthly rental period. The rental term commenced July 29, 1997, with a minimum term of one month. PGA's retention of the excavator beyond the first month extended the lease for each month Hibbard allowed PGA to retain the equipment. Hibbard could terminate the lease at any time following the first month. In typewritten "Additional Terms," the parties agreed: "Maximum rental period is 12 months. Purchase price of above equipment $108,000.00. Lease payments to go toward purchase price less 1% per month interest."

PGA made its first $4,500 payment on June 30 and took delivery of the excavator on July 29. PGA then made 25 timely monthly payments over the next 25 months, retaining the excavator without any objection from Hibbard throughout this time. Following the September 1999 payment, the amount remaining to pay off the $108,000 purchase price was $1,334. PGA nevertheless gave Hibbard an October rental check for $4,500, which bounced. Angry, Hibbard on November 6 attempted to repossess the excavator but failed. Two days later he mailed a letter to PGA terminating the lease and also filed to obtain a writ of possession on the excavator. On November 16 PGA tendered a $4,500 cashier's check to Hibbard, which he held pending the outcome of the litigation.

Finding that PGA had paid sufficient monies under the agreement to satisfy the purchase price, the magistrate court denied the writ of possession. Hibbard appealed to the State Court of Henry County and tried the matter in a bench trial. Following Hibbard's presentation of evidence, the state court judge also denied the writ of possession. Hibbard now appeals the state court ruling to this Court, enumerating four errors.

***69** 1. Three of Hibbard's enumerations of error relate to the construction of the contract and the application of the facts thereto. All three enumerations assume that the contract was a lease with an option to buy contract and contend that no evidence supported a finding that the option was ever exercised (whether orally, in writing, or by paying the full purchase price) prior to Hibbard's terminating the contract. A proper construction of the contract defeats these three enumerations.

"[T]he construction of a contract is a question of law for the court based on the intent of the parties as set forth in the contract...."[1] The court follows a three-step procedure in construing contract language: The trial court must first decide whether the contract language is ambiguous; if it is ambiguous, the trial court must then apply the applicable rules of construction (OCGA § 13–2–2); if after doing so the trial court determines that an ambiguity still remains, the jury must then resolve the ambiguity.[2] As this is a question of law, we review the three-step procedure de novo.[3]

The contract language here is ambiguous. The pre-printed terms of the lease provide that "[n]o title to the equipment shall be conveyed to Lessee by the terms of this Lease ..." and that the "lease is intended as a true lease." The typewritten "Additional Terms" set the maximum rental period at 12 months, announce the purchase price of the excavator to be $108,000, and credit the lease payments toward the purchase price less "1% per month interest." Thus, the printed terms for the most part appear to be a straightforward "true lease" agreement, but the typewritten "Additional Terms" give PGA the right to purchase the equipment for a set price to be paid by crediting portions of lease payments. The reference to interest ****373** implies that the price is seller-financed. Notably, the 12–month maximum rental period would not allow the entire amount of the purchase price to be paid off by the $4,500 monthly lease payments prior to the end of the 12 months, leaving unclear how the matter would be handled at the end of the 12 months. Also unclear is the status of the purchase rights if the lease were terminated earlier than the 12–month period, either as a matter of right or as a result of a default under the lease.

In addition to these ambiguities is the argument of Hibbard and the legal conclusion of the state court judge that the agreement is a lease with an option to buy agreement, even though the word ***70** "option" nowhere appears in the contract. The contract also contains no reference to an option exercise period, no language describing a method of exercising an option, etc. And not to be overlooked is that after the 12–month period had expired in July 1998, PGA continued to retain possession of the excavator, making regular monthly payments to Hibbard, who accepted them. When Hibbard in July or August 1998 asked PGA whether it intended to pay off the remainder of the purchase price in a lump sum, PGA responded that it wanted to simply continue paying under the set schedule, to which Hibbard did not object.

We hold the contract was ambiguous. Applying the relevant rules of contract construction, we are able to resolve the ambiguities and thus do not need to go to step three. Two applicable rules are that we construe a contract against its drafter[4] (here Hibbard) and that typewritten provisions prevail over printed provisions.[5] The typewritten provisions here specify a purchase price and describe how it is to be paid. Nothing in the contract requires any kind of option to be exercised nor any kind of notice to be given Hibbard in order for PGA to buy the excavator at the specified price, and we will not insert such terms into the contract so as to limit PGA's purchase rights.[6] The conflicting printed provision that no title shall be conveyed to PGA by the terms of the lease is construed to mean that the contract basically had two parts: the "lease" part setting forth the terms under which PGA leased the vehicle *pending* the full payment of the purchase price (which "lease" part did not convey title), and the "purchase" part setting forth the amount and method of paying the purchase price (which would convey title upon payment of the purchase price).

This was a classic "lease-purchase" contract. The lease part specified the conditions under which PGA could retain and use the excavator while title to the excavator resided in Hibbard. The terms of this lease portion did not purport to convey title of the excavator to PGA. After 12 months, this lease portion was to naturally expire and possession was to return to Hibbard unless PGA paid off the purchase price, which purchase price was calculated by crediting the lease payments as per a specified formula.

When these 12 months came and went, with PGA retaining possession and continuing to make the monthly $4,500 lease payments, then the conduct of the parties modified the contract so as to extend the lease portion, similar to the initial effect of PGA's retaining the ***71** excavator past the minimum rental term.[7] Thus, the terms of the original lease allowing the lease payments to be credited toward the purchase price continued to govern the relationship between the parties.[8] Similarly, Hibbard retained the right to terminate the lease at any time during this holdover period.

The second portion of the contract was the "purchase" portion, under which PGA had a ****374** contractual right to purchase the excavator for $108,000. Credited toward that purchase price were the lease payments as reduced by a one percent monthly interest charge on the outstanding purchase price. The continued payment of lease payments past the 12 months continued to reduce the purchase price as per the formula. Once the entire amount of the purchase price was paid, title to the excavator vested in PGA. Although Hibbard could terminate the lease at any time after the first month, no such termination clause purported to apply to the power to purchase the excavator for the specified price, and we will not insert such a term in a contract drafted by Hibbard.

In this framework we consider the facts as found by the state court judge and as reflected in the evidence construed in favor of the judgment.[9] Through October 28, 1999, PGA

was current in its lease payments, which by that time had reduced the purchase price of the excavator to $1,334. Since no rental payment was received by October 29, the lease was in default as per its terms. As title still resided in Hibbard, he had the right per the terms of the lease to remove the excavator from PGA's premises. And he had the right to terminate the lease portion of the contract, whether due to default or as an exercise of his absolute right to do so. He exercised this right of termination on November 8, when he sent a letter of termination to PGA. This, however, did not terminate PGA's right to purchase the excavator for the remaining $1334. When on November 16 PGA gave Hibbard a $4,500 cashier's check, this more than paid off the remaining amount due under the purchase portion of the contract, and at that point title to the excavator vested in PGA, thus destroying any right of Hibbard to repossess the equipment.

Evidence and a proper construction of the contract supported the state court's denial of the writ of possession.

2. Hibbard's fourth enumeration contends that the state court erred in denying Hibbard's motion for new trial based on newly discovered evidence. Specifically, Hibbard claims that he presented evidence to the state court that post-judgment PGA stopped payment on the $4,500 cashier's check and thus never paid the remaining $1,334.

Hibbard failed to preserve the matter for review in that he has not included this new evidence in the record transmitted to this Court. Although his motion for new trial brief purported to attach the evidence to the brief, the record contains no such attachment. Nor does Hibbard include in the record a transcript from the hearing on the motion for new trial, even though the state court relied on that evidentiary hearing in ruling to deny the motion for a new trial. "As the record contains no transcript of the hearing held on appellant's motion for new trial, appellant has failed to carry his burden of showing error in the trial court's ruling, and we must presume that it was correct."[10]

Judgment affirmed.

ANDREWS, P.J., and ELDRIDGE, J., concur.

All Citations

251 Ga.App. 68, 553 S.E.2d 371, 01 FCDR 2515

Footnotes

1 *Deep Six v. Abernathy,* 246 Ga.App. 71, 73(2), 538 S.E.2d 886 (2000); see OCGA §§ 13–2–1; 13–2–3.

2 *Deep Six,* supra, 246 Ga.App. at 73(2), 538 S.E.2d 886, quoting *Travelers Ins. Co. v. Blakey,* 180 Ga.App. 520, 349 S.E.2d 474 (1986).

3 *Deep Six,* supra, 246 Ga.App. at 73(2), 538 S.E.2d 886.

4 *Asian Square Partners v. Ly,* 238 Ga.App. 165, 167(1), 518 S.E.2d 166 (1999).

5 Id.

6 Cf. *Wilbanks v. Mai,* 232 Ga.App. 198, 199, 501 S.E.2d 513 (1998).

7 See OCGA § 13–4–4. Cf. *Citizens Oil Co. v. Head,* 201 Ga. 542, 543(2), 40 S.E.2d 559 (1946) (continuance of possession after expiration of the original term effects an extension of the original lease).

8 Cf. *Colonial Self Storage & c. v. Concord Properties,* 147 Ga.App. 493, 494(1), 249 S.E.2d 310 (1978) (holdover tenant holds premises subject to general terms and conditions of the lease).

9 See *Emory Rent–All v. Lisle Assoc. Gen. Contractors, Inc.,* 212 Ga.App. 516(1), 441 S.E.2d 926 (1994) (construe evidence to support court's findings against plaintiff in bench trial following presentation of plaintiff's case).

10 (Citation omitted.) *Carpenter v. Parsons,* 186 Ga.App. 3, 5(4), 366 S.E.2d 367 (1988).

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87 S.Ct. 408
Supreme Court of the United States

James R. HOFFA, Petitioner,
v.
UNITED STATES.
Thomas Ewing PARKS, Petitioner,
v.
UNITED STATES.
Larry CAMPBELL, Petitioner,
v.
UNITED STATES.
Ewing KING, Petitioner,
v.
UNITED STATES.

Nos. 32—35.
|
Argued Oct. 13, 1966.
|
Decided Dec. 12, 1966.

Synopsis
Defendants were convicted of attempting to bribe members of jury in prosecution for violation of the Taft-Hartley Act. The United States District Court entered judgment and the defendants appealed. The Court of Appeals, 349 F.2d 20, affirmed the judgment, and the defendants brought certiorari. The Supreme Court, Mr. Justice Stewart, held that use of testimony of government informer concerning conversations between defendant and informer or in his presence did not violate Fourth, Fifth and Sixth Amendment rights.

Affirmed.

Mr. Chief Justice Warren dissented.

For concurring opinion of Mr. Justice Douglas see Osborn v. U.S., 87 S.Ct. 439.

Attorneys and Law Firms

****409** ***294** Joseph A. Fanelli, Washington, D.C., for petitioners.

Fred M. Vinson, Jr., and Nathan Lewin, Washington, D.C., for respondent.

Opinion

Mr. Justice STEWART delivered the opinion of the Court.

Over a period of several weeks in the late autumn of 1962 there took place in a federal court in Nashville, Tennessee, a trial by jury in which James Hoffa was charged with violating a provision of the Taft-Hartley Act. That trial, known in the present record as the Test Fleet trial, ended with a hung jury. The petitioners now before us—James Hoffa, Thomas Parks, Larry Campbell, and Ewing King—were tried and convicted ***295** in 1964 for endeavoring to bribe members of that ****410** jury.[1] The convictions were affirmed by the Court of Appeals.[2] A substantial element in the Government's proof that led to the convictions of these four petitioners was contributed by a witness named Edward Partin, who testified to several incriminating statements which he said petitioners Hoffa and King had made in his presence during the course of the Test Fleet trial. Our grant of certiorari was limited to the single issue of whether the Government's use in this case of evidence supplied by Partin operated to invalidate these convictions. 382 U.S. 1024, 86 S.Ct. 645, 15 L.Ed.2d 538.

The specific question before us, as framed by counsel for the petitioners, is this:
'Whether evidence obtained by the Government by means of deceptively placing a secret informer in the quarters and councils of a defendant during one criminal trial so violates the defendant's Fourth, Fifth and Sixth Amendment rights that suppression of such evidence is required in a subsequent trial of the same defendant on a different charge.'

At the threshold the Government takes issue with the way this question is worded, refusing to concede that it "placed' the informer anywhere, much less that it did so 'deceptively." In the view we take of the matter, however, a resolution of this verbal controversy is unnecessary to a decision of the constitutional issues before us. The basic facts are clear enough, and a lengthy discussion of the detailed minutiae to which a large portion of the briefs and oral arguments was addressed would serve only to divert attention from the real issues before us.

***296** The controlling facts can be briefly stated. The Test Fleet trial, in which James Hoffa was the sole individual defendant, was in progress between October 22 and

December 23, 1962, in Nashville, Tennessee. James Hoffa was president of the International Brotherhood of Teamsters. During the course of the trial he occupied a three-room suite in the Andrew Jackson Hotel in Nashville. One of his constant companions throughout the trial was the petitioner King, president of the Nashville local of the Teamsters Union. Edward Partin, a resident of Baton Rouge, Louisiana, and a local Teamsters Union official there, made repeated visits to Nashville during the period of the trial. On these visits he frequented the Hoffa hotel suite, and was continually in the company of Hoffa and his associates, including King, in and around the hotel suite, the hotel lobby, the courthouse, and elsewhere in Nashville. During this period Partin made frequent reports to a federal agent named Sheridan concerning conversations he said Hoffa and King had had with him and with each other, disclosing endeavors to bribe members of the Test Fleet jury. Partin's reports and his subsequent testimony at the petitioners' trial unquestionably contributed, directly or indirectly, to the convictions of all four of the petitioners.[3]

**411 *297 The chain of circumstances which led Partin to be in Nashville during the Test Fleet trial extended back at least to September of 1962. At that time Partin was in jail in Baton Rouge on a state criminal charge. He was *298 also under a federal indictment for embezzling union funds, and other indictments for state offenses were pending against him. Between that time and Partin's initial visit to Nashville on October 22 he was released on bail on the state criminal charge, and proceedings under the federal indictment were postponed. On October 8, Partin telephoned Hoffa in Washington, D.C., to discuss local union matters and Partin's difficulties with the authorities. In the course of this conversation Partin asked if he could see Hoffa to confer about these problems, and Hoffa acquiesced. Partin again called Hoffa on October 18 and arranged to meet him in Nashville. During this period Partin also consulted on several occasions with federal law enforcement agents, who told him that Hoffa might attempt to tamper with the Test Fleet jury, and asked him to be on the lookout in Nashville for such attempts and to report to the federal authorities any evidence of wrongdoing that he discovered. Partin agreed to do so.

After the Test Fleet trial was completed, Partin's wife received four monthly installment payments of $300 from government funds, and the state and federal charges against Partin were either dropped or not actively pursued.

Reviewing these circumstances in detail, the Government insists the fair inference is that Partin went to Nashville on his own initiative to discuss union business and his own problems with Hoffa, that Partin ultimately cooperated **412 closely with federal authorities only after he discovered evidence of jury tampering in the Test Fleet trial, that the payments to Partin's wife were simply in partial reimbursement of Partin's subsequent out-of-pocket expenses, and that the failure to prosecute Partin on the state and federal charges had no necessary connection with his services as an informer. The findings of the trial court support this version of the *299 facts,[4] and these findings were accepted by the Court of Appeals as 'supported by substantial evidence.' 349 F.2d at 36. But whether or not the Government 'placed' Partin with Hoffa in Nashville during the Test Fleet trial, we proceed upon the premise that Partin was a government informer from the time he first arrived in Nashville on October 22, and that the Government compensated him for his services as such. It is upon that premise that we consider the constitutional issues presented.

Before turning to those issues we mention an additional preliminary contention of the Government. The *300 petitioner Hoffa was the only individual defendant in the Test Fleet case, and Partin had conversations during the Test Fleet trial only with him and with the petitioner King. So far as appears, Partin never saw either of the other two petitioners during that period. Consequently, the Government argues that, of the four petitioners, only Hoffa has standing to raise a claim that his Sixth Amendment right to counsel in the Test Fleet trial was impaired, and only he and King have standing with respect to the other constitutional claims. Cf. Wong Sun v. United States, 371 U.S. 471, 487—488, 491—492, 83 S.Ct. 407, 417—418, 419—420, 9 L.Ed.2d 441; Jones v. United States, 362 U.S. 257, 259—267, 80 S.Ct. 725, 730—734, 4 L.Ed.2d 697. It is clear, on the other hand, that Partin's reports to the agent Sheridan uncovered leads that made possible the development of evidence against petitioners Parks and Campbell. But we need not pursue the nuances of these 'standing' questions, because it is evident in any event that none of the petitioners can prevail unless the petitioner Hoffa prevails. For that reason, the ensuing discussion is confined to the claims of the petitioner Hoffa (hereinafter petitioner), all of which he clearly has standing to invoke.

I.

It is contended that only by violating the petitioner's rights under the Fourth Amendment was Partin able to hear the petitioner's incriminating statements in **413 the hotel suite, and that Partin's testimony was therefore inadmissible under the exclusionary rule of Weeks v. United States, 232

U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652. The argument is that Partin's failure to disclose his role as a government informer vitiated the consent that the petitioner gave to Partin's repeated entries into the suite, and that by listening to the petitioner's statements Partin conducted an illegal 'search' for verbal evidence.

***301** The preliminary steps of this argument are on solid ground. A hotel room can clearly be the object of Fourth Amendment protection as much as a home or an office. United States v. Jeffers, 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59. The Fourth Amendment can certainly be violated by guileful as well as by forcible intrusions into a constitutionally protected area. Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647. And the protections of the Fourth Amendment are surely not limited to tangibles, but can extend as well to oral statements. Silverman v. United States, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734.

Where the argument falls is in its misapprehension of the fundamental nature and scope of Fourth Amendment protection. What the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile.[5] There he is protected from unwarranted governmental intrusion. And when he puts something in his filing cabinet, in his desk drawer, or in his pocket, he has the right to know it will be secure from an unreasonable search or an unreasonable seizure. So it was that the Fourth Amendment could not tolerate the warrantless search of the hotel room in Jeffers, the purloining of the petitioner's private papers in Gouled, or the surreptitious electronic surveillance in Silverman. Countless other cases which have come to this Court over the years have involved a myriad of differing factual contexts in which the protections of the Fourth Amendment have been appropriately invoked. No doubt the future will bring countless others. By nothing we say here do we either foresee or foreclose factual ***302** situations to which the Fourth Amendment may be applicable.

In the present case, however, it is evident that no interest legitimately protected by the Fourth Amendment is involved. It is obvious that the petitioner was not relying on the security of his hotel suite when he made the incriminating statements to Partin or in Partin's presence. Partin did not enter the suite by force or by stealth. He was not a surreptitious eavesdropper. Partin was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence. The petitioner, in a word, was not relying on the security of the hotel room; he was relying upon his misplaced confidence that Partin would not reveal his wrongdoing.[6] As counsel for the petitioner himself points out, some of the communications with Partin did not take place in the suite at all, but in the 'hall of the hotel,' in the 'Andrew Jackson Hotel lobby,' and 'at the courthouse.'

Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. Indeed, the Court unanimously rejected that very contention less than four years ago in ****414** Lopez v. United States, 373 US. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462. In that case the petitioner had been convicted of attempted bribery of an internal revenue agent named Davis. The Court was divided with regard to the admissibility in evidence of a surreptitious electronic recording of an incriminating conversation Lopez had had in his private office with Davis. But there was no dissent from the view that testimony ***303** about the conversation by Davis himself was clearly admissible.

As the Court put it, 'Davis was not guilty of an unlawful invasion of petitioner's office simply because his apparent willingness to accept a bribe was not real. Compare Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441. He was in the office with petitioner's consent, and while there he did not violate the privacy of the office by seizing something surreptitiously without petitioner's knowledge. Compare Gouled v. United States, supra. The only evidence obtained consisted of statements made by Lopez to Davis, statements which Lopez knew full well could be used against him by Davis if he wished. * * *' 373 U.S. at 438, 83 S.Ct. at 1387, 10 L.Ed.2d 462. In the words of the dissenting opinion in Lopez, 'The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak.' Id., 373 U.S. at 465, 83 S.Ct. at 1402, 10 L.Ed.2d 462. See also Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312.

Adhering to these views, we hold that no right protected by the Fourth Amendment was violated in the present case.

II.

The petitioner argues that his right under the Fifth Amendment not to 'be compelled in any criminal case to be a witness against himself' was violated by the admission of Partin's testimony. The claim is without merit.

There have been sharply differing views within the Court as to the ultimate reach of the Fifth Amendment right against compulsory self-incrimination. Some of those differences were aired last Term in Miranda v. State of Arizona, 384 U.S. 436, 499, 504, 526, 86 S.Ct. 1602, 1640, 1643, 1654, 16 L.Ed.2d 694. But since at least as long ago as 1807, when Chief Justice Marshall first ***304** gave attention to the matter in the trial of Aaron Burr,[7] all have agreed that a necessary element of compulsory self-incrimination is some kind of compulsion. Thus, in the Miranda case, dealing with the Fifth Amendment's impact upon police interrogation of persons in custody, the Court predicated its decision upon the conclusion 'that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. * * *' 384 U.S., at 467, 86 S.Ct. at 1624, 16 L.Ed.2d 694.

In the present case no claim has been or could be made that the petitioner's incriminating statements were the product of any sort of coercion, legal or factual. The petitioner's conversations with Partin and in Partin's presence were wholly voluntary. For that reason, if for no other, it is clear that no right protected by the Fifth Amendment privilege ****415** against compulsory self-incrimination was violated in this case.

III.

The petitioner makes two separate claims under the Sixth Amendment, and we give them separate consideration.

A.

During the course of the Test Fleet trial the petitioner's lawyers used his suite as a place to confer with him and with each other, to interview witnesses, and to plan the following day's trial strategy. Therefore, ***305** argues the petitioner, Partin's presence in and around the suite violated the petitioner's Sixth Amendment right to counsel, because an essential ingredient thereof is the right of a defendant and his counsel to prepare for trial without intrusion upon their confidential relationship by an agent of the government, the defendant's trial adversary. Since Partin's presence in the suite thus violated the Sixth Amendment, the argument continues, any evidence acquired by reason of his presence there was constitutionally tainted and therefore inadmissible against the petitioner in this case. We reject this argument.

In the first place, it is far from clear to what extent Partin was present at conversations or conferences of the petitioner's counsel. Several of the petitioner's Test Fleet lawyers testified at the hearing on the motion to suppress Partin's testimony in the present case. Most of them said that Partin had heard or had been in a position to hear at least some of the lawyers' discussions during the Test Fleet trial. On the other hand, Partin himself testified that the lawyers 'would move you out' when they wanted to discuss the case, and denied that he made any effort to 'get into or be present at any conversations between lawyers or anything of that sort,' other than engaging in such banalities as 'how things looked,' or 'how does it look?' He said he might have heard some of the lawyers' conversations, but he didn't know what they were talking about, 'because I wasn't interested in what they had to say about the case.' He testified that he did not report any of the lawyers' conversations to Sheridan, because the latter 'wasn't interested in what the attorneys said.' Partin's testimony was largely confirmed by Sheridan. Sheridan did testify, however, to one occasion when Partin told him about a group of prospective character witnesses being interviewed in the suite by one of the petitioner's lawyers, who 'was going ***306** over' some written 'questions and answers' with them. This information was evidently relayed by Sheridan to the chief government attorney at the Test Fleet trial.[8]

The District Court in the present case apparently credited Partin's testimony, finding 'there has been no interference by the government with any attorneyclient relationship of any defendant in this case.' The Court of Appeals accepted this finding. 349 F.2d at 36. In view of Sheridan's testimony about Partin's report of the interviews with the prospective character witnesses, however, we proceed here on the hypothesis that Partin did observe and report to Sheridan at least some of the activities of defense counsel in the Test Fleet trial.

****416** The proposition that a surreptitious invasion by a government agent into the legal camp of the defense may violate the protection of the Sixth Amendment has found expression in two cases decided by the Court of Appeals for theDistrict of Columbia Circuit, Caldwell v. United States, 92 U.S.App.D.C. 355, 205 F.2d 879, and Coplon v. United

States, 89 U.S.App.D.C. 103, 191 F.2d 749. Both of those cases dealt with government intrusion of the grossest kind upon the confidential relationship between the defendant and his counsel. In Coplon, the ***307** defendant alleged that government agents deliberately intercepted telephone consultations between the defendant and her lawyer before and during trial. In Caldwell, the agent, '(i)n his dual capacity as defense assistant and Government agent * * * gained free access to the planning of the defense. * * * Neither his dealings with the defense nor his reports to the prosecution were limited to the proposed unlawful acts of the defense: they covered many matters connected with the impending trial.' 92 U.S.App.D.C., at 356, 205 F.2d at 880.

We may assume that the Coplon and Caldwell cases were rightly decided, and further assume, without deciding, that the Government's activities during the Test Fleet trial were sufficiently similar to what went on in Coplon and Caldwell to invoke the rule of those decisions. Consequently, if the Test Fleet trial had resulted in a conviction instead of a hung jury, the conviction would presumptively have been set aside as constitutionally defective. Cf. Black v. United States, 385 U.S. 26, 87 S.Ct. 190, 17 L.Ed.2d 26.

But a holding that it follows from this presumption that the petitioner's conviction in the present case should be set aside would be both unprecedented and irrational. In Coplon and in Caldwell, the Court of Appeals held that the Government's intrusion upon the defendant's relationship with his lawyer 'invalidates the trial at which it occurred.' 89 U.S.App.D.C., at 114, 191 F.2d at 759; 92 U.S.App.D.C., at 357, 205 F.2d at 881. In both of those cases the court directed a new trial,[9] and the second trial in Caldwell resulted in a conviction which this Court declined to review. 95 U.S.App.D.C. 35, 218 F.2d 370; 349 U.S. 930, 75 S.Ct. 773, 99 L.Ed. 1260. The argument here, therefore, goes far beyond anything decided in Caldwell or in Coplon. For if the petitioner's argument were accepted, ***308** not only could there have been no new conviction on the existing charges in Caldwell, but not even a conviction on other and different charges against the same defendant.

It is possible to imagine a case in which the prosecution might so pervasively insinuate itself into the councils of the defense as to make a new trial on the same charges impermissible under the Sixth Amendment.[10] But even if it were further arguable that a situation could be hypothesized in which the Government's previous activities in undermining a defendant's Sixth Amendment rights at one trial would make evidence obtained thereby inadmissible in a different trial on other charges, the case now before us does not remotely approach such a situation.

This is so because of the clinching basic fact in the present case that none of the petitioner's incriminating statements which Partin heard were made in the presence of counsel, in the hearing of counsel, or in connection in any way with the legitimate defense of the Test Fleet prosecution. The petitioner's statements related to the commission of a quite separate ****417** offense—attempted bribery of jurors—and the statements were made to Partin out of the presence of any lawyers.

Even assuming, therefore, as we have, that there might have been a Sixth Amendment violation which might have made invalid a conviction, if there had been one, in the Test Fleet case, the evidence supplied by Partin in the present case was in no sense the 'fruit' of any such violation. In Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441, a case involving exclusion of evidence under ***309** the Fourth Amendment, the Court stated that 'the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959).' 371 U.S. at 488, 83 S.Ct. at 417, 9 L.Ed.2d 441.

Even upon the premise that this same strict standard of excludability should apply under the Sixth Amendment—a question we need not decide—it is clear that Partin's evidence in this case was not the consequence of any 'exploitation' of a Sixth Amendment violation. The petitioner's incriminating statements to which Partin testified in this case were totally unrelated in both time and subject matter to any assumed intrusion by Partin into the conferences of the petitioner's counsel in the Test Fleet trial. These incriminating statements, all of them made out of the presence or hearing of any of the petitioner's counsel, embodied the very antithesis of any legitimate defense in the Test Fleet trial.

B.

The petitioner's second argument under the Sixth Amendment needs no extended discussion. That argument goes as follows: Not later than October 25, 1962, the Government had sufficient ground for taking the petitioner into custody and charging him with endeavors to tamper with the Test Fleet jury. Had the Government done so, it could not have continued to question the petitioner without

observance of his Sixth Amendment right to counsel. Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246; Escobedo v. State of Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977. Therefore, the argument concludes, evidence of statements ***310** made by the petitioner subsequent to October 25 was inadmissible, because the Government acquired that evidence only by flouting the petitioner's Sixth Amendment right to counsel.

Nothing in Massiah, in Escobedo, or in any other case that has come to our attention, even remotely suggests this novel and paradoxical constitutional doctrine, and we decline to adopt it now. There is no constitutional right to be arrested.[11] The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction.

IV.

Finally, the petitioner claims that even if there was no violation—'as separately measured by each such Amendment'—of the Fourth Amendment, the compulsory self-incrimination clause of the Fifth Amendment, or of the ****418** Sixth Amendment in this case, the judgment of conviction must nonetheless be reversed. The argument is based upon the Due Process Clause of the Fifth Amendment. The 'totality' of the Government's conduct during the Test Fleet trial operated, it is said, to "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples ***311** even toward those charged with the most heinous offenses' (Rochin v. (People of) California, 342 U.S. 165, 169 (72 S.Ct. 205, 208, 96 L.Ed. 183)).'

The argument boils down to a general attack upon the use of a government informer as 'a shabby thing in any case,' and to the claim that in the circumstances of this particular case the risk that Partin's testimony might be perjurious was very high. Insofar as the general attack upon the use of informers is based upon historic 'notions' of 'English-speaking peoples,' it is without historical foundation. In the words of Judge Learned Hand, 'Courts have countenanced the use of informers from time immemorial; in cases of conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely upon them or upon accomplices because the criminals will almost certainly proceed covertly. * * *' United States v. Dennis, 2 Cir., 183 F.2d 201, at 224.

This is not to say that a secret government informer is to the slightest degree more free from all relevant constitutional restrictions than is any other government agent. See Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246. It is to say that the use of secret informers is not per se unconstitutional.

The petitioner is quite correct in the contention that Partin, perhaps even more than most informers, may have had motives to lie. But it does not follow that his testimony was untrue, nor does it follow that his testimony was constitutionally inadmissible. The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury. At the trial of this case, Partin was subjected to rigorous cross-examination, and the extent and nature of his dealings with federal and state authorities were insistently explored.[12] ***312** The trial judge instructed the jury, both specifically[13] and generally,[14] with regard to assessing ****419** Partin's credibility. The Constitution does not require us to upset the jury's verdict.

Affirmed.

Mr. Justice WHITE and Mr. Justice FORTAS took no part in the consideration or decision of these cases.

***313** Mr. Chief Justice WARREN, dissenting.

I cannot agree either with the opinion of the Court affirming these convictions or with the separate opinions of Mr. Justice CLARK and Mr. Justice DOUGLAS to the effect that the writs of certiorari were improvidently granted.

I.

As to the latter, it seems to me that the finding of the District Court which so troubles my Brothers CLARK and DOUGLAS is in fact no roadblock to our review of the important questions presented by the petitions. It has long

been settled that this Court will not be bound by the findings of lower courts when it is alleged that fundamental constitutional rights have been violated. Jacobellis v. State of Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964); Haynes v. State of Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963); Watts v. State of Indiana, 338 U.S. 49, 69 S.Ct. 1347, 93 L.Ed. 1801 (1949); Hooven & Allison Co. v. Evatt, 324 U.S. 652, 65 S.Ct. 870, 89 L.Ed. 1252 (1945); Norris v. State of Alabama, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1935). We have said, 'The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate.' Napue v. People of State of Illinois, 360 U.S. 264, 271, 79 S.Ct. 1173, 1178, 3 L.Ed.2d 1217 (1959).

The finding in question here is not one which the District Judge arrived at by resolving contradictory testimony on the basis of credibility. Findings of fact based on crediting the testimony of some witnesses and discrediting the testimony of others may properly be accorded some insulation from appellate review because of the superior opportunity of the trial judge to observe the demeanor of the witnesses. In this case, however, the testimony concerning the circumstances surrounding Partin's entry into Hoffa's councils was not substantially ***314** in dispute. While those circumstances are set forth in greater detail infra, a brief summary discloses that Partin, after discussing Hoffa with federal agents and learning of their intense and mutually beneficial interest, successfully solicited an invitation to meet with Hoffa. Partin's release from jail was assisted by the federal agents, and he was compensated in a financial sense as well; in return, he kept the federal agents fully informed of all that occurred from the outset of his contact with Hoffa.

Surely the only reasonable construction of these facts is that Partin was acting as a paid federal informer when he traveled to Nashville and attached himself to Hoffa. And the fact that Hoffa on Partin's urging agreed to a meeting in Nashville is not inconsistent with this conclusion. An invasion of basic rights made possible by prevailing upon friendship with the victim is no less proscribed than an invasion accomplished by force. See Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964); Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647 (1921).

Moreover, at the time we granted the petitions for certiorari in these cases, we knew exactly what we know now. The findings of the District Court were in the record then before us, and no new facts to change the situation have since come to light. In short, there is nothing which should prevent us from facing up to the important questions presented and determining ****420** whether the convictions can stand either in light of the Constitution or under our power of supervision over the administration of justice in federal courts.

II.

For me, this case and two others decided today (Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312, and Osborn v. United States, 385 U.S. 323, 87 S.Ct. 429, 439, 17 L.Ed.2d 394) present for comparison of different facets of the Government's use of informers and undercover ***315** agents. In two cases of the set I have voted to sustain the activity of the Government. But in this case I find it impossible to do so because the nature of the official practices evidenced here is offensive to the fair administration of justice in federal courts.

At this late date in the annals of law enforcement, it seems to me that we cannot say either that every use of informers and undercover agents is proper or, on the other hand, that no uses are. There are some situations where the law could not adequately be enforced without the employment of some guile or misrepresentation of identity. A law enforcement officer performing his official duties cannot be required always to be in uniform or to wear his badge of authority on the lapel of his civilian clothing. Nor need he be required in all situations to proclaim himself an arm of the law. It blinks the realities of sophisticated, modern-day criminal activity and legitimate law enforcement practices to argue the contrary. However, one of the important duties of this Court is to give careful scrutiny to practices of government agents when they are challenged in cases before us, in order to insure that the protections of the Constitution are respected and to maintain the integrity of federal law enforcement.

I find these three cases which we decide today quite distinguishable from each other in this regard. Although all three involve what may be termed official deception in order to gather evidence for criminal prosecutions, the police practices reviewed are essentially different. The simplest of the three for me is Lewis, wherein a federal narcotics agent, having reason to believe that Lewis was a trafficker in narcotics, called him on the telephone using an assumed name and told him that a mutual friend had said Lewis sold narcotics. Lewis affirmed the nature of his occupation and invited the agent to his place of business which, as an incidental matter, turned out also ***316** to be his home. The

agent went there, purchased narcotics and arranged for future dealings to occur at the same place but on a reduced-price basis. Later, a second purchase of narcotics was executed by the agent in the same manner.

In Lewis, then, there was no intrusion upon the privacy of the household. Nothing was heard, seen, or taken by the agent that was not a necessary part of the business transactions between him and Lewis. The purpose of the agent's visits was to buy narcotics from Lewis, and the details of their business dealings were all that concerned him. Lewis simply is not a case where an undercover agent invaded a place used both as a business location and a home and then, overtly or covertly, either seized something or observed or heard something unrelated to the business purpose of his visit. As we said in affirming Lewis' conviction, the principles elaborated in Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647 (1921), would protect against such overreaching. We do not endorse unconscionable activities or the use of an unreliable informer when we sustain the undercover work of the agent responsible for Lewis' conviction. Compare Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958).

In the Osborn case, the petitioner employed Robert Vick, a police officer of Nashville, Tennessee, to investigate persons who were members of a panel from which a federal criminal jury was to be selected in a prior trial of James Hoffa ****421** in that city. Although he knew Vick's loyalty was due the police department, when he learned that Vick had a cousin on the panel he urged Vick to offer the cousin $10,000 in return for the latter's promise to vote for acquittal if selected to sit on the petit jury. Vick informed federal authorities of this proposal, and made an affidavit to that effect for the judge who was to preside at the Hoffa trial. The judge, in order to determine the truthfulness of the affidavit and to protect ***317** the integrity of the trial, authorized the equipping of Vick with a recording device to be used in further conversations with petitioner. I see nothing wrong with the Government's thus verifying the truthfulness of the informer and protecting his credibility in this fashion.[1] Lopez v. United States, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963). This decision in no sense supports a conclusion that unbridled use of electronic recording equipment is to be permitted in searching out crime. And it does not lend judicial sanction to wiretapping, electronic 'bugging' or any of the other questionable spying practices that are used to invade privacy and that appear to be increasingly prevalent in our country today. Cf. Silverman v. United States, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961); Black v. United States, 385 U.S. 26, 87 S.Ct. 190, 17 L.Ed.2d 26 (1966); United States v. Schipani, 362 F.2d 825, cert. denied 385 U.S. 934, 87 S.Ct. 293, 17 L.Ed.2d 217, rehearing granted, judgment vacated, and case remanded on suggestion of Solicitor General, 385 U.S. 372, 87 S.Ct. 533, 17 L.Ed.2d 428.

But I consider both Lewis and Osborn to be materially, even fundamentally, different from this Hoffa case. Here, Edward Partin, a jailbird languishing in a Louisiana jail under indictments for such state and federal crimes as embezzlement, kidnapping, and manslaughter (and soon to be charged with perjury and assault), contacted federal authorities and told them he was willing to become, and would be useful as, an informer against Hoffa who was then about to be tried in the Test Fleet case. A motive for his doing this is immediately apparent—namely, his strong desire to work his way out of jail and out of his various legal entanglements with the ***318** State and Federal Governments.[2] And it is interesting ****422** to note that, if this was his motive, he has been uniquely successful in satisfying it. In the four years since he first volunteered to be an informer against Hoffa he has not been prosecuted on any of the serious federal charges for which he was at that time jailed, and the state charges have apparently vanished into thin air.

Shortly after Partin made contact with the federal authorities and told them of his position in the Baton ***319** Rouge Local of the Teamsters Union and of his acquaintance with Hoffa, his bail was suddenly reduced from $50,000 to $5,000 and he was released from jail. He immediately telephoned Hoffa, who was then in New Jersey, and, by collaborating with a state law enforcement official, surreptitiously made a tape recording of the conversation. A copy of the recording was furnished to federal authorities. Again on a pretext of wanting to talk with Hoffa regarding Partin's legal difficulties, Partin telephoned Hoffa a few weeks later and succeeded in making a date to meet in Nashville where Hoffa and his attorneys were then preparing for the Test Fleet trial. Unknown to Hoffa, this call was also recorded and again federal authorities were informed as to the details.

Upon his arrival in Nashville, Partin manifested his 'friendship' and made himself useful to Hoffa, thereby worming his way into Hoffa's hotel suite and becoming part and parcel of Hoffa's entourage. As the 'faithful' servant and factotum of the defense camp which he became, he was in a position to overhear conversations not directed to him, many of which were between attorneys and either their or prospective defense witnesses. Pursuant to the general instructions he received from federal authorities to report

'any attempts at witness intimidation or tampering with the jury,' anything illegal,' or even 'anything of interest,' Part in became the equivalent of a bugging device which moved with Hoffa wherever he went. Everything Partin saw or heard was reported to federal authorities and much of it was ultimately the subject matter of his testimony in this case. For his services he was well paid by the Government, both through devious and secret support payments to his wife and, it may be inferred, by executed promises not to pursue the indictments under which he was charged at the time he became an informer.

***320** This type of informer and the uses to which he was put in this case evidence a serious potential for undermining the integrity of the truth-finding process in the federal courts. Given the incentives and background of Partin, no conviction should be allowed to stand when based heavily on his testimony. And that is exactly the quicksand upon which these convictions rest, because without Partin, who was the principal government witness, there would probably have been no convictions here. Thus, although petitioners make their main arguments on constitutional grounds and raise serious Fourth and Sixth Amendment questions, it should not even be necessary for the Court to reach those questions. For the affront to the quality and fairness of federal law enforcement which this case presents is sufficient to require an exercise of our supervisory powers. As we said in ordering a new trial in Mesarosh v. United States, 352 U.S. 1, 14, 77 S.Ct. 1, 8, 1 L.Ed.2d 1 (1956), a federal case involving the testimony of an unsavory informer who, the Government admitted, had committed perjury in other cases:
'This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal ****423** courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.

'The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them.'

See also McNabb v. United States, 318 U.S. 332, 341, 63 S.Ct. 608, 613, 87 L.Ed. 819 (1943).

I do not say that the Government may never use as a witness a person of dubious or even bad character. In performing its duty to prosecute crime the Government must take the witnesses as it finds them. They may ***321** be persons of good, bad, or doubtful credibility, but their testimony may be the only way to establish the facts, leaving it to the jury to determine their credibility. In this case, however, we have a totally different situation. Here the Government reaches into the jailhouse to employ a man who was himself facing indictments far more serious (and later including one for perjury) than the one confronting the man against whom he offered to inform. It employed him not for the purpose of testifying to something that had already happened, but rather for the purpose of infiltration to see if crimes would in the future be committed. The Government in its zeal even assisted him in gaining a position from which he could be a witness to the confidential relationship of attorney and client engaged in the preparation of a criminal defense. And, for the dubious evidence thus obtained, the Government paid an enormous price. Certainly if a criminal defendant insinuated his informer into the prosecution's camp in this manner he would be guilty of obstructing justice. I cannot agree that what happened in this case is in keeping with the standards of justice in our federal system and I must, therefore, dissent.

Mr. Justice CLARK, joined by Mr. Justice DOUGLAS.

I would dismiss the writs of certiorari as improvidently granted.

The writs of certiorari granted by the Court in these cases are limited to the following question:
'Whether evidence obtained by the Government by means of deceptively placing a secret informer in the quarters and councils of a defendant during one criminal trial so violates the defendant's Fourth, Fifth and Sixth Amendment rights that suppression of such evidence is required in a subsequent trial of the same defendant on a different charge.'

***322** My examination of the record reveals that at the hearing on petitioner's motion to suppress the evidence obtained by the informer, Partin, the District Judge found that 'the government did not place this witness Mr. Partin in the defendants' midst * * * rather that he was knowingly and voluntarily placed in their midst by one of the defendants (Hoffa).' This specific finding was approved by the Court of Appeals as being 'supported by substantial evidence and * * * not clearly erroneous.' 349 F.2d at 36. No attack is made here on the findings.

It has long been the rule of this Court that it 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.' Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275, 69 S.Ct. 535, 538, 93 L.Ed. 672 (1949).

My careful examination of the record shows that there is a choice here between two permissible views as to the weight of the evidence. The District Judge found the weight of the evidence to be with the Government and the Court of Appeals has approved his finding. I cannot say on ****424** this record that it is clearly erroneous[*] United States v. Yellow Cab Co., 338 U.S. 338, 342, 70 S.Ct. 177, 179, 94 L.Ed. 150 (1949).

In the light of this finding, by which we are bound, there is no issue before us for decision since no evidence was 'obtained by the Government by means of deceptively placing a secret informer in the quarters and councils of' petitioner Hoffa.

I would therefore dismiss the writs as improvidently granted.

All Citations

385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374

Footnotes

1 Petitioners Hoffa, Parks, and Campbell were convicted under 18 U.S.C. s 1503 for endeavoring corruptly to influence Test Fleet juror Gratin Fields. Petitioners Hoffa and King were convicted of a similar offense involving Test Fleet juror Mrs. James M. Paschal.

2 349 F.2d 20.

3 Partin testified at the trial of this case that petitioners Hoffa and King had made the following statements during the course of the Test Fleet trial:

On October 22, the day Partin first arrived in Nashville, King told him that a meeting had been 'set up on the jury that night.' That evening Hoffa told Partin that he wanted Partin to stay in Nashville in order to call on some people. Hoffa explained 'that they was going to get to one juror or try to get to a few scattered jurors and take their chances.' The next day Partin was told by Hoffa that Hoffa might want him 'to pass something for him.' As Hoffa said this, he hit his rear pocket with his hand. On October 25, the day after Test Fleet juror James Tippens had reported to the trial judge that he had been approached with a bribe offer, Partin asked Hoffa about his wanting Partin to 'pass something.' Hoffa replied, 'The dirty bastards went in and told the Judge that his neighbor had offered him $10,000,' and added, 'We are going to have to lay low for a few days.' King told Partin on October 26 that he intended to influence a female juror, Mrs. Paschal, in Hoffa's favor, and added that the juror and her husband, a highway patrolman, 'loved money, and $10,000.00 (is) a lot of money.' Hoffa informed Partin on October 29 that he 'would pay 15 or $20,000, whatever—whatever it cost to get to the jury.' On November 5, in Partin's presence, Hoffa berated King for failing in his promises to 'get the patrolman.' King then told Partin that he was arranging a meeting with the highway patrolman, but on November 7 King admitted to Partin that he had not yet contacted the highway patrolman and that Hoffa had been complaining 'about not getting to the jury.' Hoffa criticized King in the presence of Partin on November 14 for 'not making a contact like he told him he would,' adding that he 'wanted some insurance.' Later the same day, King told Partin that he had arranged to meet with the highway patrolman, and that he had prepared a cover story to allay suspicion. On November 15 Hoffa asked King in Partin's presence whether he had 'made the contacts.' King related to Partin on November 20 a meeting that King had had with juror Paschal's husband, stating that the highway patrolman wanted a promotion rather than money. The same day Hoffa told Partin that he was disturbed because 'the Highway Patrolman wouldn't take the money,' adding that if he had 'taken the money it would have pinned him down and he couldn't have backexd up.'

There was other evidence at the trial that petitioner Campbell, a union associate of Hoffa's, and petitioner Parks, Campbell's uncle, had made bribe offers to Gratin Fields, a Negro juror. On November 7, according to Partin, Hoffa told Partin that he had 'the colored male juror in (his) hip pocket,' and that Campbell 'took care of it.' Hoffa told Partin that Campbell, a Negro, was related to Fields, and that while Fields had refused the bribe he would not 'go against his own people.' Hoffa concluded, '(I)t looks like our best bet is a hung jury unless we can get to the foreman of the jury. If they have a hung jury, it will be the same as acquittal because they will never try the case again.'

4 In denying the defense motion to suppress Partin's testimony, the trial court stated: 'I would further find that the government did not place this witness Mr. Partin in the defendants' midst or have anything to do with placing him in their midst, rather that he was knowingly and voluntarily placed in their midst by one of the defendants.'

The trial court's memorandum denying a motion for a new trial contained the following statement:

'The action of the Court in denying the motions of the defendants to suppress the testimony of the witness Partin is complained of in Grounds 41 and 42 of the motions for new trial. It is contended that one of the findings of fact of the Court with respect to the motion to suppress was rendered incorrect by subsequent evidence in the case. It is contended that the telephone transcriptions of the telephone calls between Partin and Hoffa on October 8 and 18, 1962, established that the defendant Hoffa did not invite Partin to Nashville. The telephone transcriptions reflect that the defendant Hoffa agreed to an appointment to see Partin in Nashville. Even if the defendant Hoffa did not initiate the invitation of Partin to come to Nashville, but rather Partin solicited the invitation, this does not in any way alter the Court's finding that the Government did not place or keep Partin with the defendant Hoffa. * * * The Government requested of Partin only that he report information of jury tampering or other illegal activity of which he became aware. Partin voluntarily furnished such information. He remained in Nashville or returned to Nashville either at the request or with the consent of the defendant Hoffa and not at the instruction of the Government.'

5 We do not deal here with the law of arrest under the Fourth Amendment.

6 The applicability of the Fourth Amendment if Partin had been a stranger to the petitioner is a question we do not decide. Cf. Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312.

7 'Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. * * *' United States v. Burr (In re Willie), 25 Fed.Cas. 38, 40 (No. 14,692e) (C.C.D.Va.1807). (Emphasis supplied.)

8 Petitioner maintains that the cross-examination of one of these character witnesses at the Test Fleet trial shows that the prosecution availed itself of the information transmitted by Partin. The following exchange between the prosecutor and witness occurred:

Q. 'Did (defense counsel) give you anything to read, Mr. Sammut?'

A. 'No, sir, not even a newspaper.'

Q. 'Not even a newspaper? I am not talking about newspapers, I am talking with respect to your testimony. Did they give you anything to read with respect to your testimony?'

A. 'After I talked to them.'

Q. 'They gave you written questions and answers, didn't they?'

A. 'The questions that they asked me and the questions that I answered.'

9 In Coplon, the grant of a new trial was conditioned on the defendant's proof of her wiretapping allegations.

10 In the Caldwell case, the Court of Appeals implicitly recognized the possibility of a case arising in which a showing could be made of 'prejudice to the defense of such a nature as would necessarily render a subsequent trial unfair to the accused.' 92 U.S.App.D.C. 355, 357, n. 11, 205 F.2d 879, 881—882, n. 11.

11 We put to one side the extraordinary problems that would have arisen if the petitioner had been arrested and charged during the progress of the Test Fleet trial.

12 Partin underwent cross-examination for an entire week. The defense was afforded wide latitude to probe Partin's background, character, and ties to the authorities; it was permitted to explore matters that are normally excludable, for example, whether Partin had been charged with a crime in 1942, even though that charge had never been prosecuted.

13 The judge instructed the jury that it was petitioner's contention that he 'did not invite Edward Partin to come to Nashville, Tennessee, during the trial of (the Test Fleet case) but that the said Edward Partin came of his own accord under the pretense of attempting to convince Mr. Hoffa that the Teamsters local union in Baton Rouge, Louisiana should not be placed in trusteeship by reason of Partin's being under indictment and other misconduct on Partin's part, but for the real purpose of fabricating evidence against Hoffa in order to serve his own purposes and interests.'

14 The jury was instructed: 'You should carefully scrutinize the testimony given and the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, his motives, state of mind, his demeanor and manner while on the witness stand. Consider also any relation each witness may bear to either side of the case * * *. All evidence of a witness whose self-interest is shown from either benefits received, detriments suffered, threats or promises made, or any attitude of the witness which might tend to prompt testimony either favorable or unfavorable to the accused should be considered with caution and weighed with care.'

1 The recording was not used here as a means to avoid calling the informer to testify. As I noted in my opinion concurring in the result in Lopez (373 U.S., at 441, 83 S.Ct. at 1389, 10 L.Ed.2d 462), I would not sanction the use of a secretary made recording other than for the purposes of corroborating the testimony of a witness who can give firsthand testimony concerning the recorded conversations and who is made available for cross-examination.

2 One Sydney Simpson, who was Partin's cellmate at the time the latter first contacted federal agents to discuss Hoffa, has testified by affidavit as follows:

'Sometime in September, 1962, I was transferred from the Donaldsonville Parish Jail to the Baton Rouge Parish Jail. I was placed in a cell with Partin. For the first few days, Partin acted sort of brave. Then when it was clear that he was not going to get out in a hurry, he became more excited and nervous. After I had been in the same cell with Partin for about three days, Partin said, 'I know a way to get out of here. They want Hoffa more than they want me.' Partin told me that he was going to get one of the deputies to get Bill Daniels. Bill Daniels is an officer in the State of Louisiana. Partin said he wanted to talk to Daniels about Hoffa. Partin said that he was going to talk to Captain Edwards and ask him to get Daniels. A deputy, whose name is not known to me, came and took Partin from the cell. Partin remained away for several hours.

'A few days later Partin was released from the jail. From the day when I first saw the deputy, until the date when Partin was released, Partin was out of the cell most of the day and sometimes part of the night. On one occasion Partin returned to the cell and said, 'It will take a few more days and we will have things straightened out, but don't worry.' Partin was taken in and out of the cell frequently each day. Partin told me during this time that he was working with Daniels and the FBI to frame Hoffa. On one occasion I asked Partin if he knew enough about Hoffa to be of any help to Daniels and the FBI, and Partin said, 'It doesn't make any difference. If I don't know it, I can fix it up.'

'While we were in the cell, I asked Partin why he was doing this to Hoffa. Partin replied: 'What difference does it make? I'm thinking about myself. Aren't you thinking about yourself? I don't give a damn about Hoffa. * * *' R. 171—172.

* At one point the informer, Partin, testified: 'Mr. Hoffa is the one told me he wanted me to stick around.' Petitioners' own witnesses testified that Partin was in the suite 'virtually every day' as well as the 'nightly meetings,' had 'ready access' to the files and offices and acted as 'sergeant-at-arms' just outside the door of the suite. Hoffa did not testify at the hearing on the motion to suppress.

110 S.Ct. 2638
Supreme Court of the United States

PENNSYLVANIA, Petitioner,

v.

Inocencio MUNIZ.

No. 89–213.
|
Argued Feb. 27, 1990.
|
Decided June 18, 1990.

Synopsis

Defendant was convicted of driving under influence of alcohol by Court of Common Pleas, Cumberland County, Pennsylvania, G. Hoffer, J. Defendant appealed. The Pennsylvania Superior Court, 377 Pa.Super. 382, 547 A.2d 419, Cirillo, President Judge, reversed and remanded. Certiorari was granted. The Supreme Court, Justice Brennan, held that: (1) slurred nature of defendant's answers to police questions given before he received his *Miranda* warning was not testimonial, within scope of privilege against self-incrimination; (2) answer to question regarding date of his sixth birthday was testimonial and inadmissible; (3) answers to questions eliciting his name, address, height, weight, eye color, date of birth, and current age were admissible; and (4) remarks made by defendant in connection with videotaped efforts to perform sobriety tests and regarding his refusal to take breathalyzer test were admissible.

Vacated and remanded.

Chief Justice Rehnquist filed an opinion concurring in part, concurring in the result in part, and dissenting in part, in which Justices White, Blackmun, and Stevens joined.

Justice Marshall filed an opinion concurring in part and dissenting in part.

***582** ****2639** *Syllabus*[*]

Respondent Muniz was arrested for driving while under the influence of alcohol on a Pennsylvania highway. Without being advised of his rights under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, he was taken to a booking center where, as was the routine practice, he was told that his actions and voice would be videotaped. He then answered seven questions regarding his name, address, height, weight, eye color, date of birth, and current age, stumbling over two responses. He was also asked, and was unable to give, the date of his sixth birthday. In addition, he made several incriminating statements while he performed physical sobriety tests and when he was asked to submit to a breathalyzer test. He refused to take the breathalyzer test and was advised, for the first time, of his *Miranda* rights. Both the video and audio portions of the tape were admitted at trial, and he was convicted. His motion for a new trial on the ground that the court should have excluded, *inter alia,* the videotape was denied. The Pennsylvania Superior Court reversed. ****2640** While finding that the videotape of the sobriety testing exhibited physical rather than testimonial evidence within the meaning of the Fifth Amendment, the court concluded that Muniz's answers to questions and his other verbalizations were testimonial and, thus, the audio portion of the tape should have been suppressed in its entirety.

Held: The judgment is vacated and remanded.

377 Pa.Super. 382, 547 A.2d 419 (1988), vacated and remanded.

Justice BRENNAN delivered the opinion of the Court with respect to Parts I, II, III–A, III–B, and IV, concluding that only Muniz's response to the sixth birthday question constitutes a testimonial response to custodial interrogation for purposes of the Self–Incrimination Clause of the Fifth Amendment. Pp. 2643–2649, 2650–2652.

(a) The privilege against self-incrimination protects an "accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature," *Schmerber v. California,* 384 U.S. 757, 761, 86 S.Ct. 1826, 1830, 16 L.Ed.2d 908, but not from being compelled by the State to produce "real or physical evidence," *id.,* at 764, 86 S.Ct., at 1832. To be testimonial, the communication must, "explicitly or implicitly, relate a factual assertion or disclose information." *Doe v. United States,* 487 U.S. 201, 210, 108 S.Ct. 2341, 2347, 101 L.Ed.2d 184. Pp. 2643–2644.

***583** (b) Muniz's answers to direct questions are not rendered inadmissible by *Miranda* merely because the slurred nature of his speech was incriminating. Under *Schmerber* and its progeny, any slurring of speech and other evidence

of lack of muscular coordination revealed by his responses constitute nontestimonial components of those responses. Requiring a suspect to reveal the physical manner in which he articulates words, like requiring him to reveal the physical properties of the sound of his voice by reading a transcript, see *United States v. Dionisio,* 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67, does not, without more, compel him to provide a "testimonial" response for purposes of the privilege. Pp. 2644–2645.

(c) However, Muniz's response to the sixth birthday question was incriminating not just because of his delivery, but also because the *content* of his answer supported an inference that his mental state was confused. His response was testimonial because he was required to communicate an express or implied assertion of fact or belief and, thus, was confronted with the "trilemma" of truth, falsity, or silence, the historical abuse against which the privilege against self-incrimination was aimed. By hypothesis, the custodial interrogation's inherently coercive environment precluded the option of remaining silent, so he was left with the choice of incriminating himself by admitting the truth that he did not then know the date of his sixth birthday, or answering untruthfully by reporting a date that he did not know was accurate (which would also have been incriminating). Since the state court's holdings that the sixth birthday question constituted an unwarned interrogation and that Muniz's answer was incriminating were not challenged, this testimonial response should have been suppressed. Pp. 2645–2649.

(d) Muniz's incriminating utterances during the sobriety and breathalyzer tests were not prompted by an interrogation within the meaning of *Miranda* and should not have been suppressed. The officer's dialogue with Muniz concerning the physical sobriety tests consisted primarily of carefully scripted instructions as to how the tests were to be performed that were not likely to be perceived as calling for any verbal response. Therefore, they were not "words or actions" constituting custodial interrogation, and Muniz's incriminating utterances were "voluntary." The officer administering the breathalyzer test also carefully limited her role to providing Muniz with relevant information about the test and the implied consent law. She questioned him only as to whether he understood her instructions and ****2641** wished to submit to the test. These limited and focused inquiries were necessarily "attendant to" a legitimate police procedure and were not likely to be perceived as calling for any incriminating response. Pp. 2649–2652.

Justice BRENNAN, joined by Justice O'CONNOR, Justice SCALIA, and Justice KENNEDY, concluded in Part III–C that the first seven ***584** questions asked Muniz fall outside *Miranda* protections and need not be suppressed. Although they constituted custodial interrogation, see *Rhode Island v. Innis,* 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297, they are nonetheless admissible because the questions were asked "for record-keeping purposes only," and therefore they fall within a "routine booking question" exception which exempts from *Miranda's* coverage questions to secure the "biographical data necessary to complete booking or pretrial services," *United States v. Horton,* 873 F.2d 180, 181, n. 2. Pp. 2649–2650.

THE CHIEF JUSTICE, joined by Justice WHITE, Justice BLACKMUN, and Justice STEVENS, concluded that Muniz's responses to the "booking" questions were not testimonial and therefore do not warrant application of the privilege. P. 2654.

BRENNAN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A, and IV, in which REHNQUIST, C.J., and WHITE, BLACKMUN, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined, the opinion of the Court with respect to Part III–B, in which MARSHALL, O'CONNOR, SCALIA, and KENNEDY, JJ., joined, and an opinion with respect to Part III–C, in which O'CONNOR, SCALIA, and KENNEDY, JJ., joined. REHNQUIST, C.J., filed an opinion concurring in part, concurring in the result in part, and dissenting in part, in which WHITE, BLACKMUN, and STEVENS, JJ., joined, *post,* p. 2653. MARSHALL, J., filed an opinion concurring in part and dissenting in part, post, p. 2654.

Attorneys and Law Firms

J. Michael Eakin argued the cause and filed a brief for petitioner.

Richard F. Maffett, Jr., argued the cause and filed a brief for respondent.*

* *Solicitor General Starr, Assistant Attorney General Dennis, Deputy Solicitor General Bryson,* and *Christopher J. Wright* filed a brief for the United States as *amicus curiae* urging reversal.

Opinion

Justice BRENNAN delivered the opinion of the Court, except as to Part III–C.

We must decide in this case whether various incriminating utterances of a drunken-driving suspect, made while performing a series of sobriety tests, constitute testimonial responses to custodial interrogation for purposes of the Self–Incrimination Clause of the Fifth Amendment.

***585** I

During the early morning hours of November 30, 1986, a patrol officer spotted respondent Inocencio Muniz and a passenger parked in a car on the shoulder of a highway. When the officer inquired whether Muniz needed assistance, Muniz replied that he had stopped the car so he could urinate. The officer smelled alcohol on Muniz's breath and observed that Muniz's eyes were glazed and bloodshot and his face was flushed. The officer then directed Muniz to remain parked until his condition improved, and Muniz gave assurances that he would do so. But as the officer returned to his vehicle, Muniz drove off. After the officer pursued Muniz down the highway and pulled him over, the officer asked Muniz to perform three standard field sobriety tests: a "horizontal gaze nystagmus" test, a "walk and turn" test, and a "one leg stand" test.[1] Muniz performed these ****2642** tests poorly, and he informed the officer that he had failed the tests because he had been drinking.

The patrol officer arrested Muniz and transported him to the West Shore facility of the Cumberland County Central Booking Center. Following its routine practice for receiving persons suspected of driving while intoxicated, the booking center videotaped the ensuing proceedings. Muniz was informed that his actions and voice were being recorded, but he ***586** was not at this time (nor had he been previously) advised of his rights under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Officer Hosterman first asked Muniz his name, address, height, weight, eye color, date of birth, and current age. He responded to each of these questions, stumbling over his address and age. The officer then asked Muniz, "Do you know what the date was of your sixth birthday?" After Muniz offered an inaudible reply, the officer repeated, "When you turned six years old, do you remember what the date was?" Muniz responded, "No, I don't."

Officer Hosterman next requested Muniz to perform each of the three sobriety tests that Muniz had been asked to perform earlier during the initial roadside stop. The videotape reveals that his eyes jerked noticeably during the gaze test, that he did not walk a very straight line, and that he could not balance himself on one leg for more than several seconds. During the latter two tests, he did not complete the requested verbal counts from 1 to 9 and from 1 to 30. Moreover, while performing these tests, Muniz "attempted to explain his difficulties in performing the various tasks, and often requested further clarification of the tasks he was to perform." 377 Pa.Super. 382, 390, 547 A.2d 419, 423 (1988).

Finally, Officer Deyo asked Muniz to submit to a breathalyzer test designed to measure the alcohol content of his expelled breath. Officer Deyo read to Muniz the Commonwealth's Implied Consent Law, 75 Pa. Cons. Stat. § 1547 (1987), and explained that under the law his refusal to take the test would result in automatic suspension of his driver's license for one year. Muniz asked a number of questions about the law, commenting in the process about his state of inebriation. Muniz ultimately refused to take the breath test. At this point, Muniz was for the first time advised of his *Miranda* rights. Muniz then signed a statement waiving his rights and admitted in response to further questioning that he had been driving while intoxicated.

***587** Both the video and audio portions of the videotape were admitted into evidence at Muniz' bench trial,[2] along with the arresting officer's testimony that Muniz failed the roadside sobriety tests and made incriminating remarks at that time. Muniz was convicted of driving under the influence of alcohol in violation of 75 Pa. Cons. Stat. § 3731(a)(1) (1987). Muniz filed a motion for a new trial, contending that the court should have excluded the testimony relating to the field sobriety tests and the videotape taken at the booking center "because they were incriminating and completed prior to [Muniz's] receiving his Miranda warnings." App. to Pet. for Cert. C–5—C–6. The trial court denied the motion, holding that " 'requesting a driver, suspected of driving under the influence of alcohol, to perform physical tests or take a breath analysis does not violate [his] privilege against self-incrimination because [the] evidence procured is of a physical nature rather than testimonial, and therefore ****2643** no Miranda warnings are required.' " *Id.,* at C–6, quoting *Commonwealth v. Benson,* 280 Pa.Super. 20, 29, 421 A.2d 383, 387 (1980).

On appeal, the Superior Court of Pennsylvania reversed. The appellate court agreed that when Muniz was asked "to submit to a field sobriety test, and later perform these tests before the videotape camera, no *Miranda* warnings were required" because such sobriety tests elicit physical, rather than testimonial, evidence within the meaning of the Fifth Amendment. 377 Pa.Super., at 387, 547 A.2d, at 422. The court concluded, however, that "when the physical nature of the tests begins to yield testimonial and communicative statements ... the protections afforded by *Miranda* are invoked." *Ibid.* The court explained that Muniz's answer to the question regarding his sixth birthday and the statements and inquiries he made while performing the physical ***588** dexterity tests and discussing the breathalyzer test "are precisely the sort of testimonial evidence that we expressly protected in [previous cases]," *id.,* at 390, 547 A.2d, at 423, because they " 'reveal [ed] his thought processes.' " *Id.,* at 389, 547 A.2d, at 423. The court further explained: "[N]one of Muniz's utterances were spontaneous, voluntary verbalizations. Rather, they were clearly compelled by the questions and instructions presented to him during his detention at the Booking Center. Since the ... responses and communications were elicited before Muniz received his *Miranda* warnings, they should have been excluded as evidence." *Id.,* at 390, 547 A.2d, at 423.[3] Concluding that the audio portion of the videotape should have been suppressed in its entirety, the court reversed Muniz's conviction and remanded the case for a new trial.[4] After the Pennsylvania Supreme Court denied the Commonwealth's application for review, 522 Pa. 575, 559 A.2d 36 (1989), we granted certiorari. 493 U.S. 916, 110 S.Ct. 275, 107 L.Ed.2d 256 (1989).

II

The Self–Incrimination Clause of the Fifth Amendment[5] provides that no "person ... shall be compelled in any criminal case to be a witness against himself." Although the text does not delineate the ways in which a person might be made ***589** a "witness against himself," cf. *Schmerber v. California,* 384 U.S. 757, 761–762, n. 6, 86 S.Ct. 1826, 1831, n. 6, 16 L.Ed.2d 908 (1966), we have long held that the privilege does not protect a suspect from being compelled by the State to produce "real or physical evidence." *Id.,* at 764, 86 S.Ct., at 1832. Rather, the privilege "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." *Id.,* at 761, 86 S.Ct., at 1830. "[I]n order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself." *Doe v. United States,* 487 U.S. 201, 210, 108 S.Ct. 2341, 2347, 101 L.Ed.2d 184 (1988).

In *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), we reaffirmed ****2644** our previous understanding that the privilege against self-incrimination protects individuals not only from legal compulsion to testify in a criminal courtroom but also from "informal compulsion exerted by law-enforcement officers during in-custody questioning." *Id.,* at 461, 86 S.Ct., at 1620–1621. Of course, voluntary statements offered to police officers "remain a proper element in law enforcement." *Id.,* at 478, 86 S.Ct., at 1630. But "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.,* at 467, 86 S.Ct., at 1624. Accordingly, we held that protection of the privilege against self-incrimination during pretrial questioning requires application of special "procedural safeguards." *Id.,* at 444, 86 S.Ct., at 1612. "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Ibid.* Unless a suspect "voluntarily, knowingly and intelligently" waives these rights, *ibid.,* any incriminating responses to questioning may not be introduced into evidence in the prosecution's case in chief in a subsequent criminal proceeding.

***590** This caseimplicates both the "testimonial" and "compulsion" components of the privilege against self-incrimination in the context of pretrial questioning. Because Muniz was not advised of his *Miranda* rights until after the videotaped proceedings at the booking center were completed, any verbal statements that were both testimonial in nature and elicited during custodial interrogation should have been suppressed. We focus first on Muniz's responses to the initial informational questions, then on his questions and utterances while performing the physical dexterity and balancing tests, and finally on his questions and utterances surrounding the breathalyzer test.

III

In the initial phase of the recorded proceedings, Officer Hosterman asked Muniz his name, address, height, weight, eye color, date of birth, current age, and the date of his sixth birthday. Both the delivery and content of Muniz's answers were incriminating. As the state court found, "Muniz's videotaped responses ... certainly led the finder of fact to infer that his confusion and failure to speak clearly indicated a state of drunkenness that prohibited him from safely operating his vehicle." 377 Pa.Super., at 390, 547 A.2d, at 423. The Commonwealth argues, however, that admission of Muniz's answers to these questions does not contravene Fifth Amendment principles because Muniz's statement regarding his sixth birthday was not "testimonial" and his answers to the prior questions were not elicited by custodial interrogation. We consider these arguments in turn.

A

We agree with the Commonwealth's contention that Muniz's answers are not rendered inadmissible by *Miranda* merely because the slurred nature of his speech was incriminating. The physical inability to articulate words in a clear manner due to "the lack of muscular coordination of his tongue and mouth," Brief for Petitioner 16, is not itself a testimonial ***591** component of Muniz's responses to Officer Hosterman's introductory questions. In *Schmerber v. California, supra,* we drew a distinction between "testimonial" and "real or physical evidence" for purposes of the privilege against self-incrimination. We noted that in *Holt v. United States,* 218 U.S. 245, 252–253, 31 S.Ct. 2, 6, 54 L.Ed. 1021 (1910), Justice Holmes had written for the Court that " '[t]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of ****2645** his body as evidence when it may be material.' " 384 U.S., at 763, 86 S.Ct., at 1832. We also acknowledged that "both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." *Id.,* at 764, 86 S.Ct., at 1832. Embracing this view of the privilege's contours, we held that "the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." *Ibid.* Using this "helpful framework for analysis," *ibid.,* we held that a person suspected of driving while intoxicated could be forced to provide a blood sample, because that sample was "real or physical evidence" outside the scope of the privilege and the sample was obtained in a manner by which "[p]etitioner's testimonial capacities were in no way implicated." *Id.,* at 765, 86 S.Ct., at 1832.

We have since applied the distinction between "real or physical" and "testimonial" evidence in other contexts where the evidence could be produced only through some volitional act on the part of the suspect. In *United States v. Wade,* 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), we held that a suspect could be compelled to participate in a lineup and to repeat a phrase provided by the police so that witnesses could view him and listen to his voice. We explained that requiring his presence and speech at a lineup reflected "compulsion of the accused to ***592** exhibit his physical characteristics, not compulsion to disclose any knowledge he might have." *Id.,* at 222, 87 S.Ct., at 1930; see *id.,* at 222–223, 87 S.Ct., at 1930 (suspect was "required to use his voice as an identifying physical characteristic"). In *Gilbert v. California,* 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967), we held that a suspect could be compelled to provide a handwriting exemplar, explaining that such an exemplar, "in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside [the privilege's] protection." *Id.,* at 266–267, 87 S.Ct., at 1953. And in *United States v. Dionisio,* 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973), we held that suspects could be compelled to read a transcript in order to provide a voice exemplar, explaining that the "voice recordings were to be used solely to measure the physical properties of the witnesses' voices, not for the testimonial or communicative content of what was to be said." *Id.,* at 7, 93 S.Ct., at 768.

Under *Schmerber* and its progeny, we agree with the Commonwealth that any slurring of speech and other evidence of lack of muscular coordination revealed by Muniz's responses to Officer Hosterman's direct questions constitute nontestimonial components of those responses. Requiring a suspect to reveal the physical manner in which he articulates words, like requiring him to reveal the physical properties of the sound produced by his voice, see *Dionisio, supra,* does not, without more, compel him to provide a "testimonial" response for purposes of the privilege.

B

This does not end our inquiry, for Muniz's answer to the sixth birthday question was incriminating, not just because of his delivery, but also because of his answer's *content;* the trier of fact could infer from Muniz's answer (that he did not *know* the proper date) that his mental state was confused.[6] ***593** The Commonwealth and the United States as *amicus curiae* argue that this incriminating inference does not trigger the ****2646** protections of the Fifth Amendment privilege because the inference concerns "the physiological functioning of [Muniz's] brain," Brief for Petitioner 21, which is asserted to be every bit as "real or physical" as the physiological makeup of his blood and the timbre of his voice.

But this characterization addresses the wrong question; that the "fact" to be inferred might be said to concern the physical status of Muniz's brain merely describes the way in which the inference is incriminating. The correct question for present purposes is whether the incriminating inference of mental confusion is drawn from a testimonial act or from physical evidence. In *Schmerber,* for example, we held that the police could compel a suspect to provide a blood sample in order to determine the physical makeup of his blood and thereby draw an inference about whether he was intoxicated. This compulsion was outside of the Fifth Amendment's protection, not simply because the evidence concerned the suspect's physical body, but rather because the evidence was *obtained* in a manner that did not entail any testimonial act on the part of the suspect: "Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis." 384 U.S., at 765, 86 S.Ct., at 1832. In contrast, had the police instead asked the suspect directly whether his blood contained a high concentration of alcohol, his affirmative response would have been testimonial even though it would have been used to draw the same inference concerning his physiology. See *ibid.* ("[T]he blood test evidence ... was neither [the suspect's] testimony nor evidence relating to some communicative act"). In this case, the question is not whether a suspect's "impaired mental faculties" can fairly be characterized as an aspect of his physiology, but rather whether Muniz's response ***594** to the sixth birthday question that gave rise to the inference of such an impairment was testimonial in nature.[7]

We recently explained in *Doe v. United States,* 487 U.S. 201, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988), that "in order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." *Id.,* at 210, 108 S.Ct., at 2347. We reached this conclusion after addressing our reasoning in *Schmerber, supra,* and its progeny:

> "The Court accordingly held that the privilege was not implicated in [the line of cases beginning with *Schmerber*], because the suspect was not required 'to disclose any knowledge he might have,' or 'to speak his guilt.' *Wade,* 388 U.S., at 222–223 [87 S.Ct., at 1929–1930]. See *Dionisio,* 410 U.S., at 7 [93 S.Ct., at 768]; *Gilbert,* 388 U.S., at 266–267 [87 S.Ct., at 1953–1954]. It is the 'extortion of information from the accused,' *Couch v. United States,* 409 U.S., [322] at 328 [93 S.Ct. 611, 616, 34 L.Ed.2d 548] [(1973)] the attempt to force him 'to disclose the contents of his own mind,' *Curcio v. United States,* 354 U.S. 118, 128 [77 S.Ct. 1145, 1151–1152, 1 L.Ed.2d 1225] (1957), that implicates the Self–Incrimination Clause.... 'Unless some attempt is made to secure a communication —written, oral or otherwise—upon which reliance is to be placed as involving [the accused's] consciousness of the facts and the operations of his mind in expressing it, the ****2647** demand made upon ***595** him is not a testimonial one.' 8 Wigmore § 2265, p. 386." 487 U.S., at 210–211, 108 S.Ct., at 2348.

After canvassing the purposes of the privilege recognized in prior cases,[8] we concluded that "[t]hese policies are served when the privilege is asserted to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government."[9] *Id.,* at 213, 108 S.Ct., at 2349.

This definition of testimonial evidence reflects an awareness of the historical abuses against which the privilege against self-incrimination was aimed. "Historically, the privilege was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him. Such was the process of the ***596** ecclesiastical courts and the Star Chamber—the inquisitorial method of putting the accused upon his oath and compelling him to answer questions designed to uncover uncharged offenses, without evidence from another source. The major thrust of the policies undergirding the privilege is to prevent such compulsion." *Id.,* at 212, 108 S.Ct., at 2348 (citations omitted); see also *Andresen v. Maryland,* 427 U.S. 463, 470–471, 96 S.Ct. 2737, 2743–2744, 49 L.Ed.2d 627 (1976). At its core, the privilege reflects our fierce " 'unwillingness to

subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt,' " *Doe*, 487 U.S., at 212, 108 S.Ct., at 2348 (citation omitted), that defined the operation of the Star Chamber, wherein suspects were forced to choose between revealing incriminating private thoughts and forsaking their oath by committing perjury. See *United States v. Nobles,* 422 U.S. 225, 233, 95 S.Ct. 2160, 2167, 45 L.Ed.2d 141 (1975) ("The Fifth Amendment privilege against compulsory self-incrimination ... protects 'a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation' ") (quoting *Couch v. United States,* 409 U.S. 322, 327, 93 S.Ct. 611, 615, 34 L.Ed.2d 548 (1973)).

We need not explore the outer boundaries of what is "testimonial" today, for our decision flows from the concept's core meaning. Because the privilege was designed primarily to prevent "a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality," *Ullmann v. United States,* 350 U.S. 422, 428, 76 S.Ct. 497, 501, 100 L.Ed. 511 (1956), it is evident that a suspect is "compelled ... to be a witness against himself" at least whenever he must face the modern-day analog of the historic ****2648** trilemma—either during a criminal trial where a sworn witness faces the identical three choices, or during custodial interrogation where, as we explained in *Miranda,* the choices are analogous and hence raise similar concerns.[10] Whatever ***597** else it may include, therefore, the definition of "testimonial" evidence articulated in *Doe* must encompass all responses to questions that, if asked of a sworn suspect during a criminal trial, could place the suspect in the "cruel trilemma." This conclusion is consistent with our recognition in *Doe* that "[t]he vast majority of verbal statements thus will be testimonial" because "[t]here are very few instances in which a verbal statement, either oral or written, will not convey information or assert facts." 487 U.S., at 213, 108 S.Ct., at 2349. Whenever a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief,[11] the suspect confronts the "trilemma" of truth, falsity, or silence, and hence the response (whether based on truth or falsity) contains a testimonial component.

This approach accords with each of our post-*Schmerber* cases finding that a particular oral or written response to express or implied questioning was nontestimonial; the questions presented in these cases did not confront the suspects with this trilemma. As we noted in *Doe, supra,* at 210–211, 108 S.Ct., at 2347–2348, the cases upholding compelled writing and voice exemplars did not involve situations in which suspects were asked to communicate any personal beliefs or knowledge of facts, and therefore the suspects were not forced to choose between ***598** truthfully or falsely revealing their thoughts. We carefully noted in *Gilbert v. California,* 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967), for example, that a "mere handwriting exemplar, *in contrast to the content of what is written,* like the voice or body itself, is an identifying physical characteristic outside [the privilege's] protection." *Id.,* at 266–267, 87 S.Ct., at 1953 (emphasis added). Had the suspect been asked to provide a writing sample of his own composition, the content of the writing would have reflected his assertion of facts or beliefs and hence would have been testimonial; but in *Gilbert* "[n]o claim [was] made that the content of the exemplars was testimonial or communicative matter." *Id.,* at 267, 87 S.Ct., at 1953.[12] And in *Doe,* the suspect was asked merely to sign a consent form waiving a ****2649** privacy interest in foreign bank records. Because the consent form spoke in the hypothetical and did not identify any particular banks, accounts, or private records, the form neither "communicate[d] any factual assertions, implicit or explicit, [n]or convey[ed] any information to the Government." 487 U.S., at 215, 108 S.Ct., at 2350. We concluded, therefore, that compelled execution of the consent directive did not "forc[e] [the suspect] to express the contents of his mind," *id.,* at 210, n. 9, 108 S.Ct., at 2347, n. 9, but rather forced the suspect only to make a "nonfactual statement." *Id.,* at 213, n. 11, 108 S.Ct., at 2349, n. 11.

In contrast, the sixth birthday question in this case required a testimonial response. When Officer Hosterman ***599** asked Muniz if he knew the date of his sixth birthday and Muniz, for whatever reason, could not remember or calculate that date, he was confronted with the trilemma. By hypothesis, the inherently coercive environment created by the custodial interrogation precluded the option of remaining silent, see n. 10, *supra.* Muniz was left with the choice of incriminating himself by admitting that he did not then know the date of his sixth birthday, or answering untruthfully by reporting a date that he did not then believe to be accurate (an incorrect guess would be incriminating as well as untruthful). The content of his truthful answer supported an inference that his mental faculties were impaired, because his assertion (he did not know the date of his sixth birthday) was different from the assertion (he knew the date was (correct date)) that the trier of fact might reasonably have expected a lucid person to provide. Hence, the incriminating inference of impaired mental faculties stemmed, not just from the fact that Muniz slurred his response, but also from a testimonial aspect of that response.[13]

***600** The state court held that the sixth birthday question constituted an unwarned interrogation for purposes of the privilege against self-incrimination, 377 Pa.Super., at 390, 547 A.2d, at 423, and that Muniz's answer was incriminating. *Ibid.* The Commonwealth does not question either conclusion. Therefore, because we conclude that Muniz's response to the sixth birthday question was testimonial, the response should have been suppressed.

C

The Commonwealth argues that the seven questions asked by Officer Hosterman ****2650** just *prior* to the sixth birthday question—regarding Muniz's name, address, height, weight, eye color, date of birth, and current age—did not constitute custodial interrogation as we have defined the term in *Miranda* and subsequent cases. In *Miranda,* the Court referred to "interrogation" as actual "questioning initiated by law enforcement officers." 384 U.S., at 444, 86 S.Ct., at 1612. We have since clarified that definition, finding that the "goals of the *Miranda* safeguards could be effectuated if those safeguards extended not only to express questioning, but also to 'its functional equivalent.' " *Arizona v. Mauro,* 481 U.S. 520, 526, 107 S.Ct. 1931, 1935, 95 L.Ed.2d 458 (1987). In *Rhode Island v. Innis,* 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), the Court defined the phrase "functional equivalent" of express questioning to include "any words or actions on the part of the police (other than those normally attendant to arrest and custody) ***601** that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." *Id.,* at 301, 100 S.Ct., at 1689–1690 (footnotes omitted); see also *Illinois v. Perkins,* 496 U.S. 292, 296, 110 S.Ct. 2394, 2397, 110 L.Ed.2d 243 (1990). However, "[a]ny knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining" what the police reasonably should have known. *Innis, supra,* 446 U.S., at 302, n. 8, 100 S.Ct., at 1690, n. 8. Thus, custodial interrogation for purposes of *Miranda* includes both express questioning and words or actions that, given the officer's knowledge of any special susceptibilities of the suspect, the officer knows or reasonably should know are likely to "have ... the force of a question on the accused," *Harryman v. Estelle,* 616 F.2d 870, 874 (CA5 1980), and therefore be reasonably likely to elicit an incriminating response.

We disagree with the Commonwealth's contention that Officer Hosterman's first seven questions regarding Muniz's name, address, height, weight, eye color, date of birth, and current age do not qualify as custodial interrogation as we defined the term in *Innis, supra,* merely because the questions were not intended to elicit information for investigatory purposes. As explained above, the *Innis* test focuses primarily upon "the perspective of the suspect." *Perkins, supra,* 496 U.S., at 296, 110 S.Ct., at 2397. We agree with *amicus* United States, however, that Muniz's answers to these first seven questions are nonetheless admissible because the questions fall within a "routine booking question" exception which exempts from *Miranda* 's coverage questions to secure the " 'biographical data necessary to complete booking or pretrial services.' " Brief for United States as *Amicus Curiae* 12, quoting *United States v. Horton,* 873 F.2d 180, 181, n. 2 (CA8 1989). The state court found that the first seven questions were "requested for record-keeping purposes only," App. B16, and therefore the questions appear reasonably related to the police's administrative ***602** concerns.[14] In this context, therefore, the first seven questions asked at the booking center fall outside the protections of *Miranda* and the answers thereto need not be suppressed.

IV

During the second phase of the videotaped proceedings, Officer Hosterman asked Muniz to perform the same three sobriety ****2651** tests that he had earlier performed at roadside prior to his arrest: the "horizontal gaze nystagmus" test, the "walk and turn" test, and the "one leg stand" test. While Muniz was attempting to comprehend Officer Hosterman's instructions and then perform the requested sobriety tests, Muniz made several audible and incriminating statements.[15] Muniz argued to the state court that both the videotaped performance of the physical tests themselves and the audiorecorded verbal statements were introduced in violation of *Miranda.*

The court refused to suppress the videotaped evidence of Muniz's paltry performance on the physical sobriety tests, reasoning that " '[r]equiring a driver to perform physical [sobriety] tests ... does not violate the privilege against self-incrimination because the evidence procured is of a physical nature rather than testimonial.' " 377 Pa.Super., at 387, 547 A.2d, at 422 (quoting ***603** *Commonwealth v. Benson,*

280 Pa.Super. at 29, 421 A.2d, at 387).[16] With respect to Muniz's verbal statements, however, the court concluded that "none of Muniz's utterances were spontaneous, voluntary verbalizations," 377 Pa.Super., at 390, 547 A.2d, at 423, and because they were "elicited before Muniz received his *Miranda* warnings, they should have been excluded as evidence." *Ibid.*

We disagree. Officer Hosterman's dialogue with Muniz concerning the physical sobriety tests consisted primarily of carefully scripted instructions as to how the tests were to be performed. These instructions were not likely to be perceived as calling for any verbal response and therefore were not "words or actions" constituting custodial interrogation, with two narrow exceptions not relevant here.[17] The dialogue also contained limited and carefully worded inquiries as to whether Muniz understood those instructions, but these focused inquiries were necessarily "attendant to" the police ***604** procedure held by the court to be legitimate. Hence, Muniz's incriminating utterances during this phase of the videotaped proceedings were "voluntary" in the sense that they were not elicited in response to custodial interrogation.[18] See *South Dakota v. Neville,* 459 U.S. 553, 564, n. 15, 103 S.Ct. 916, 923, n. 15, 74 L.Ed.2d 748 (1983) (drawing analogy to "police request to submit to fingerprinting or ****2652** photography" and holding that police inquiry whether suspect would submit to blood-alcohol test was not "interrogation within the meaning of *Miranda* ").

Similarly, we conclude that *Miranda* does not require suppression of the statements Muniz made when asked to submit to a breathalyzer examination. Officer Deyo read Muniz a prepared script explaining how the test worked, the nature of Pennsylvania's Implied Consent Law, and the legal consequences that would ensue should he refuse. Officer Deyo then asked Muniz whether he understood the nature of the test and the law and whether he would like to submit to the test. Muniz asked Officer Deyo several questions concerning the legal consequences of refusal, which Deyo answered directly, and Muniz then commented upon his state of inebriation. 377 Pa.Super., at 387, 547 A.2d, at 422. After offering to take the test only after waiting a couple of hours or drinking some water, Muniz ultimately refused.[19]

***605** We believe that Muniz's statements were not prompted by an interrogation within the meaning of *Miranda,* and therefore the absence of *Miranda* warnings does not require suppression of these statements at trial.[20] As did Officer Hosterman when administering the three physical sobriety tests, see *supra,* at 2651–2652, Officer Deyo carefully limited her role to providing Muniz with relevant information about the breathalyzer test and the Implied Consent Law. She questioned Muniz only as to whether he understood her instructions and wished to submit to the test. These limited and focused inquiries were necessarily "attendant to" the legitimate police procedure, see *Neville, supra,* at 564, n. 15, 103 S.Ct., at 923, n. 15, and were not likely to be perceived as calling for any incriminating response.[21]

V

We agree with the state court's conclusion that *Miranda* requires suppression of Muniz's response to the question regarding the date of his sixth birthday, but we do not agree that the entire audio portion of the videotape must be suppressed.[22] Accordingly, the court's judgment reversing ***606** Muniz's conviction is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Chief Justice REHNQUIST, with whom Justice WHITE, Justice BLACKMUN, and Justice STEVENS join, concurring in part, concurring in the result in part, and dissenting in part.

I join Parts I, II, III–A, and IV of the Court's opinion. In addition, although I ****2653** agree with the conclusion in Part III–C that the seven "booking" questions should not be suppressed, I do so for a reason different from that of Justice BRENNAN. I dissent from the Court's conclusion that Muniz's response to the "sixth birthday question" should have been suppressed.

The Court holds that the sixth birthday question Muniz was asked required a testimonial response, and that its admission at trial therefore violated Muniz's privilege against compulsory self-incrimination. The Court says:

> "When Officer Hosterman asked Muniz if he knew the date of his sixth birthday and Muniz, for whatever reason, could not remember or calculate that date, he was confronted with the trilemma [*i.e.,* the ' "trilemma" of truth, falsity, or silence,' see *ante,* at 2648].... Muniz was left with the

choice of incriminating himself by admitting that he did not then know the date of his sixth birthday, or answering untruthfully by reporting a date that he did not then believe to be accurate (an incorrect guess would be incriminating as well as untruthful)." *Ante,* at 2649.

As an assumption about human behavior, this statement is wrong. Muniz would no more have felt compelled to fabricate a false date than one who cannot read the letters on an eye chart feels compelled to fabricate false letters; nor does a wrong guess call into question a speaker's veracity. The Court's statement is also a flawed predicate on which to base its conclusion that Muniz's answer to this question was "testimonial" for purposes of the Fifth Amendment.

***607** The need for the use of the human voice does not automatically make an answer testimonial, *United States v. Wade,* 388 U.S. 218, 222–223, 87 S.Ct. 1926, 1929–1930, 18 L.Ed.2d 1149 (1967), any more than does the fact that a question calls for the exhibition of one's handwriting in written characters. *Gilbert v. California,* 388 U.S. 263, 266–267, 87 S.Ct. 1951, 1953–1954, 18 L.Ed.2d 1178 (1967). In *Schmerber v. California,* 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), we held that the extraction and chemical analysis of a blood sample involved no "shadow of testimonial compulsion upon or enforced communication by the accused." *Id.,* at 765, 86 S.Ct., at 1832. All of these holdings were based on Justice Holmes' opinion in *Holt v. United States,* 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021 (1910), where he said for the Court that "the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." *Id.,* at 252–253, 31 S.Ct., at 6.

The sixth birthday question here was an effort on the part of the police to check how well Muniz was able to do a simple mathematical exercise. Indeed, had the question related only to the date of his birth, it presumably would have come under the "booking exception" to *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), to which the Court refers elsewhere in its opinion. The Court holds in this very case that Muniz may be required to perform a "horizontal gaze nystagmus" test, the "walk and turn" test, and the "one leg stand" test, all of which are designed to test a suspect's physical coordination. If the police may require Muniz to use his body in order to demonstrate the level of his physical coordination, there is no reason why they should not be able to require him to speak or write in order to determine his mental coordination. That was all that was sought here. Since it was permissible for the police to extract and examine a sample of Schmerber's blood to determine how much that part of his system had been affected by alcohol, I see no reason why they may not examine the functioning of Muniz's mental processes for the same purpose.

***608** Surely if it were relevant, a suspect might be asked to take an eye examination in the course of which he might have to admit that he could not read the letters on the third ****2654** line of the chart. At worst, he might utter a mistaken guess. Muniz likewise might have attempted to guess the correct response to the sixth birthday question instead of attempting to calculate the date or answer "I don't know." But the potential for giving a bad guess does not subject the suspect to the truth-falsity-silence predicament that renders a response testimonial and, therefore, within the scope of the Fifth Amendment privilege.

For substantially the same reasons, Muniz's responses to the videotaped "booking" questions were not testimonial and do not warrant application of the privilege. Thus, it is unnecessary to determine whether the questions fall within the "routine booking question" exception to *Miranda* Justice BRENNAN recognizes.

I would reverse in its entirety the judgment of the Superior Court of Pennsylvania. But given the fact that five members of the Court agree that Muniz's response to the sixth birthday question should have been suppressed, I agree that the judgment of the Superior Court should be vacated so that, on remand, the court may consider whether admission of the response at trial was harmless error.

Justice MARSHALL, concurring in part and dissenting in part.

I concur in Part III–B of the Court's opinion that the "sixth birthday question" required a testimonial response from respondent Muniz. For the reasons discussed below, see n. 1, *infra,* that question constituted custodial interrogation. Because the police did not apprise Muniz of his rights under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), before asking the question, his response should have been suppressed.

I disagree, however, with Justice BRENNAN's recognition in Part III–C of a "routine booking question" exception to *Miranda.* Moreover, even were such an exception warranted,

***609** it should not extend to booking questions that the police should know are reasonably likely to elicit incriminating responses. Because the police in this case should have known that the seven booking questions were reasonably likely to elicit incriminating responses and because those questions were not preceded by *Miranda* warnings, Muniz's testimonial responses should have been suppressed.

I dissent from the Court's holding in Part IV that Muniz's testimonial statements in connection with the three sobriety tests and the breathalyzer test were not the products of custodial interrogation. The police should have known that the circumstances in which they confronted Muniz, combined with the detailed instructions and questions concerning the tests and the Commonwealth's Implied Consent Law, were reasonably likely to elicit an incriminating response, and therefore constituted the "functional equivalent" of express questioning. *Rhode Island v. Innis,* 446 U.S. 291, 301, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980). Muniz's statements to the police in connection with these tests thus should have been suppressed because he was not first given the *Miranda* warnings.

Finally, the officer's directions to Muniz to count aloud during two of the sobriety tests sought testimonial responses, and Muniz's responses were incriminating. Because Muniz was not informed of his *Miranda* rights prior to the tests, those responses also should have been suppressed.

I

A

Justice BRENNAN would create yet another exception to *Miranda:* the "routine booking question" exception. See also *Illinois v. Perkins,* 496 U.S. 292, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990) (creating exception to *Miranda* for custodial interrogation by an undercover police officer posing as the suspect's fellow prison inmate). Such exceptions undermine *Miranda* ' s fundamental principle that the doctrine should be clear so ****2655** that it can be easily applied by both police and courts. See *Miranda, supra,* 384 U.S., at 441–442, 86 S.Ct., at 1610–1611; ***610** *Fare v. Michael C.,* 442 U.S. 707, 718, 99 S.Ct. 2560, 2568, 61 L.Ed.2d 197 (1979); *Perkins, supra,* 495 U.S., at 308–309, 110 S.Ct., at 2403 (MARSHALL, J., dissenting). Justice BRENNAN's position, were it adopted by a majority of the Court, would necessitate difficult, time-consuming litigation over whether particular questions asked during booking are "routine," whether they are necessary to secure biographical information, whether that information is itself necessary for recordkeeping purposes, and whether the questions are—despite their routine nature —designed to elicit incriminating testimony. The far better course would be to maintain the clarity of the doctrine by requiring police to preface all direct questioning of a suspect with *Miranda* warnings if they want his responses to be admissible at trial.

B

Justice BRENNAN nonetheless asserts that *Miranda* does not apply to express questioning designed to secure " ' "biographical data necessary to complete booking or pretrial services," ' " *ante,* at 2650 (citation omitted), so long as the questioning is not " 'designed to elicit incriminatory admissions,' " *ante,* at 2650, n. 14 (quoting Brief for United States as *Amicus Curiae* 13; citing *United States v. Avery,* 717 F.2d 1020, 1024–1025 (CA6 1983) (acknowledging that "[e]ven a relatively innocuous series of questions may, in light of the factual circumstances and the susceptibility of a particular suspect, be reasonably likely to elicit an incriminating response"); *United States v. Mata–Abundiz,* 717 F.2d 1277, 1280 (CA9 1983) (holding that routine booking question exception does not apply if "the questions are reasonably likely to elicit an incriminating response in a particular situation"); *United States v. Glen–Archila,* 677 F.2d 809, 816, n. 18 (CA11 1982) ("Even questions that usually are routine must be proceeded *[sic]* by *Miranda* warnings if they are intended to produce answers that are incriminating")). Even if a routine booking question exception to *Miranda* were warranted, that exception should not extend to any booking question ***611** that the police should know is reasonably likely to elicit an incriminating response, cf. *Innis,* 446 U.S., at 301, 100 S.Ct., at 1690, regardless of whether the question is "designed" to elicit an incriminating response. Although the police's intent to obtain an incriminating response is relevant to this inquiry, the key components of the analysis are the nature of the questioning, the attendant circumstances, and the perceptions of the suspect. Cf. *id.,* at 301, n. 7, 100 S.Ct., at 1690, n. 7. Accordingly, *Miranda* warnings are required before the police may engage in any questioning reasonably likely to elicit an incriminating response.

Here, the police should have known that the seven booking questions—regarding Muniz's name, address, height, weight,

eye color, date of birth, and age—were reasonably likely to elicit incriminating responses from a suspect whom the police believed to be intoxicated. Cf. *id.,* at 302, n. 8, 100 S.Ct., at 1690, n. 8 ("Any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response from the suspect"). Indeed, as the Court acknowledges, Muniz did in fact "stumbl[e] over his address and age," *ante,* at 2642; more specifically, he was unable to give his address without looking at his license and initially told police the wrong age. Moreover, the very fact that, after a suspect has been arrested for driving under the influence, the Pennsylvania police regularly videotape the subsequent questioning strongly implies a purpose to the interrogation other than "recordkeeping." The seven questions in this case, then, do not fall within the routine booking question exception ****2656** even under Justice BRENNAN's standard.[1]

***612** C

Although Justice BRENNAN does not address this issue, the booking questions sought "testimonial" responses for the same reason the sixth birthday question did: because the content of the answers would indicate Muniz's state of mind. *Ante,* at 2648, and n. 12. See also *Estelle v. Smith,* 451 U.S. 454, 464–465, 101 S.Ct. 1866, 1873–1874, 68 L.Ed.2d 359 (1981). The booking questions, like the sixth birthday question, required Muniz to (1) answer correctly, indicating lucidity, (2) answer incorrectly, implying that his mental faculties were impaired, or (3) state that he did not know the answer, also indicating impairment. Muniz's initial incorrect response to the question about his age and his inability to give his address without looking at his license, like his inability to answer the sixth birthday question, in fact gave rise to the incriminating inference that his mental faculties were impaired. Accordingly, because the police did not inform Muniz of his *Miranda* rights before asking the booking questions, his responses should have been suppressed.

II

A

The Court finds in Part IV of its opinion that *Miranda* is inapplicable to Muniz's statements made in connection with the three sobriety tests and the breathalyzer examination because those statements (which were undoubtedly testimonial) were not the products of "custodial interrogation." In my view, however, the circumstances of this case—in particular, Muniz's apparent intoxication—rendered the officers' words and actions the "functional equivalent" of express questioning ***613** because the police should have known that their conduct was "reasonably likely to evoke an incriminating response." *Innis, supra,* 446 U.S., at 301, 100 S.Ct., at 1689–1690. As the Court recounts, *ante,* at 2650–2652, Officer Hosterman instructed Muniz how to perform the sobriety tests, inquired whether Muniz understood the instructions, and then directed Muniz to perform the tests. Officer Deyo later explained the breathalyzer examination and the nature of the Commonwealth's Implied Consent Law, and asked several times if Muniz understood the Law and wanted to take the examination. *Ante,* at 2652. Although these words and actions might not prompt most sober persons to volunteer incriminating statements, Officers Hosterman and Deyo had good reason to believe—from the arresting officer's observations, App. 13–19 (testimony of Officer Spotts), from Muniz's failure of the three roadside sobriety tests, *id.,* at 19, and from their own observations—that Muniz was intoxicated. The officers thus should have known that Muniz was reasonably likely to have trouble understanding their instructions and their explanation of the Implied Consent Law, and that he was reasonably likely to indicate, in response to their questions, that he did not understand the tests or the Law. Moreover, because Muniz made several incriminating statements regarding his intoxication during and after the roadside tests, *id.,* at 20–21, the police should have known that the same tests at the booking center were reasonably likely to prompt similar incriminating statements.

****2657** The Court today, however, completely ignores Muniz's condition and focuses solely on the nature of the officers' words and actions. As the Court held in *Innis,* however, the focus in the "functional equivalent" inquiry is on "the perceptions of the suspect," not on the officers' conduct viewed in isolation. 446 U.S., at 301, 100 S.Ct., at 1690. Moreover, the *Innis* Court emphasized that the officers' knowledge of any "unusual susceptibility" of a suspect to a particular means of eliciting information is relevant to the question whether they should have known that their conduct was reasonably likely to elicit ***614** an incriminating response. *Id.,* at 302, n. 8, 100 S.Ct., at 1690,

n. 8; *supra,* at 2642. See also *Arizona v. Mauro,* 481 U.S. 520, 531, 107 S.Ct. 1931, 1937, 95 L.Ed.2d 458 (1987) (STEVENS, J., dissenting) (police "interrogated" suspect by allowing him to converse with his wife "at a time when they knew [the conversation] was reasonably likely to produce an incriminating statement"). Muniz's apparent intoxication, then, and the police's knowledge of his statements during and after the roadside tests compel the conclusion that the police should have known that their words and actions were reasonably likely to elicit an incriminating response.[2] Muniz's statements were thus the product of custodial interrogation and should have been suppressed because Muniz was not first given the *Miranda* warnings.

B

The Court concedes that Officer Hosterman's directions that Muniz count aloud to 9 while performing the "walk and turn" test and to 30 while performing the "one-leg-stand" test constituted custodial interrogation. *Ante,* at 2651, and n. 17. Also indisputable is the testimonial nature of the responses sought by those directions; the content of Muniz's counting, just like his answers to the sixth birthday and the booking questions, would provide the basis for an inference regarding his state of mind. Cf. *ante,* at 2649; *supra,* at 2656. The Court finds the admission at trial of Muniz's responses permissible, however, because they were not incriminating "except to the extent [they] exhibited a tendency to slur words, ***615** which [the Court already found to be] nontestimonial [evidence]." *Ante,* at 2651, n. 17. The Court's conclusion is wrong for two reasons. First, as a factual matter, Muniz's responses *were* incriminating for a reason other than his apparent slurring. Muniz did not count at all during the walk and turn test, supporting the inference that he was unable to do so.[3] And, contrary to the Court's assertion, *ibid.,* during the one leg stand test, Muniz incorrectly counted in Spanish from one to six, skipping the number ****2658** two. Even if Muniz had not skipped "two," his failure to complete the count was incriminating in itself.

Second, and more importantly, Muniz's responses would have been "incriminating" for purposes of *Miranda* even if he had fully and accurately counted aloud during the two tests. As the Court stated in *Innis,* "[b]y 'incriminating response' we refer to any response—whether inculpatory or exculpatory—that the *prosecution* may seek to introduce at trial." 446 U.S., at 301, n. 5, 100 S.Ct., at 1690, n. 5. See also *Miranda,* 384 U.S., at 476–477, 86 S.Ct., at 1629 ("The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory' "). Thus, *any* response by ***616** Muniz that the prosecution sought to use against him was incriminating under *Miranda.* That the majority thinks Muniz's responses were incriminating only because of his slurring is therefore irrelevant. Because Muniz did not receive the *Miranda* warnings, then, his responses should have been suppressed.

III

All of Muniz's responses during the videotaped session were prompted by questions that sought testimonial answers during the course of custodial interrogation. Because the police did not read Muniz the *Miranda* warnings before he gave those responses, the responses should have been suppressed. I would therefore affirm the judgment of the state court.[4]

All Citations

496 U.S. 582, 110 S.Ct. 2638, 110 L.Ed.2d 528, 58 USLW 4817

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The "horizontal gaze nystagmus" test measures the extent to which a person's eyes jerk as they follow an object moving from one side of the person's field of vision to the other. The test is premised on the understanding that, whereas everyone's eyes exhibit some jerking while turning to the side, when the subject is intoxicated "the onset of the jerking occurs after fewer degrees of turning, and the jerking at more extreme angles becomes more distinct." 1 R. Erwin et al., Defense of Drunk Driving Cases § 8A.99, pp. 8A–43, 8A–45 (1989). The "walk and turn" test requires the subject to walk

heel to toe along a straight line for nine paces, pivot, and then walk back heel to toe along the line for another nine paces. The subject is required to count each pace aloud from one to nine. The "one leg stand" test requires the subject to stand on one leg with the other leg extended in the air for 30 seconds, while counting aloud from 1 to 30.

2 There was a 14–minute delay between the completion of the physical sobriety tests and the beginning of the breathalyzer test. During this period, Muniz briefly engaged in conversation with Officer Hosterman. This 14–minute segment of the videotape was not shown at trial. App. 29.

3 The court did not suppress Muniz's verbal admissions to the arresting officer during the roadside tests, ruling that Muniz was not taken into custody for purposes of *Miranda* until he was arrested after the roadside tests were completed. See *Pennsylvania v. Bruder,* 488 U.S. 9, 109 S.Ct. 205, 102 L.Ed.2d 172 (1988).

4 The Superior Court's opinion refers to Art. 1, § 9, of the Pennsylvania Constitution but explains that this provision " 'offers a protection against self-incrimination identical to that provided by the Fifth Amendment.' " 377 Pa.Super., at 386, 547 A.2d, at 421 (quoting *Commonwealth v. Conway,* 368 Pa.Super. 488, 498, 534 A.2d 541, 546 (1987)). The decision therefore does not rest on an independent and adequate state ground. See *Michigan v. Long,* 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

5 In *Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964), we held the privilege against self-incrimination applicable to the States through the Fourteenth Amendment.

6 Under Pennsylvania law, driving under the influence of alcohol consists of driving while intoxicated to a degree " 'which substantially impairs [the suspect's] judgment, or clearness of intellect, or any of the normal faculties essential to the safe operation of an automobile.' " *Commonwealth v. Griscavage,* 512 Pa. 540, 545, 517 A.2d 1256, 1258 (1986) (emphasis deleted).

7 See, *e.g., Doe v. United States,* 487 U.S. 201, 211, n. 10, 108 S.Ct. 2341, 2348, n. 10, 101 L.Ed.2d 184 (1988) ("[T]he *Schmerber* line of cases does not draw a distinction between unprotected evidence sought for its physical characteristics and protected evidence sought for its [other] content. Rather, the Court distinguished between the suspect's being compelled himself to *serve as evidence* and the suspect's being compelled to *disclose or communicate information or facts* that might serve as or lead to incriminating evidence") (emphasis added); cf. *Baltimore Dept. of Social Services v. Bouknight,* 493 U.S. 549, 555, 110 S.Ct. 900, 905, 107 L.Ed.2d 992 (1990) (individual compelled to produce document or other tangible item to State "may not claim the [Fifth] Amendment's protections based upon the incrimination that may result from the contents or nature of the thing demanded" but may "clai[m] the benefits of the privilege because the act of production would amount to testimony").

8 See *Doe, supra,* at 212–213, 108 S.Ct., at 2348–2349 (quoting *Murphy v. Waterfront Comm'n of New York Harbor,* 378 U.S. 52, 55, 84 S.Ct. 1594, 1596–1597, 12 L.Ed.2d 678 (1964) (internal citations omitted)): "[T]he privilege is founded on 'our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government ... in its contest with the individual to shoulder the entire load," ...; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," ...; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent." ' "

9 This definition applies to both verbal and nonverbal conduct; nonverbal conduct contains a testimonial component whenever the conduct reflects the actor's communication of his thoughts to another. See *Doe, supra,* at 209–210, and n. 8, 108 S.Ct., at 2346–2348, and n. 8; *Schmerber v. California,* 384 U.S. 757, 761, n. 5, 86 S.Ct. 1826, 1830, n. 5, 16 L.Ed.2d 908 (1966) ("A nod or head-shake is as much a 'testimonial' or 'communicative' act in this sense as are spoken words"); see also *Braswell v. United States,* 487 U.S. 99, 122, 108 S.Ct. 2284, 101 L.Ed.2d 98 (1988) (KENNEDY, J., dissenting) ("Those assertions [contained within the act of producing subpoenaed documents] can convey information about that individual's knowledge and state of mind as effectively as spoken statements, and the Fifth Amendment protects individuals from having such assertions compelled by their own acts").

10 During custodial interrogation, the pressure on the suspect to respond flows not from the threat of contempt sanctions, but rather from the "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda v. Arizona,* 384 U.S. 436, 467, 86 S.Ct. 1602, 1624, 16 L.Ed.2d 694 (1966). Moreover, false testimony does not give rise directly to sanctions (either religious sanctions for lying under oath or prosecutions for perjury), but only indirectly (false testimony might itself prove incriminating, either because it links (albeit falsely) the suspect to the crime or because the prosecution might later prove at trial that the suspect lied to the police, giving rise to an inference of guilty conscience). Despite these differences, however, "[w]e are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning." *Id.,* at 461, 86 S.Ct., at 1620–1621; see *id.,* at 458, 86 S.Ct., at 1619 (noting "intimate connection between the privilege against self-incrimination and police custodial questioning").

11 As we explain *infra,* at 2649–2650, for purposes of custodial interrogation such a question may be either express, as in this case, or else implied through words or actions reasonably likely to elicit a response.

12 See also *United States v. Wade,* 388 U.S. 218, 222–223, 87 S.Ct. 1926, 1930, 18 L.Ed.2d 1149 (1967) ("[T]o utter words purportedly uttered by the robber [and dictated to the suspect by the police] was not compulsion to utter statements of a 'testimonial' nature; [the suspect] was required to use his voice as an identifying physical characteristic, not to speak his guilt" because the words did not reflect any facts or beliefs asserted by the suspect); *United States v. Dionisio,* 410 U.S. 1, 7, 93 S.Ct. 764, 768, 35 L.Ed.2d 67 (1973) (where suspects were asked to create voice exemplars by reading already-prepared transcripts, the "voice recordings were to be used solely to measure the physical properties of the witnesses' voices, not for the testimonial or communicative content of what was to be said" because the content did not reflect any facts or beliefs asserted by the suspects).

13 The Commonwealth's protest that it had no investigatory interest in the actual date of Muniz's sixth birthday, see Tr. of Oral Arg. 18, is inapposite. The critical point is that the Commonwealth had an investigatory interest in Muniz's assertion of belief that was communicated by his answer to the question. Putting it another way, the Commonwealth may not have cared about the *correct* answer, but it cared about *Muniz's* answer. The incriminating inference stems from the then-existing contents of Muniz's mind as evidenced by his assertion of his knowledge at that time.

This distinction is reflected in *Estelle v. Smith,* 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), where we held that a defendant's answers to questions during a psychiatric examination were testimonial in nature. The psychiatrist asked a series of questions, some focusing on the defendant's account of the crime. After analyzing both the "statements [the defendant] made, and remarks he omitted," *id.,* at 464, 101 S.Ct., at 1874, the psychiatrist made a prognosis as to the defendant's "future dangerousness" and testified to this effect at his capital sentencing hearing. The psychiatrist had no investigative interest in whether the defendant's account of the crime and other disclosures were either accurate or complete as a historical matter; rather, he relied on the remarks—both those made and omitted—to infer that the defendant would likely pose a threat to society in the future because of his state of mind. We nevertheless explained that the "Fifth Amendment privilege ... is directly involved here because the State used as evidence against [the defendant] the *substance of his disclosures* during the pretrial psychiatric examination." *Id.,* at 464–465, 101 S.Ct., at 1874 (emphasis added). The psychiatrist may have presumed the defendant's remarks to be truthful for purposes of drawing his inferences as to the defendant's state of mind, see *South Dakota v. Neville,* 459 U.S. 553, 561–562, n. 12, 103 S.Ct. 916, 921, n. 12, 74 L.Ed.2d 748 (1983), but that is true in Muniz's case as well: The incriminating inference of mental confusion is based on the premise that Muniz was responding truthfully to Officer Hosterman's question when he stated that he did not then know the date of his sixth birthday.

14 As *amicus* United States explains, "[r]ecognizing a 'booking exception' to *Miranda* does not mean, of course, that any question asked during the booking process falls within that exception. Without obtaining a waiver of the suspect's *Miranda* rights, the police may not ask questions, even during booking, that are designed to elicit incriminatory admissions." Brief for United States as *Amicus Curiae* 13. See, *e.g., United States v. Avery,* 717 F.2d 1020, 1024–1025 (CA6 1983); *United States v. Mata–Abundiz,* 717 F.2d 1277, 1280 (CA9 1983); *United States v. Glen–Archila,* 677 F.2d 809, 816, n. 18 (CA11 1982).

15 Most of Muniz's utterances were not clearly discernible, though several of them suggested excuses as to why he could not perform the physical tests under these circumstances.

16 This conclusion is in accord with that of many other state courts, which have reasoned that standard sobriety tests measuring reflexes, dexterity, and balance do not require the performance of testimonial acts. See, *e.g., Weatherford v. State,* 286 Ark. 376, 692 S.W.2d 605 (1985); *People v. Boudreau,* 115 App.Div.2d 652, 496 N.Y.S.2d 489 (1985); *Commonwealth v. Brennan,* 386 Mass. 772, 438 N.E.2d 60 (1982); *State v. Badon,* 401 So.2d 1178 (La.1981); *State v. Arsenault,* 115 N.H. 109, 336 A.2d 244 (1975). Muniz does not challenge the state court's conclusion on this point, and therefore we have no occasion to review it.

17 The two exceptions consist of Officer Hosterman's requests that Muniz count aloud from 1 to 9 while performing the "walk and turn" test and that he count aloud from 1 to 30 while balancing during the "one leg stand" test. Muniz's counting at the officer's request qualifies as a response to custodial interrogation. However, as Muniz counted accurately (in Spanish) for the duration of his performance on the "one leg stand" test (though he did not complete it), his verbal response to this instruction was not incriminating except to the extent that it exhibited a tendency to slur words, which we have already explained is a nontestimonial component of his response. See *supra,* at 2644–2646. Muniz did not count during the "walk and turn" test, and he does not argue that his failure to do so has any independent incriminating significance. We therefore need not decide today whether Muniz's counting (or not counting) itself was "testimonial" within the meaning of the privilege.

18 We cannot credit the state court's contrary determination that Muniz's utterances (both during this phase of the proceedings and during the next when he was asked to provide a breath sample) were compelled rather than voluntary. 377 Pa.Super., at 390, 547 A.2d, at 423. The court did not explain how it reached this conclusion, nor did it cite *Innis* or any other case defining custodial interrogation.

19 Muniz does not and cannot challenge the introduction into evidence of his refusal to submit to the breathalyzer test. In *South Dakota v. Neville,* 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983), we held that since submission to a blood test could itself be compelled, see *Schmerber v. California,* 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), a State's decision to permit a suspect to refuse to take the test but then to comment upon that refusal at trial did not "compel" the suspect to incriminate himself and hence did not violate the privilege. *Neville, supra,* 459 U.S., at 562–564, 103 S.Ct., at 921–923. We see no reason to distinguish between chemical blood tests and breathalyzer tests for these purposes. Cf. *Schmerber, supra,* 384 U.S., at 765–766, n. 9, 86 S.Ct., at 1832–1833, n. 9.

20 We noted in *Schmerber* that "there may be circumstances in which the pain, danger, or severity of an operation [or other test seeking physical evidence] would almost inevitably cause a person to prefer confession to undergoing the 'search,' " 384 U.S., at 765, n. 9, 86 S.Ct., at 1833, n. 9, and in such cases "[i]f it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forgo the advantage of any *testimonial* products of administering the test." *Ibid.* See also *Neville, supra,* 459 U.S., at 563, 103 S.Ct., at 922 ("Fifth Amendment may bar the use of testimony obtained when the proffered alternative was to submit to a test so painful, dangerous, or severe, or so violative of religious beliefs, that almost inevitably a person would prefer 'confession' "). But Muniz claims no such extraordinary circumstance here.

21 See n. 18, *supra.*

22 The parties have not asked us to decide whether any error in this case was harmless. The state court is free, of course, to consider this question upon remand.

1 The sixth birthday question also clearly constituted custodial interrogation because it was a form of "express questioning." *Rhode Island v. Innis,* 446 U.S. 291, 300–301, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980). Furthermore, that question would not fall within Justice BRENNAN's proposed routine booking question exception. The question serves no apparent recordkeeping need, as the police already possessed Muniz's date of birth. The absence of any administrative need for the question, moreover, suggests that the question was designed to obtain an incriminating response. Regardless of any administrative need for the question and regardless of the officer's intent, *Miranda* warnings were required because the police should have known that the question was reasonably likely to elicit an incriminating response. *Supra,* at 2642–2643.

2 An additional factor strongly suggests that the police expected Muniz to make incriminating statements. Pursuant to their routine in such cases, App. 28–29, the police allotted 20 minutes for the three sobriety tests and for "observation." Because Muniz finished the tests in approximately 6 minutes, the police required him to wait another 14 minutes before they asked him to submit to the breathalyzer examination. Given the absence of any apparent technical or administrative

reason for the delay and the stated purpose of "observing" Muniz, the delay appears to have been designed in part to give Muniz the opportunity to make incriminating statements.

3 The Commonwealth could not use Muniz's failure to count against him regardless of whether his silence during the walk and turn test was itself testimonial in those circumstances. Cf. *ante,* at 2651, n. 17. A defendant's silence in response to police questioning is not admissible at trial even if the silence is not, in the particular circumstances, a form of communicative conduct. *Miranda v. Arizona,* 384 U.S. 436, 468, n. 37, 86 S.Ct. 1602, 1624, n. 37, 16 L.Ed.2d 694 (1966) ("[I]t is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation"). Cf. *Griffin v. California,* 380 U.S. 609, 615, 85 S.Ct. 1229, 1233, 14 L.Ed.2d 106 (1965) ("[T]he Fifth Amendment ... forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt").

4 I continue to have serious reservations about the Court's limitation of the Fifth Amendment privilege to "testimonial" evidence. See *United States v. Mara,* 410 U.S. 19, 32–38, 93 S.Ct. 774, 781–784, 35 L.Ed.2d 99 (1973) (MARSHALL, J., dissenting). I believe that privilege extends to *any* evidence that a person is compelled to furnish against himself. *Id.,* at 33–35, 93 S.Ct., at 782–783. At the very least, the privilege includes evidence that can be obtained only through the person's affirmative cooperation. *Id.,* at 36–37, 93 S.Ct., at 783–784. Of course, a person's refusal to incriminate himself also cannot be used against him. See n. 3, *supra.* Muniz's performance of the sobriety tests and his refusal to take the breathalyzer examination are thus protected by the Fifth Amendment under this interpretation. But cf. *ante,* at 2652, n. 19. Because Muniz does not challenge the admission of the video portion of the videotape showing the sobriety tests or of his refusal to take the breathalyzer examination, however, those issues are not before this Court.

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205 Cal.App.4th 26
Court of Appeal, Fourth District, Division 2, California.

The PEOPLE, Plaintiff and Respondent,

v.

Michael Lee BEJASA,

Defendant and Appellant.

No. E051308.
|
April 19, 2012.
|
Certified for Partial Publication.*
|
Review Denied July 18, 2012.

Synopsis

Background: Defendant was convicted in the Superior Court, Riverside County, No. SWF026666, Mark E. Petersen, J., of driving a vehicle under the influence of a drug and personally causing great bodily injury to another, transporting a controlled substance, and driving without a license. Defendant appealed.

Holdings: The Court of Appeal, King, J., held that:

defendant's questioning was custodial;

defendant's questioning was interrogation under *Miranda*;

defendant's estimation of time in Romberg sobriety test was within privilege against self-incrimination; but

admission of statements defendant made in custodial interrogation without *Miranda* warnings was harmless.

Affirmed.

Attorneys and Law Firms

****83** Doris M. LeRoy, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Christine Levingston Bergman and Marissa A. Bejarano, Deputy Attorney General, for Plaintiff and Respondent.

***30** OPINION

KING, J.

I. INTRODUCTION

Defendant and appellant Michael Lee Bejasa was involved in an automobile collision that seriously injured his passenger. The first police officer at the scene searched defendant and found two syringes, one of which contained methamphetamine. Defendant admitted that the syringes were used to inject methamphetamine and that he was on parole. The police officer handcuffed defendant, told him he was being detained for a possible parole violation, and placed him in the back of his police car. The officer did not give defendant the *Miranda*[1] warnings.

***31** Upon the arrival of additional officers a short time later, defendant was released from the police car and his handcuffs were removed. The investigating officer conducted an interview and various field sobriety tests (FST) and determined that defendant was possibly under the influence of drugs. The officer then advised defendant he was under arrest. Defendant was not given his *Miranda* rights until he was taken to the police station.

Defendant was charged and convicted by a jury of driving a vehicle under the influence of a drug and personally causing great bodily injury to another (count 1),[2] as well as transporting a controlled substance (count 2).[3] Defendant also pled guilty to driving without a license (count 3).[4] Following a bifurcated court trial, the court found true allegations of prior convictions and two prior strike convictions.[5] The trial court sentenced defendant to consecutive 25–year–to–life sentences on counts 1 and 2. On count 3, defendant received a term of 180 days, to run concurrent to count 1.

On appeal, defendant argues the trial court erred in refusing to suppress evidence of statements made to the police after defendant was handcuffed and placed in a police car prior to being advised of his *Miranda* rights. Among other statements that should have been suppressed, defendant claims that his estimation of time, made during a "Romberg," or modified attention, FST (Romberg test), was testimonial evidence and

should have been excluded **84 under *Miranda*. In the published portion of our opinion, we conclude the trial court erred in admitting defendant's custodial statements to the police, including the estimation of time made during the Romberg test. However, because we further conclude the error was harmless, we affirm defendant's conviction.

The remaining issues concern the trial court's sentencing of defendant. Defendant contends the court failed to realize that the "Three Strikes" law does not require consecutive sentencing if the crimes were committed on the same occasion, and the imposition of a consecutive sentence on count 2 was an abuse of discretion. Defendant also argues the court should have stayed the sentence on count 2 pursuant to Penal Code section 654 because the two crimes were committed with a single intent and objective. We address these *32 issues in the nonpublished portion of our opinion. We agree with defendant that the court was unaware of its discretion in determining whether to impose a consecutive or concurrent sentence on count 2, and failed to exercise such discretion. A new sentencing hearing is therefore required, at which the court shall exercise such discretion. Finally, we agree with defendant that the sentence on count 2 must be stayed pursuant to Penal Code section 654.

II. DISCUSSION

A. *Motion to Suppress Defendant's Statements Made Prior to Miranda Warnings*

1. *Factual and Procedural Background*

Prior to trial, defendant moved to suppress statements made to police officers after he was handcuffed and placed in the police car and prior to being advised of his *Miranda* rights. The motion was based on the evidence presented at defendant's preliminary hearing. The following is our summary of that evidence.

On the evening of September 19, 2008, defendant was driving a Jeep northbound on State Street in Hemet. Defendant's girlfriend, Stasha Lewellyn, was riding in the passenger seat. At approximately 6:52 p.m., Terri Patterson observed the Jeep as she drove in the southbound slow lane. The oncoming Jeep changed lanes and veered all the way across the street into Patterson's lane. Patterson was unable to avoid the Jeep, and the vehicles collided head-on. Lewellyn, who was not wearing a seatbelt, was thrown from the Jeep. As a result, she sustained major injuries.

Hemet Police Officer Derek Maddox was the first police officer to arrive at the scene of the crash. After making sure that the injured parties were being treated by paramedics, Officer Maddox contacted defendant and asked him what happened. Defendant said he had been driving and Lewellyn had been thrown from the Jeep because she was not wearing a seatbelt. Officer Maddox noticed that defendant's eyes were bloodshot. He told defendant to sit on the curb.

Traffic officers were called to continue the investigation. Officer Maddox waited until other officers arrived, then resumed questioning defendant. During this exchange, defendant admitted he was on parole. Defendant consented to a search, during which Officer Maddox found two syringes. One *33 syringe was empty; the other contained a small amount of liquid that was later determined to be methamphetamine. Defendant admitted he used the syringe to "shoot up methamphetamine." By the time of the search, less than 20 minutes had passed since Officer Maddox arrived on the scene.

Officer Maddox handcuffed defendant and placed him in the back of his police car **85 to await officers from the traffic department. As defendant was being handcuffed, Officer Maddox informed him that "he was being detained for a possible parole violation." Officer Maddox did not give defendant the *Miranda* warnings.

Officer Tony Spates, a Hemet traffic officer, arrived at the scene of the crash at approximately 7:15 p.m. Four other traffic officers responded as well. When Officer Spates arrived, Officer Maddox and another officer briefed him on the collision. Officer Spates then allowed defendant to get out of the police car and removed defendant's handcuffs. Officer Spates proceeded to interview defendant, using a form provided by the Hemet Police Department, in order to determine whether defendant had been driving under the influence. These questions included: "What have you been drinking?," "How much?," "When did you start?," "When did you stop?," "Do you feel the effects of the alcohol?," and "Do you think that you should be driving?" In response to Officer Spates's questions, defendant made incriminating statements regarding his use of drugs.[6]

Officer Spates also administered a number of FST's on defendant, with mixed results. While defendant was able to perform some of the tests to Officer Spates's satisfaction,

other test results suggested that defendant was under the influence of a narcotic.

The first FST administered by Officer Spates was the Romberg test. Defendant was asked to stand at attention, close his eyes, tilt his head back, and estimate the passage of 30 seconds. While defendant performed the test, Officer Spates observed defendant's balance and his ability to accurately measure the passage of 30 seconds. Officer Spates testified that defendant leaned slightly and finished counting at 25 seconds. Officer Spates testified ***34** that the result was consistent with the use of a stimulant because it showed that defendant was "moving a little fast."

At the conclusion of the FST's, Officer Spates advised defendant he was under arrest. Defendant's blood subsequently tested positive for methamphetamine.

2. *The Hearing on the Motion to Suppress*

At the hearing on defendant's motion to suppress, defendant argued he had been placed in custody and his statements made to Officer Spates were inadmissible because he had received no *Miranda* warnings. Furthermore, defendant claimed the FST's were also inadmissible testimonial evidence for the same reason.

The trial court rejected defendant's argument and ruled that, in light of the totality of the circumstances, defendant was not in custody. The court found that Officer Maddox was conducting a preliminary investigation and that he had, at most, only one other officer with him. The court reasoned that Officer Maddox detained defendant briefly, until an investigating officer arrived, in order to effectively manage the accident scene. Once Officer Spates arrived, defendant was released ****86** and "essentially free to move around." The statements made to Officer Spates were thus not the result of custodial interrogation. The trial court also denied the motion to suppress the FST results based on the conclusions that defendant was not in custody at the time the FST's were administered and defendant's performance on the FST's were "non-testimonial." Therefore, the statements and FST results were ruled admissible.

On appeal, defendant challenges the admissibility of the incriminating statements made to Officer Spates and the estimation of time during the Romberg test.

3. *Miranda*

In *Miranda,* the United States Supreme Court held that the Fifth Amendment privilege against self-incrimination prevents the prosecution from using "statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." (*Miranda, supra,* 384 U.S. at p. 444, 86 S.Ct. 1602.) The court was concerned that, without these procedural safeguards, the "inherently compelling pressures" of custodial interrogation might induce suspects to speak where they normally would not. (*Id.* at p. 467, 86 S.Ct. 1602.)

***35** These procedural safeguards require that a person in custody "first be informed in clear and unequivocal terms that he has the right to remain silent" and "that anything said can and will be used against the individual in court." (*Miranda, supra,* 384 U.S. at pp. 467–469, 86 S.Ct. 1602.) Furthermore, a person in custody must be advised of his or her "right to consult with a lawyer and to have the lawyer with him during interrogation." (*Id.* at p. 471, 86 S.Ct. 1602.) Finally, the person must be told that "if he is indigent a lawyer will be appointed to represent him." (*Id.* at p. 473, 86 S.Ct. 1602.) If these advisements are not made, "no evidence obtained as a result of interrogation can be used against him." (*Id.* at p. 479, 86 S.Ct. 1602, fn. omitted.)

In reviewing a trial court's ruling on a motion to suppress evidence based upon a *Miranda* violation, " 'we accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. We independently determine from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained.' [Citation.]" (*People v. Gamache* (2010) 48 Cal.4th 347, 385, 106 Cal.Rptr.3d 771, 227 P.3d 342.)

4. *Custody*

Miranda advisements are only required when a person is subjected to custodial interrogation. (*Miranda, supra,* 384 U.S. at p. 444, 86 S.Ct. 1602.) A suspect is in custody when a reasonable person in the suspect's position would feel that his "freedom of action is curtailed to a 'degree associated with formal arrest.' [Citation.]" (*Berkemer v. McCarty* (1984) 468 U.S. 420, 440, 442, 104 S.Ct. 3138, 82 L.Ed.2d 317 (*Berkemer*).)

Because a *Miranda* warning is only required once custodial interrogation begins, the defendant must necessarily have

been in custody in order to assert a violation. "In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation...." (*Stansbury v. California* (1994) 511 U.S. 318, 322, 114 S.Ct. 1526, 128 L.Ed.2d 293.) These circumstances must be measured "against an objective, ****87** legal standard: would a reasonable person in the suspect's position during the interrogation experience a restraint on his or her freedom of movement to the degree normally associated with a formal arrest." (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1161, 59 Cal.Rptr.2d 587; see *Berkemer, supra,* 468 U.S. at p. 442, 104 S.Ct. 3138; *California v. Beheler* (1983) 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275; *People v. Stansbury* (1995) 9 Cal.4th 824, 830, 38 Cal.Rptr.2d 394, 889 P.2d 588.)

California courts have identified a number of factors relevant to this determination. While no one factor is conclusive, relevant factors include: ***36** "(1) [W]hether the suspect has been formally arrested; (2) absent formal arrest, the length of the detention; (3) the location; (4) the ratio of officers to suspects; and (5) the demeanor of the officer, including the nature of the questioning." (*People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403, 42 Cal.Rptr.3d 301; see *People v. Forster* (1994) 29 Cal.App.4th 1746, 1753, 35 Cal.Rptr.2d 705; *People v. Lopez* (1985) 163 Cal.App.3d 602, 608, 209 Cal.Rptr. 575.)

Additional factors include: "[W]hether the suspect agreed to the interview and was informed he or she could terminate the questioning, whether police informed the person he or she was considered a witness or suspect, whether there were restrictions on the suspect's freedom of movement during the interview, and whether police officers dominated and controlled the interrogation or were 'aggressive, confrontational, and/or accusatory,' whether they pressured the suspect, and whether the suspect was arrested at the conclusion of the interview." (*People v. Pilster, supra,* 138 Cal.App.4th at pp. 1403–1404, 42 Cal.Rptr.3d 301, citing *People v. Aguilera, supra,* 51 Cal.App.4th at p. 1162, 59 Cal.Rptr.2d 587.)

In denying the defense's motion for suppression of evidence, the trial court concluded that, under the totality of the circumstances, defendant was not placed in custody when he was initially restrained. The trial court characterized the seizure as a "brief detention." The trial court supported this ruling with facts from the record that weigh against an objective determination of custody.

For example, the trial court found that defendant was restrained for only a brief period of time. The record provides ample evidence supporting this conclusion. Officer Maddox responded to the collision at approximately 6:52 p.m. Officer Spates arrived at approximately 7:15 p.m. During this time, Officer Maddox checked for injured parties, then proceeded to question and search defendant before handcuffing him and placing him in the police car. Because of this small window of time, defendant was likely restrained only for a matter of minutes. The brief nature of this restraint tends to show that defendant was merely detained, not in custody.

The trial court also found that, when defendant was restrained, Officer Maddox was accompanied by no more than one other officer. Logically, the fewer the number of officers surrounding a suspect the less likely the suspect will be affected by custodial pressures. However, while this factor would normally weigh against a finding of custody, the argument is less persuasive under the present facts. Here, defendant was restrained when police were shorthanded. However, questioning resumed after more officers arrived.

***37** Another factor identified by the trial court is the fact that Officer Maddox was in "preliminary investigative stages" when he restrained defendant. This also tends to support the determination that defendant was not in custody. Because Officer ****88** Maddox was concerned with gathering information regarding what had occurred, rather than questioning defendant as a suspect, it is less likely defendant was exposed to custodial pressures.

While the above facts offer some support for the trial court's determination that defendant was not in custody, other circumstances lend great weight to the argument that a reasonable person would have felt restrained in a manner normally associated with formal arrest. First, prior to being restrained, defendant had incriminated himself in a number of ways. While talking to Officer Maddox, defendant admitted he was on parole. Defendant then consented to a search of his person. That search yielded two syringes, one of which contained a liquid. Defendant further admitted that the syringes were used to "shoot up methamphetamine." At that point, Officer Maddox restrained defendant and informed him that he was being "detained for a possible parole violation."

The fact that defendant offered several incriminating facts and was restrained so quickly thereafter weighs strongly in favor of a finding of custody. A reasonable person in defendant's

position would know that possession of methamphetamine and related paraphernalia is a parole violation and a crime, and that arrest would likely follow.

Second, the fact that Officer Maddox advised defendant he was being "detained for a possible parole violation" also weighs in favor of custody. The word "detained," by itself, cannot abrogate the likelihood of custodial pressures. A reasonable person would probably not be comforted by the fact that the officer used the word "detained" and mentioned only a "possible" crime. Here, defendant had just admitted that he was on parole and had been using and carrying methamphetamine. In this context, a reasonable person would understand the officer's statement to mean that he or she was not free to leave.

Even if the above circumstances are insufficient to constitute a level of restraint comparable to formal arrest, the physical restraint that followed crosses that boundary. Defendant was confronted with two of the most unmistakable indicia of arrest: he was handcuffed and placed in the back of a police car. A reasonable person, under these circumstances, would feel restrained to a " 'degree associated with formal arrest.' " (*Berkemer, supra,* 468 U.S. at p. 440, 104 S.Ct. 3138.)

***38** In their respondent's brief, the People cite language from *Berkemer* pertaining to "ordinary traffic stops." (See *Berkemer, supra,* 468 U.S. at p. 440, 104 S.Ct. 3138.) As the People note, the *Berkemer* opinion states that the "circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police." (*Id.* at p. 438, 104 S.Ct. 3138.) The United States Supreme Court concluded that "persons temporarily detained pursuant to such [ordinary traffic] stops are not 'in custody' for the purposes of *Miranda.*" (*Id.* at p. 440, 104 S.Ct. 3138.)

This was not a typical traffic stop. Defendant was handcuffed and placed in the back of a police car before Officer Spates arrived. A reasonable person in that situation would feel completely at the mercy of the police. As *Berkemer* stated, such a person is "entitled to the full panoply of protections prescribed by *Miranda.*" (*Berkemer, supra,* 468 U.S. at p. 440, 104 S.Ct. 3138.)

The People also contend it was reasonable for Officer Maddox to place defendant in the back of the police car until other officers arrived. We do not disagree with this point. As the first officer on the ****89** scene, Officer Maddox was likely met with chaos. Officer Maddox testified that there were "numerous officers directing traffic" and that police "had to shut down the entire roadway for the helicopter." By restraining defendant and waiting for backup, we have no doubt that Officer Maddox acted prudently.

However, this argument is misdirected. "Whether an individual has been unreasonably seized for Fourth Amendment purposes and whether that individual is in custody for *Miranda* purposes are two different issues. [Citation.]" (*People v. Pilster, supra,* 138 Cal.App.4th at p. 1405, 42 Cal.Rptr.3d 301.) Here, the issue is not whether the police acted reasonably in detaining or restraining defendant, but rather " 'whether there [was] a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.' [Citation.]" (*Stansbury v. California, supra,* 511 U.S. at p. 322, 114 S.Ct. 1526.)

While a reviewing court must apply a deferential substantial evidence standard to the trial court's factual findings, it must independently determine whether the defendant was in custody. (*People v. Ochoa* (1998) 19 Cal.4th 353, 402, 79 Cal.Rptr.2d 408, 966 P.2d 442; *People v. Pilster, supra,* 138 Cal.App.4th at p. 1403, 42 Cal.Rptr.3d 301.) Based on the totality of the circumstances, we hold that defendant was placed in custody when he was handcuffed and placed in the police car.

Furthermore, although defendant was released from the police car and the handcuffs removed by the time Officer Spates questioned him, defendant remained in custody for purposes of *Miranda.* The removal of the restraints was not enough to ameliorate the custodial pressures that likely remained ***39** from the initial confinement. Furthermore, defendant was released from the police car only after numerous officers had arrived at the scene. The ratio of officers to suspect had increased to at least seven to one, thus increasing the custodial pressure on defendant.[7]

5. *Interrogation*

Interrogation is express questioning or "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297, fns. omitted.)

After releasing defendant from his handcuffs, Officer Spates proceeded to question defendant. The People argue that these

questions were of a sufficiently general nature to escape the requirement of a *Miranda* warning. Relying on *People v. Milham* (1984) 159 Cal.App.3d 487, 205 Cal.Rptr. 688 (*Milham*), the People assert that general questions regarding the facts of a crime may be asked of "persons temporarily detained by officers who do not have probable cause to arrest." (*Id.* at p. 500, 205 Cal.Rptr. 688.) These questions are "designed to ... enable the police to quickly ascertain whether such person should be permitted to go about his business or held to answer charges." (*Ibid.*)

While this principle is sound, it is inapplicable to the facts of this case. For instance, defendant was restrained after Officer Maddox suspected a parole violation. It is likely that Officer Maddox had ****90** probable cause to arrest defendant at that point. However, by restraining defendant for further investigation, it is evident that Officer Maddox had decided not to allow defendant "to go about his business." (*Milham, supra,* 159 Cal.App.3d at p. 500, 205 Cal.Rptr. 688.) Furthermore, the questions asked by Officer Spates were not "[g]eneral on-the-scene" questions. (See *ibid.*) The questions were such that the police should reasonably have known they were "likely to elicit an incriminating response." (*Rhode Island v. Innis, supra,* 446 U.S. at p. 301, 100 S.Ct. 1682, fn. omitted.) The facts of *Milham* clearly illustrate this distinction.

In *Milham,* the defendant was involved in a car accident that resulted in the death of two of his passengers. (*Milham, supra,* 159 Cal.App.3d 487, 205 Cal.Rptr. 688.) At the scene of the crash, a responding officer approached the defendant and asked whether he was involved in the accident. (*Id.* at p. 499, 205 Cal.Rptr. 688.) The defendant stated that he had been driving the car and that he was worried he had killed his wife. (*Ibid.*) The officer then asked how the accident had happened. (*Ibid.*) ***40** The defendant answered that he thought he had "blacked out." (*Ibid.*) He was later convicted of driving under the influence. (*Id.* at p. 487, 205 Cal.Rptr. 688.)

The defendant appealed his conviction, arguing that the statements made to the officer should have been excluded because no *Miranda* warnings had been given. (*Milham, supra,* 159 Cal.App.3d at p. 499, 205 Cal.Rptr. 688.) The court rejected this argument, explaining that the "[g]eneral on-the-scene questioning" present in the facts did not present a *Miranda* violation. (*Id.* at p. 500, 205 Cal.Rptr. 688.) The court noted that the responding officer had no indication that a crime had been committed. (*Ibid.*) The court also reasoned that, although the officer asked the defendant questions, the officer's "suspicion of criminality" had not yet focused on the defendant. (*Id.* at pp. 500–501, 205 Cal.Rptr. 688.) Finally, the defendant in *Milham* was not in police custody at the time of the questioning. (*Id.* at p. 500, 205 Cal.Rptr. 688.)

Each of the above factors presents a separate point of distinction. First, Officer Spates was briefed by Officer Maddox before he began to question defendant. He knew that defendant was on parole and had been in possession of methamphetamine and syringes. It cannot be said, therefore, that Officer Spates lacked an indication that a crime had been committed. Similarly, it cannot be reasonably argued that defendant was not under suspicion of criminality. Finally, when the questioning began, defendant was already in police custody because of a "possible parole violation."

As the court noted in *Milham,* the "shift from investigatory to accusatory questioning can be very subtle." (*Milham, supra,* 159 Cal.App.3d at p. 500, 205 Cal.Rptr. 688.) However, this case provides no such subtlety. Here, defendant was asked questions such as, "[w]hat have you been drinking?" and "[h]ow much?" These questions contrast strongly against general questions such as, "[w]ere you involved in the accident?" (*Id.* at p. 494, 205 Cal.Rptr. 688.)

Unlike the questions in *Milham,* the questions posed to defendant were such that the police should have known they would likely elicit an incriminating response. Here, the police knew defendant had violated his parole and was carrying methamphetamine. The questions posed to defendant by Officer Spates reflected that knowledge. By the time he contacted defendant, Officer Spates had moved past investigation and into the realm of inculpation. ****91** Therefore, defendant was interrogated by Officer Spates.

Because defendant was interrogated while in custody, the police were obligated to apprise defendant of his *Miranda* rights. Since defendant was not given his *Miranda* advisements until after Officer Spates's interrogation, evidence of his responses to the interrogation cannot be used against him. (*Miranda, supra,* 384 U.S. at p. 479, 86 S.Ct. 1602.) Accordingly, the trial court erred in denying defendant's motion to suppress such evidence.

***41** 6. *Admission of Romberg Test*

At the hearing on the motion to suppress, defendant challenged the admissibility of evidence that he estimated the passage of 30 seconds under the Romberg test when only 25 seconds had passed. The trial court denied the motion

to suppress the FST results based on its conclusion that defendant was not in custody at the time the FST's were administered. The court further ruled that the FST's were "non-testimonial" in nature.

On appeal, defendant argues he was in custody at the time the FST's were administered and that the estimation of time was testimonial because he was asked to "communicate the result of his mental process."[8] Defendant argues, therefore, that the evidence was inadmissible because there had been no *Miranda* warnings.

Because we previously determined that defendant was in custody for the purposes of *Miranda* and that Officer Spates's questions constituted interrogation, the remaining issue is whether the estimation of time made during the Romberg test is testimonial evidence for purposes of *Miranda.*

The Fifth Amendment provides that no "person ... shall be compelled in any criminal case to be a witness against himself...." (U.S. Const., 5th Amend.) The United States Supreme Court has held that this privilege "does not protect a suspect from being compelled by the State to produce 'real or physical evidence.' " (*Muniz, supra,* 496 U.S. at p. 589, 110 S.Ct. 2638, quoting *Schmerber v. California, supra,* 384 U.S. at p. 764, 86 S.Ct. 1826.) The privilege "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." (*Schmerber v. California, supra,* at p. 761, 86 S.Ct. 1826, fn. omitted.) "[I]n order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself." (*Doe v. U.S.* (1988) 487 U.S. 201, 210, 108 S.Ct. 2341, 101 L.Ed.2d 184, fn. omitted.)

Here, defendant contends the estimation of time made during the Romberg test was a communication that divulged his mental process in an incriminating manner, and is therefore testimonial evidence. To support this proposition, defendant relies on *Muniz.*

***42** In *Muniz,* the defendant was pulled over by police and asked to perform various ****92** FST's. (*Muniz, supra,* 496 U.S. at p. 585, 110 S.Ct. 2638.) After performing poorly, the defendant admitted he had been drinking. (*Ibid.*) The police later asked the defendant to state "his name, address, height, weight, eye color, date of birth, and current age." (*Id.* at p. 586, 110 S.Ct. 2638.) Finally, the police asked the defendant for the date of his sixth birthday, which the defendant could not answer. (*Ibid.*) The defendant had not been given *Miranda* warnings. (*Muniz, supra,* at p. 586, 110 S.Ct. 2638.)

The Supreme Court held that any physical observations made by police were nontestimonial and, therefore, were not gathered in violation of *Miranda.* (*Muniz, supra,* 496 U.S. at p. 583, 110 S.Ct. 2638.) For example, in reference to the defendant's slurred speech, the court held that "[r]equiring a suspect to reveal the physical manner in which he articulates words, like requiring him to reveal the physical properties of the sound produced by his voice, [citation] does not, without more, compel him to provide a 'testimonial' response for purposes of the privilege." (*Id.* at p. 592, 110 S.Ct. 2638.) Additionally, "routine booking question[s]," such as the defendant's height, weight, eye color, etc., fall outside of *Miranda* protections. (*Muniz, supra,* at p. 601, 110 S.Ct. 2638.)

The Supreme Court held, however, that the question regarding the defendant's sixth birthday called for a testimonial response because the question required the defendant to "communicate an express or implied assertion of fact or belief." (*Muniz, supra,* 496 U.S. at pp. 597–599, 110 S.Ct. 2638, fn. omitted.) In such circumstances, "the suspect confronts the 'trilemma' of truth, falsity, or silence." (*Id.* at p. 597, 110 S.Ct. 2638.)[9] Because the defendant was in custody and had not been advised of his right to silence, the defendant's only choices were to incriminate himself by admitting that he did not know the date of his sixth birthday, or to answer falsely and possibly incriminate himself with an incorrect guess. (*Id.* at pp. 598–599, 110 S.Ct. 2638.) "[H]ence the response ... contain[ed] a testimonial component." (*Id.* at p. 597, 110 S.Ct. 2638.)

The court held that the defendant's inability to answer the question "supported an inference that his mental faculties were impaired, because his assertion (he did not know the date of his sixth birthday) was different from the assertion (he knew the date was (correct date)) that the trier of fact might reasonably have expected a lucid person to provide." (*Muniz, supra,* 496 U.S. at p. 599, 110 S.Ct. 2638.) Therefore, "the incriminating inference of impaired mental faculties stemmed, not just from the fact that Muniz slurred his response, but also from a testimonial aspect of that response." (*Ibid.,* fn. omitted.)

***43** Defendant claims that the Romberg test is "materially indistinguishable" from the sixth birthday question in *Muniz* because defendant, like the defendant in *Muniz,* was "asked to

make a calculation, and communicate the result of his mental process." The People, in response, argue that the estimation of time was "analogous to the slurred speech in *Muniz.*" The determination of the issue, therefore, depends on whether the Romberg test required a testimonial response or produced only real or physical evidence.

****93** As suggested by the People, the Romberg test results are similar, in some respects, to the physical evidence observed by officers during FST's. The Romberg test is designed to "evaluate[ ] an individual's internal clock." (*Ramirez v. City of Buena Park* (9th Cir.2009) 560 F.3d 1012, 1018.) An individual's internal clock is undoubtedly affected, at least in part, by his or her physical condition.

However, the Romberg results are also unlike other purely physical observations, such as loss of balance, redness in the cheeks, or slurred speech. This point is illustrated by the relative complexity of the Romberg test. For example, evidence of slurred speech reflects only an officer's observation of the physical manifestation of the subject's intoxication (i.e., a lack of muscular coordination). Although the subject must speak in order for the observation to be made, the evidentiary value of the observation rests in how the communication was made, not its content.

The Romberg test, on the other hand, implicitly requires the subject to count each passing second, or otherwise estimate the passage of time. Once the subject has counted 30 seconds, the subject must then notify the officer that his estimation is complete. Thus, unlike the slurring of speech observed in *Muniz,* the Romberg test requires the subject to make a mental calculation and communicate that calculation to police.

The probative value of the Romberg test, therefore, lies firmly in the accuracy of the subject's estimation as communicated to police. Because the test requires the suspect to communicate an implied assertion of fact or belief (i.e., that 30 seconds has elapsed), the test is similar to the sixth birthday question in *Muniz,* which called for a testimonial response. (*Muniz, supra,* 496 U.S. at p. 597, 110 S.Ct. 2638.) Because he was not told of his right to remain silent, defendant was faced with the choice of stating an incriminating truth (i.e., that he believed 30 seconds had elapsed when that amount of time has not in fact passed) or a falsity (i.e., making a guess as to when 30 seconds has passed).

The communication of a mental calculation also distinguishes the use of the Romberg test from FST's that merely call for the suspect to count or ***44** recite the alphabet. In *Muniz,* for example, the defendant was asked to count while performing walking and balancing FST's. The defendant counted accurately in one test and did not count at all in the other. (*Muniz, supra,* 496 U.S. at p. 603, fn. 17, 110 S.Ct. 2638.) Because the defendant did not argue that his failure to count was incriminating, the court refused to rule on "whether Muniz's counting (or not counting) itself was 'testimonial' within the meaning of the privilege." (*Ibid.*)

Although the United States Supreme Court and California courts have not addressed the testimonial nature of FST's involving counting, the majority of state courts that have addressed the issue hold that counting (as well as reciting the alphabet) is nontestimonial.[10] In most of these cases, the courts have reasoned that counting or reciting the alphabet does not reveal a person's personal beliefs or knowledge.[11]

****94** However, even assuming, *arguendo,* that counting is nontestimonial, the inquiry concerning the Romberg test must continue. While the ability to count may reasonably be viewed as indicative of a reflexive or physical process, it is evident that the Romberg test requires a calculation that goes beyond the simple recitation of a memorized sequence. In contrast to reflexive counting, the Romberg test requires the subject to measure the passage of time, and then make an assertion that 30 seconds has passed. It is this assertion that determines the testimonial nature of the Romberg test response. Therefore, we need not decide if counting is testimonial for *Miranda* purposes. The subject of a Romberg test must not only count, but also count at a speed that accurately measures the passage of time.

Here, as in *Muniz,* the suspect was required to make a calculation and communicate the results of that calculation to the police. That communication was an assertion of fact or belief that was relevant for its accuracy, not for the manner in which it was delivered. Therefore, defendant's estimation of time was testimonial evidence. Because the test was administered while defendant was in custody and was reasonably likely to elicit an incriminating response, *Miranda* warnings were required. Because no such warnings were given, defendant's estimation was inadmissible.

***45** 7. *Prejudice*

Although the court erred in failing to exclude the challenged statements, the error was not prejudicial.

Federal constitutional error is not prejudicial and does not require reversal where the reviewing court properly concludes it was "harmless beyond a reasonable doubt." (*Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705.)

The first statement challenged on appeal is defendant's statement to Officer Spates that he had consumed alcohol. This statement was harmless because the focus of the trial was on defendant's possession and use of methamphetamine, not alcohol. Indeed, the jury heard defendant's preliminary alcohol screening returned a 0.00 percent reading. Furthermore, Officer Spates testified that he "excluded alcohol" as a suspected intoxicant after performing the preliminary alcohol screening. It is clear from the record that defendant was convicted based on his consumption of methamphetamine. The fact that defendant said he consumed alcohol could not reasonably have affected the jury's verdict.

The second challenged statement was defendant's statement that he should not have been driving because he did not have a license. This statement was harmless as well. Defendant pled guilty to driving without a license and, at trial, his counsel stated that driving without a license "was never an issue." While it may be argued that the suspension or revocation of a license may suggest a past crime, here defendant was not asked why his license was revoked. Again, testimony focused on whether defendant was under the influence of methamphetamine. Therefore, this statement is unlikely to have influenced the jury.

****95** Defendant also challenges the admissibility of his declaration that "he had shot up some speed" and that he had "injected it into his left wrist." These statements, although clearly relevant to the issue of defendant's intoxication, were harmless as well. At trial, a great body of evidence was presented establishing defendant's use of methamphetamine. For example, the jury heard that defendant was found to be in possession of methamphetamine and syringes. Defendant admitted to Officer Maddox that the syringes were used "[f]or shooting up methamphetamine." The jury also heard Officer Spates's testimony regarding defendant's physical appearance (including the puncture wound on defendant's wrist) and his poor physical performance during sobriety tests. In addition, the jury heard that defendant's blood was found to contain 198 nanograms of methamphetamine—an amount an expert testified "is consistent with an abuse level."

***46** In contrast to the strong evidence of defendant's intoxication, the results of the Romberg test were not necessarily even incriminating. For example, a toxicologist testified with respect to the Romberg results: "It's not too far off from actual time. It's heading in a fast direction." In addition, Officer Spates admitted that if two people counted to 30, a five-second disparity could be explained by the simple fact that one person "counted a little faster." Although the Romberg evidence supports an inference that defendant was under the influence of a stimulant, it is clear that the inclusion of this evidence, even in conjunction with the other statements made to Officer Spates, was overshadowed by the properly admitted evidence supporting a finding of intoxication.

Defendant argues, however, that because there was conflicting evidence presented at trial on the issue of impairment, it is likely that the statements were relatively influential. While it is clear that these statements are relevant to defendant's use of methamphetamine, when viewed in the context of the entire record, it is improbable they influenced the jury. The jury heard that defendant drove a vehicle into oncoming traffic. He was in possession of methamphetamine and drug paraphernalia. He exhibited various physical indications of intoxication. Methamphetamine was found in defendant's blood at levels indicating abuse. Finally, the jury heard expert testimony that a person "would [not] be able to safely operate a motor vehicle" "based on the levels [of methamphetamine] detected in this case, the driving pattern ..., as well as the eyelid flutter and the rebound dilation."

Under these facts, we hold that the erroneous admission of defendant's statements to police, and the results of the Romberg test, was "harmless beyond a reasonable doubt." (*Chapman v. California, supra,* 386 U.S. at p. 24, 87 S.Ct. 824.)

B. *Sentencing Issues*[**]

III. DISPOSITION

Defendant's conviction is affirmed. Following remand, the court shall hold a new sentencing hearing to determine, in its discretion, whether to impose concurrent or consecutive sentences as to counts 1 and 2. Regardless of how the court exercises such discretion, the court shall direct that the sentence on ***47** count 2 be stayed pursuant to Penal Code

section 654. The trial court is directed to amend the minute order and the abstract of judgment to reflect the stay of the sentence on count 2, and to forward a certified copy of the amended abstract to **96 the Department of Corrections and Rehabilitation.

We concur: RICHLI, Acting P.J., and CODRINGTON, J.

All Citations

205 Cal.App.4th 26, 140 Cal.Rptr.3d 80, 12 Cal. Daily Op. Serv. 4280, 2012 Daily Journal D.A.R. 4981

Footnotes

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part II.B.

1 *Miranda v. Arizona* (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (*Miranda*).

2 Vehicle Code section 23153, subdivision (a). The jury also found that in the commission of the offense charged in count 1, defendant personally inflicted bodily injury upon another within the meaning of Penal Code sections 12022.7, subdivision (a) and 1192.7, subdivision (c)(8).

3 Health and Safety Code section 11379, subdivision (a).

4 Vehicle Code section 14601.1, subdivision (a).

5 Penal Code sections 667.5, subdivision (b), 667, subdivisions (a), (c), (e)(2)(A), and 1170.12, subdivision (c)(2)(A).

6 The nature of defendant's responses to Officer Spates was not entirely clear at the time of the suppression hearing. As noted above, the motion to suppress was based upon the evidence adduced at the preliminary hearing. At that time, the court sustained defense counsel's objections to the admission of defendant's responses to Officer Spates's questions before they were disclosed. However, when the court asked the prosecutor whether there were admissions or confessions defendant made to Officer Spates, the prosecutor responded: “[T]he statements ... involving his drug use history [,] ... that he had shot up, [and] that he did have puncture wounds.” At trial, Officer Spates testified that defendant admitted he “had shot up some speed” into his left wrist at approximately 7:00 a.m.

7 According to Officer Huff, five traffic officers responded to the call. These five included Officers Huff, Spates, Gomez, Reinbolt, and Nevarez. Officers Maddox and McGinnis were on the scene when the traffic officers arrived.

8 The word “testimonial” is often used in discussion of confrontation clause issues. Here, however, there is no intended reference to “testimonial hearsay.” (*Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177.) In this context, the word “testimonial” refers to communication which falls under the Fifth Amendment privilege against self-incrimination, as distinguished from physical evidence, such as the slurring of speech or the taking of blood. (*Pennsylvania. v. Muniz* (1990) 496 U.S. 582, 110 S.Ct. 2638, 110 L.Ed.2d 528 (*Muniz*); *Schmerber v. California* (1966) 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908.)

9 The *Muniz* court analogized the trilemma of truth, falsity, or silence in the custodial interrogation context to the “ ‘ “cruel trilemma of self-accusation, perjury or contempt” ’ [citation] that defined the operation of the Star Chamber, wherein suspects were forced to choose between revealing incriminating private thoughts and forsaking their oath by committing perjury.” (*Muniz, supra,* 496 U.S. at p. 596, 110 S.Ct. 2638.)

10 See *People v. Berg* (1999) 92 N.Y.2d 701, 685 N.Y.S.2d 906, 708 N.E.2d 979, *State v. Devlin* (1999) 294 Mont. 215, 980 P.2d 1037, *Vanhouton v. Commonwealth* (1997) 424 Mass. 327, 676 N.E.2d 460, *State v. Superior Court* (1987) 154 Ariz. 275, 742 P.2d 286, *State v. Maze* (1992) 16 Kan.App.2d 527, 825 P.2d 1169, *State v. Zummach* (N.D.1991) 467 N.W.2d 745, *People v. Bugbee* (1990) 201 Ill.App.3d 952, 147 Ill.Dec. 381, 559 N.E.2d 554,; *Gassaway v. State* (Tex.Crim.App.1997) 957 S.W.2d 48. Contra, *Allred v. State* (Fla.1993) 622 So.2d 984; *State v. Fish* (1995) 321 Or. 48, 893 P.2d 1023.

11 See *People v. Berg, supra,* 685 N.Y.S.2d 906, 708 N.E.2d 979, *State v. Devlin, supra,* 980 P.2d 1037, *Vanhouton v. Commonwealth, supra,* 676 N.E.2d 460, *State v. Superior Court, supra,* 742 P.2d 286, *State v. Maze, supra,* 825 P.2d 1169, *State v. Zummach, supra,* 467 N.W.2d 745,; *People v. Bugbee, supra,* 147 Ill.Dec. 381, 559 N.E.2d 554.

** See footnote *, *ante* page 26.

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37 Cal.App.5th 642
Court of Appeal, Second District, Division 3, California.

The PEOPLE, Plaintiff and Respondent,

v.

Sheila COOPER, Defendant and Appellant.

B286201
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Filed 07/18/2019

Synopsis

Background: Defendant was convicted in the Superior Court, Los Angeles County, No. BA459662, Robert J. Perry, J., of driving under the influence of alcohol causing injury within ten years of prior driving under the influence offense. Defendant appealed.

Holdings: The Court of Appeal, Egerton, J., held that:

statements made by defendant at police station, after police officer brought defendant there to perform field sobriety tests in light of defendant's uncooperative behavior on roadway, were not testimonial and thus were not subject to privilege against self-incrimination, and

any error in admission of defendant's statement estimating number of seconds that had passed, during modified Romberg test used by police officer as field sobriety test, was harmless error.

Affirmed.

****513** APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Affirmed. Los Angeles County Super. Ct. No. BA459662

Attorneys and Law Firms

Darden Law Group and Christopher Darden, Los Angeles, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie C. Brenan and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

Opinion

EGERTON, J.

***644** A jury convicted defendant and appellant Sheila Cooper of driving under the influence of alcohol causing injury within 10 years of a prior driving under the influence offense. On appeal, Cooper contends the trial court erred in denying her motion to suppress statements she made to police during field sobriety tests administered at the police station. Cooper claims a violation of her Fifth Amendment rights under *Miranda v. Arizona* (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (*Miranda*). We find no error and affirm.

FACTS AND PROCEDURAL BACKGROUND

1. *Cooper slams into the victims' car*

Just after 8:30 p.m. one January night in 2017, Yessenia Rosales was driving her Kia Forte on Manchester Boulevard in Los Angeles. In the passenger seat was her fiancé, Edmundo Mendez. Both Rosales and Mendez were wearing seatbelts. Rosales was stopped at a red light. Just as the light turned green, Rosales and Mendez saw in their rearview mirror the lights of a car coming up behind them, closer and closer. The lights in the rearview mirror were getting brighter and more intense. The oncoming car hit the Kia very, very hard. Rosales's car went flying forward at least 50 feet and ended up on the other side of the intersection.

Mendez called 911. The operator told him just to get the information from the other driver. Mendez walked over to the car that hit him, a Chevrolet Camaro. Cooper was sitting in the driver's seat. Mendez spoke to her. At first she was "unresponsive" but after a few seconds she seemed to "c[o]me to." Cooper told Mendez he had no authority to ask for her identification because he was not a police officer. Cooper's speech was slurred and Mendez smelled alcohol on her breath.

A tow truck happened to drive by and stopped to help. Cooper got out of her car, approached the tow truck driver, and said, "I need to get out of here. ***645** Can you get me out of here?" Mendez noticed Cooper was "wobbling," "swaying side to side" "like she couldn't walk straight." Mendez called 911 again.

****514** Donyell Journagin also was driving down Manchester that night. While sitting at the red light, Journagin saw the lights of a car coming fast. He estimated the car was traveling at least 65 or 70 miles per hour; the speed limit there is 35. The car "just smack[ed]" into another car, "hit[ting] it hard" and knocking it "a good 70, 80 feet" across the intersection. Journagin pulled over and got out to make sure everyone was alright, "[b]ecause the crash ... was like a hard hit."

Journagin saw Cooper, who was "kind of stumbling" and kind of disoriented. Journagin asked Cooper if she was okay and told her "[t]he people [were] going to need [her] I.D. to exchange the information." Cooper started "acting crazy." As Mendez walked up, Cooper "turned around" and "start[ed] saying like, what the fuck? You motherfuckers work for Trump or something like that." Journagin backed up; he and Mendez walked to the curb and Journagin told Mendez he would have to wait for the police because "[y]ou can't take her I.D. or anything."

Los Angeles Police Department Officers Samual Colwart and Nathan Grate arrived at the scene about 10 minutes after the collision. Cooper was standing on the sidewalk. Colwart asked Cooper for her driver's license, registration, and proof of insurance. Colwart noticed Cooper's eyes were red and watery, she smelled like alcohol, and she was chewing gum. Her speech was slurred. Cooper walked back to her car. She was stumbling and unable to walk straight.

Cooper got into her car and "kind of just sat there." She was upset and crying. Eventually Cooper went through her wallet and handed her license to Colwart. She got out of her car. Colwart again asked Cooper for her registration and proof of insurance. Cooper "became very upset" and "threw her wallet on the hood of the car." She was "walking around" and "cursing."

Colwart asked Cooper if she had been drinking; she said no. Colwart asked Cooper if she had "any physical defects"; she said no. Colwart asked Cooper where she had been going; she refused to answer. In response to Colwart's questions, Cooper told him what she had eaten and when she had last slept. Colwart asked Cooper if she was under a doctor's care and she responded, "Ain't your business."

Rosales saw that, while Cooper was talking with the officers, "[s]he was throwing her hands up" "then down in a slumping over motion," "walking back and forth," and "walking away from [the] officers."

646 2.** ***Officers take Cooper to the police station and ask her to perform field sobriety tests

Colwart decided to take Cooper to the 77th Street police station to administer the field sobriety tests (FSTs). Colwart later explained: "[S]he was just so upset at the scene, she wasn't focused on any—the questions I was asking. She just was really upset. She wasn't ... with the investigation at the time .... It would be unsafe." Cooper was "pacing around" and the roadway "was still an active collision scene." Female officers arrived. They had to "grab [Cooper] and bring her to the [police] car." The station was one and one-half to two miles from the scene.

Once at the station, Colwart began the FSTs with Cooper in the long hallway next to the watch commander's room. Cooper was not handcuffed. Colwart did not see any "physical defects," physical problems, or medical issues that might prevent Cooper from performing the FSTs. According to Colwart, there are "preset instructions" for the FSTs—officers give the tests in a particular order. Colwart typically explains ****515** each test in turn, asks the suspect if she understands the test, and then asks the suspect to perform the test.

The first test was the "eye examination," looking for horizontal gaze nystagmus. Cooper's performance was "consistent with somebody who is impaired due to alcohol."

Next, Colwart had Cooper perform the modified Romberg test.[1] Colwart instructed Cooper to stand with her feet together, hands to her sides, close her eyes, tilt her head back, and estimate 30 seconds. Colwart demonstrated. Cooper swayed back and forth slightly while performing the test; she estimated 23 seconds to be 30 seconds. Variation within the "normal range" is five seconds in either direction; Cooper's estimate of 23 seconds thus was just outside the normal range. Her performance on that test—without more—would not demonstrate impairment.

Next, Colwart explained, then demonstrated, the walk-and-turn test. Cooper indicated she understood the test but she refused to perform it. Cooper told Colwart "her thighs were too big and her pants were too tight." Colwart then explained and demonstrated the one-leg stand test. Cooper refused to do that test as well. She told Colwart "she wouldn't be able to

do it because she had a disability." Cooper told Colwart the nature of the disability "ain't [your] business."

***647** Colwart read Cooper the chemical admonition, advising her she was required to submit to a breath test or a blood test.[2] Cooper chose the breath test. Colwart's partner Grate administered the Intox EC/IR intoxilyzer breath test. Grate first observed Cooper for 15 minutes. Grate then explained to Cooper how to do the test. Cooper purported to blow into the machine but she did not blow hard enough and the machine "said insufficient sample." Grate asked Cooper three more times to blow into the machine properly and with sufficient force, without success. At one point, Cooper wrapped her lips too tightly around the mouthpiece so her breath was "block[ed]" from "go[ing] into the EC/IR machine to provide a sample."

Colwart summoned the watch commander, Sergeant Deanna Quesada, from her office. Quesada explained to Cooper "that she's required by the state to submit to a chemical test to determine the alcohol content of your blood." Quesada told Cooper she could have a breath test or a blood test. Quesada advised Cooper of the consequences of refusing to submit to a test. According to Quesada, Cooper did not respond; she was just silent. Colwart recalled Cooper did respond; he could not remember her exact words, but she "essentially refuse[d] to take any more tests."

3. *The victims' injuries*

The victims' Kia was totaled. At the time of trial, about nine months after the collision, Rosales still had headaches every day. She suffered from knee pain, shoulder pain where her seatbelt had crossed her shoulder, and insomnia, even though she was taking muscle relaxants. The shoulder pain was "constant": "[i]t really hurts ... all the time now." Rosales was unable to perform some of her job duties as a nanny.

****516** Mendez suffered from back pain caused by discs that were "protruding a few centimeters out of place." He also had muscle weakness in his hip and went to physical therapy for five months. He was not able to perform all of his duties as a security officer.

4. *The charges*, Miranda *hearing, trial, verdicts, and sentence*

The People charged Cooper with driving under the influence of alcohol (DUI) within 10 years of a prior felony DUI conviction (count 1), and DUI causing injury within 10 years of another DUI offense (count 2). The People ***648** alleged Cooper had refused to submit to the mandatory chemical test, and she had suffered a prior strike conviction for criminal threats.

Before trial, Cooper filed a *Miranda* motion. Cooper "object[ed] to the admission in [the] trial of any and all evidence related to admissions of the Defendant made prior to being advised of her *Miranda* rights, after she was detained (handcuffed and placed in a patrol vehicle)." Before the trial began, the court conducted an evidentiary hearing. Officer Colwart testified Cooper almost certainly was handcuffed while being transported to the station in the police car. Officers removed the cuffs at the station before Cooper began the FSTs.

Colwart described each test he demonstrated for Cooper. He testified she did not perform the walk-and-turn test; she said "her thighs [were] too big" and her "jeans [were] too tight." Colwart testified after he explained the one-leg stand test and asked Cooper to perform it, she said, "I won't be able to due to disability." The court asked, "So you've done the one test, now you're moving to the next test ... and you're explaining that test to her? ... And then at some point she makes certain statements to you about why she can't perform that test?" Colwart answered, "Yes.... That's the way it happened."

On cross-examination, Colwart testified he had not yet arrested Cooper, nor even formed an opinion that she was under the influence or impaired, when he had her transported to the station. It was still a pending investigation at that juncture.

Cooper's counsel argued Cooper was in custody once she was put in the police car and taken to the station. The court asked, "[Y]ou're not contesting that they had the right to administer these tests, are you?" Counsel responded, "They are voluntar[y] test[s]." The court said, "But what interrogation was going on there? This was an administration of tests." The court continued, "Your issue is ... there is no way that the police can transport someone to the station and give them sobriety tests unless they give them a *Miranda* warning and the person consents to the test[s]; that's your position?" Counsel answered, "Yes." The court asked, "You want me to suppress all oral statements she made from the time she got out of the car and was asked to do the field sobriety tests; is that what your position is?" Counsel said, "Yes." The court denied the motion.

In October 2017, a jury convicted Cooper of both counts and found the refusal allegation true. Cooper waived jury on, and later admitted, her prior ***649** convictions. The trial court denied Cooper's *Romero* motion.[3] The court earlier had said it might well grant the motion, as Cooper's strike was more than 13 years old. But after reading the probation department report, the court stated it was "astonished" ****517** at Cooper's record. The court recounted Cooper's numerous DUI convictions.[4] The court said, "I just was astonished at the record and dismayed by the number of convictions. I feel she has a serious problem with alcohol and with driving under the influence, and I would consider her to be a serious danger to those in the community." The court sentenced Cooper to six years in the state prison, calculated as the upper term of three years doubled because of Cooper's strike. The court also ordered Cooper to serve four additional days in custody for refusing to submit to a chemical test.

DISCUSSION

Cooper argues the trial court erred in declining to suppress six statements she made at the police station:

- "That her thighs were to[o] big [to] perform a field sobriety test";
- "That her jeans were too tight to perform a field sobriety test";
- "That she could not perform a field sobriety test because she suffered a disability";
- "That when asked the nature of her disability she stated, 'Ain't none of your business' ";
- " 'I don't want to take any more tests' "; and
- "Her response to the modified Romberg test, when she stated 23 seconds had passed when in fact only 30 seconds had lapsed [*sic*]."

***650** The People argue "The trial court properly found these statements admissible because [Cooper] was not being interrogated when she made the statements."[5]

In California, federal constitutional standards govern the admissibility of statements made during a custodial interrogation. (*People v. Nelson* (2012) 53 Cal.4th 367, 374, 135 Cal.Rptr.3d 312, 266 P.3d 1008; *People v. Cunningham* (2001) 25 Cal.4th 926, 993, 108 Cal.Rptr.2d 291, 25 P.3d 519.) "In reviewing the trial court's denial of a suppression motion on *Miranda*-*Edwards*[6] grounds, 'it is well established that we accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. We independently determine from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained.' " (*People v. Gamache* (2010) 48 Cal.4th 347, 385, 106 Cal.Rptr.3d 771, 227 P.3d 342; see also *Cunningham*, at p. 992, 108 Cal.Rptr.2d 291, 25 P.3d 519.)

The Fifth Amendment does not bar the admission of "[v]olunteered statements of any kind" (****518** *Miranda*, *supra*, 384 U.S. at p. 478, 86 S.Ct. 1602), nor those otherwise not resulting from interrogation. (*Rhode Island v. Innis* (1980) 446 U.S. 291, 299-300, 100 S.Ct. 1682, 64 L.Ed.2d 297.) Nontestimonial responses by a suspect—even though made in the course of custodial interrogation—are not subject to the *Miranda* rule. (*Pennsylvania v. Muniz* (1990) 496 U.S. 582, 110 S.Ct. 2638, 110 L.Ed.2d 528 (*Muniz*).) The United States Supreme Court has drawn "a distinction between 'testimonial' and 'real or physical evidence' for purposes of the privilege against self-incrimination." (*Id.* at p. 591, 110 S.Ct. 2638.) Thus, a suspect may be compelled to provide a blood sample (*Schmerber v. California* (1966) 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908); participate in a lineup and repeat a phrase provided by police (*United States v. Wade* (1967) 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149); provide a handwriting exemplar (*Gilbert v. California* (1967) 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178); and read a transcript to provide a voice exemplar (*United States v. Dionisio* (1973) 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67).

In *Muniz*, police found Muniz parked on the shoulder of a highway. He appeared to be under the influence. The officer asked Muniz to perform three FSTs: the horizontal gaze nystagmus test, the walk-and-turn test, and the one-leg stand test. (*Muniz*, *supra*, 496 U.S. at p. 585, 110 S.Ct. 2638.) Muniz performed poorly. The officer arrested Muniz and took him to the station, where he asked him to repeat the tests. Muniz " 'often requested further clarification of ***651** the tasks he was to perform' " and " 'attempted to explain his difficulties in performing the various tasks.' " (*Id.* at pp. 585-586, 110 S.Ct. 2638.)

The officer also asked Muniz several questions, such as his address, height, weight, and so forth. One of those questions required Muniz to give the date of his sixth birthday. Muniz

was unable to do so. (*Muniz*, *supra*, 496 U.S. at p. 586, 110 S.Ct. 2638.)

The court held requiring a suspect to perform FSTs does not violate the Fifth Amendment "because the evidence procured is of a physical nature rather than testimonial." The officer's "dialogue with Muniz concerning the physical sobriety tests consisted primarily of carefully scripted instructions as to how the tests were to be performed. These instructions were not likely to be perceived as calling for any verbal responses and therefore were not 'words or actions' constituting custodial interrogation .... The dialogue also contained limited and carefully worded inquiries as to whether Muniz understood those instructions, but these focused inquiries were necessarily 'attendant to' the police procedure held by the court to be legitimate. Hence, Muniz's incriminating utterances during this phase of the ... proceedings were 'voluntary' in the sense that they were not elicited in response to custodial interrogation." (*Muniz*, *supra*, 496 U.S. at pp. 602-604, 110 S.Ct. 2638.)

The officer's request that Muniz calculate the date of his sixth birthday was different, however. Because that question required Muniz "to communicate an express or implied assertion of fact or belief," Muniz's inability to answer the question was testimonial. (*Muniz*, *supra*, 496 U.S. at pp. 592, 597, 110 S.Ct. 2638.)

Muniz forecloses Cooper's argument as to the first four of the six statements she lists in her brief. Asking a DUI suspect to perform physical tests is not an "interrogation." Colwart testified he explained each test, demonstrated several of them, asked Cooper if she understood, then asked her to perform the tests. Cooper volunteered her statements, claiming an inability to perform the tests and telling ****519** Colwart the nature of the "disability" she cited was none of his business. It is plain why the legal analysis Cooper proposes is not the law: A driver suspected of being under the influence could simply behave obstreperously at the scene, requiring officers to take her to the station for everyone's safety to perform the FSTs. The suspect then could claim—because she was now "in custody"—her *Miranda* rights attached and she had a Fifth Amendment right to refuse to perform the tests. Where—as here—officers ***652** did not yet have probable cause to arrest the suspect, but instead were trying to continue their investigation, they would have no choice but to release the suspect.[7]

Cooper's argument as to the fifth listed statement—that she didn't want to take any more tests—similarly fails.[8] A police inquiry to a suspect as to whether she will submit to a chemical test is not an "interrogation" within the meaning of *Miranda.* (*South Dakota v. Neville* (1983) 459 U.S. 553, 564, 103 S.Ct. 916, 74 L.Ed.2d 748; *Muniz*, *supra*, 496 U.S. at pp. 604-605, 110 S.Ct. 2638 [officer read suspect script explaining how breathalyzer examination worked, nature of state's implied consent law, and consequences of refusal; officer's questions whether suspect understood instructions and wished to submit to test did not constitute interrogation under *Miranda*].)

Cooper's sixth challenged statement—her estimate of 23 seconds on the modified Romberg test when in fact 30 seconds had elapsed—requires a different analysis. Cooper relies on *People v. Bejasa* (2012) 205 Cal.App.4th 26, 140 Cal.Rptr.3d 80 (*Bejasa*). There, officers arrived at the scene of an auto accident and found Bejasa, who had methamphetamine and syringes. He also was on parole. An officer handcuffed Bejasa, told him he was being detained for a possible parole violation, and put him in the police car. After other officers arrived, Bejasa was let out of the car and uncuffed. He was "interview[ed]," asked to do FSTs (including the Romberg test), and then arrested. (*Id.* at pp. 30-31, 140 Cal.Rptr.3d 80.)

The appellate court concluded Bejasa's "incriminating statements regarding his use of drugs" made during questioning, as well as his performance on the Romberg test, should have been suppressed. (Bejasa, supra, 205 Cal.App.4th at p. 33.) The court noted officers already had probable cause to arrest Bejasa on a parole violation. (*Bejasa*, *supra*, 205 Cal.App.4th at pp. 33, 39-45, 140 Cal.Rptr.3d 80.) The officer's questioning went beyond general on-the-scene questioning; by the time the officer "contacted [Bejasa], [he] had moved past interrogation and into the realm of inculpation." (*Id.* at p. 40, 140 Cal.Rptr.3d 80.) Moreover, Bejasa's statement during the Romberg test was like Muniz's response to the question about the date of his sixth birthday: it required the suspect to make a calculation and "to communicate an implied assertion of fact or belief." (*Id.* at p. 43, 140 Cal.Rptr.3d 80.)

Here, Officer Colwart testified he did not have probable cause to arrest Cooper before he administered the FSTs. His investigation was ongoing. In ***653** any event, any error by the trial court in denying Cooper's motion to suppress her estimate of 23 ****520** seconds on the Romberg test was

harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705.) Cooper's performance on the horizontal gaze nystagmus test showed impairment, she refused to do two other FSTs, she was swaying and unsteady on her feet on the roadway, and she smelled of alcohol. Colwart admitted Cooper's "slight" deviation from normal on the Romberg test was not enough to constitute probable cause for a DUI arrest.

We affirm Sheila Cooper's conviction.

Edmon, P. J., and Lavin, J., concurred.

All Citations

37 Cal.App.5th 642, 250 Cal.Rptr.3d 511, 19 Cal. Daily Op. Serv. 6944, 2019 Daily Journal D.A.R. 6742

DISPOSITION

Footnotes

1 Colwart testified the Romberg test is not a standardized field sobriety test recognized by the National Highway Traffic Safety Administration. The LAPD uses the test anyway.

2 Under California's implied consent law, "[a] person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood or breath for the purpose of determining the alcohol content of his or her blood, if lawfully arrested for [a driving under the influence] offense ...." (Veh. Code, § 23612, subd. (a)(1)(A).)

3 *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 53 Cal.Rptr.2d 789, 917 P.2d 628.

4 According to the probation department, Cooper pled to reckless driving in August 2002 in a case initially filed as a DUI. Less than a month later, she again was charged with a DUI. Less than two months later, Cooper was arrested again for DUI, convicted, and ordered to complete an 18-month alcohol education program. Less than six months later, Cooper was arrested and charged with DUI as well as making criminal threats, battery on a peace officer, and gassing. In November 2004, she was arrested for driving with a suspended license. In October 2006, Cooper again committed a DUI. In July 2007 she committed a hit-and-run; she also was charged with driving while her license was suspended for failure to comply with DUI conditions. In July 2009, Cooper was charged with felony DUI causing injury and hit-and-run with injury committed in November 2007. Cooper also was convicted of theft and drug crimes between 1989 and 2008.

5 The People do not dispute Cooper was in custody for *Miranda* purposes once she was handcuffed and taken to the police station.

6 *Edwards v. Arizona* (1981) 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378.

7 Officer Colwart testified he did not arrest every suspect who was detained and asked to perform FSTs. If—as a result of the FSTs—Colwart determined the suspect was not under the influence, Colwart would let that person go.

8 As noted, Sergeant Quesada's recollection was Cooper never made this statement. Officer Colwart testified Cooper said something to that effect, but he could not recall her exact words.

New York Official Reports

244 A.D.2d 499, 664 N.Y.S.2d
110, 1997 N.Y. Slip Op. 09663

The People of the State of
New York, Respondent,
v.
Mark T. Dutcher, Appellant.

Supreme Court, Appellate Division,
Second Department, New York
91/93, 94-10324
(November 17, 1997)

CITE TITLE AS: People v Dutcher

Appeal by the defendant from a judgment of the County Court, Dutchess County (Marlow, J.), rendered November 14, 1994, convicting him of vehicular manslaughter in the second degree (two counts), criminally negligent homicide, and violation of Vehicle & Traffic Law § 1180 (two counts), upon a jury verdict, and imposing sentence.

HEADNOTE

CRIMES
TRIAL
Mistrial

(1) Judgment convicting defendant of vehicular manslaughter and other offenses affirmed --- Court did not err in denying defendant's application for mistrial based on testimony of prosecution witness who opined that bruise in defendant's left shoulder area was caused by seat belt; determination to grant or deny request for mistrial rests within sound discretion of trial court, which is in best position to determine if such drastic relief is warranted to protect defendant's right to fair trial; here, once defendant's counsel objected to opinion testimony, court took prompt curative action by striking improper portion of witness's response, and directing jury to disregard it; court's action was sufficient to alleviate any prejudice to defendant.

Ordered that the judgment is affirmed, and the matter is remitted to the County Court, Dutchess County, for further proceedings pursuant to CPL 460.50 (5).

We find unpersuasive the defendant's contention that the verdict was against the weight of the evidence. While the proof indicating that the defendant was the operator of the vehicle was circumstantial, and was disputed by the defendant's expert witness, the resolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury, which saw and heard the witnesses (*see, People v Gaimari,* 176 NY 84, 94). Its determination should be accorded great weight on appeal and should not be disturbed unless clearly unsupported by the record (*see, People v Garafolo,* 44 AD2d 86, 88). Upon the exercise of our factual review power, we are satisfied that the verdict of guilt was not against the weight of the evidence (CPL 470.15 [5]).

Furthermore, the court did not err in denying the defendant's application for a mistrial based on the testimony of a prosecution witness who opined that a bruise in the defendant's left shoulder area was caused by a seat belt. The determination to ***500** grant or deny a request for a mistrial rests within the sound discretion of the trial court (*see, People v Ortiz,* 54 NY2d 288), which is in the best position to determine if such drastic relief is warranted to protect the defendant's right to a fair trial (*see, People v Cooper,* 173 AD2d 551). Here, once the defendant's counsel objected to the opinion testimony, the court took prompt curative action by striking the improper portion of the witness's response, and directing the jury to disregard it. The court's action was sufficient to alleviate any prejudice to the defendant, and the drastic relief of a mistrial was not warranted under the circumstances (*see, People v Young,* 48 NY2d 995).

The defendant's sentence was not excessive (*see, People v Suitte,* 90 AD2d 80).

Sullivan, J. P., Friedmann, Florio and McGinity, JJ., concur.

End of Document

124 Nev. 1247
Supreme Court of Nevada.

SHERIFF, CLARK COUNTY, Appellant,

v.

Daniel J. BURCHAM, Respondent.

No. 50026.
|
Dec. 24, 2008.
|
Rehearing Denied Feb. 23, 2009.

Synopsis

Background: Defendant filed a pretrial petition for a writ of habeas corpus after he was charged with felony driving under the influence (DUI) and other offenses. The Eighth Judicial District Court, Clark County, Kenneth C. Cory, J., granted the petition in part and dismissed the charge of felony DUI. The state appealed.

Holdings: The Supreme Court, Gibbons, J., held that:

to find that a defendant was under the influence of intoxicating liquor, a factfinder must determine that the alcohol affected the defendant to a degree that rendered him or her incapable of safely driving or exercising actual physical control of the vehicle;

"under the influence" is not vague in violation of due process as used in the statute on felony DUI;

evidence was sufficient to support a grand jury's finding of probable cause to believe that defendant committed felony DUI by driving under the influence of intoxicating liquor;

the state is not required to use expert testimony or explain retrograde extrapolation to a grand jury when a charge of felony DUI is based on certain evidence; and

evidence was sufficient to support a grand jury's finding of probable cause to believe that defendant committed felony DUI by driving with a blood-alcohol concentration (BAC) of 0.08 or more.

Reversed and remanded.

Cherry, J., concurred in part and dissented in part and filed opinion in which Douglas and Saitta, JJ., concurred.

Attorneys and Law Firms

****327** Catherine Cortez Masto, Attorney General, Carson City; David J. Roger, District Attorney, and Bruce W. Nelson, Deputy District Attorney, Clark County, for Appellant.

Thomas F. Pitaro, Las Vegas, for Respondent.

BEFORE THE COURT EN BANC.

***1249** *OPINION*

By the Court, GIBBONS, J.:

Respondent Daniel J. Burcham was charged with felony driving under the influence (DUI) pursuant to NRS 484.3795(*l*)(a) and (b) following an accident that caused the death of another driver. The State appeals the district court's order granting Burcham's pretrial habeas petition and dismissing the felony DUI charge.

***1250** We primarily consider whether the definition of "under the influence," set forth in this court's 1987 decision, *Cotter v. State,*[1] applies to the current version of NRS 484.3795(*L*)(A). IN 1995, the Legislature amended NRS 484.3795, delineating the various acts that may constitute violations of the statute into separate paragraphs.[2] Although we acknowledge that these amendments impact the analysis in *Cotter* with respect to ****328** NRS 484.3795(1), we nevertheless conclude that the standard set forth in *Cotter* is still appropriate for determining whether a defendant is "under the influence." To find someone " under the influence," a factfinder must determine that the driver was impaired "to a degree which renders him incapable of driving safely."[3] We further conclude that because the State's burden at a grand jury proceeding is to present slight or marginal evidence to support a reasonable inference that the defendant committed the crime charged,[4] the State presented sufficient evidence that Burcham was under the influence of alcohol.

Second, we consider whether the State must use expert testimony or explain retrograde extrapolation to a grand jury when a charge under NRS 484.3795(*l*) (b) is based

on evidence that the defendant's blood-alcohol concentration (BAC) was tested twice within a reasonable time after the collision, was lower in the second test, and was below 0.08. We conclude that expert testimony regarding retrograde extrapolation or an explanation by the State is not required in grand jury proceedings under these circumstances.

Therefore, we reverse the district court's order granting Burcham's pretrial petition for a writ of habeas corpus on the felony DUI charge, and we remand this matter for further proceedings.

FACTS AND PROCEEDINGS

Sometime between 6:15 a.m. and 6:30 a.m. on April 30, 2006, Burcham rear-ended Dylan Whisman's car, which had been stopped at a traffic light for at least one minute. An expert in accident reconstruction testified that Burcham was traveling 56 to 69 miles per hour in a 45–mile–per–hour zone when his truck pushed Whisman's car through the intersection and into a ditch. Whisman's car then erupted into flames. The coroner investigator testified that the cause of death was related to the collision, but she was unable to determine at the scene whether the specific cause was blunt force trauma or fire.

***1251** At the hospital, Burcham admitted drinking one beer at approximately 8 p.m. the night before the collision, and a Nevada Highway Patrol trooper observed that Burcham's eyes were bloodshot and watery and that his breath smelled of alcohol. Blood tests confirmed that Burcham had alcohol in his blood. At 7:15 a.m., his BAC was 0.07, and at 8:22 a.m., it was 0.04.

The grand jury indicted Burcham for violations of NRS 484.3795 (DUI causing death)[5] based on two theories: (1) that Burcham was under the influence of alcohol, pursuant to subsection (*l*)(a), when he collided with Whisman's car and (2) that Burcham was driving with a BAC of 0.08 or more, pursuant to subsection (*l*)(b).

Burcham filed a pretrial petition for a writ of habeas corpus, arguing that the State produced insufficient evidence to establish probable cause as to the felony DUI charge.[6] In particular, Burcham argued that, as to the theory based on NRS 484.3795(*l*)(a), the State had failed to establish probable cause that he was under the influence at the time of the collision. As to the theory based on NRS 484.3795(*l*)(b), Burcham argued that the State had failed to establish probable cause that his BAC was 0.08 or higher at the time of the collision because the State's theory required expert testimony regarding retrograde extrapolation.

In response, the State asserted that sufficient evidence supported the indictment for felony DUI because only slight impairment is required for a defendant to be "under the influence" pursuant to NRS 484.3795(*l*)(a). The State also argued that "simple arithmetic" ****329** supported the inference, based on the two blood tests taken after the collision, that Burcham's BAC at the time of the collision was 0.085 and therefore expert testimony was not required on this issue for the State to meet its burden before the grand jury for purposes of NRS 484.3795(*l*)(b).[7] Burcham responded that the State offered no evidence regarding retrograde extrapolation and, therefore, did not meet its burden of proof.

***1252** The district court granted the petition and dismissed the charge of DUI causing death for two reasons. First, the district court concluded that the term "under the influence" as set forth in NRS 484.3795(*l*)(a) has the meaning ascribed to it in *Cotter* and that the State had failed to present evidence to establish "a connection between [Burcham's] intoxication and his inability to exercise physical control over his vehicle." Second, the district court ruled that the State was required to present expert testimony on retrograde extrapolation in order to support its theory that, based on the BAC in the two blood samples taken from Burcham after the collision, Burcham had a BAC of 0.08 or higher at the time of the collision for purposes of NRS 484.3795(*l*)(b). According to the district court, the process of retrograde extrapolation "is more complex than the State would have this [c]ourt believe," and the State was required to present some evidence to explain the process. Therefore, the district court concluded that the State had failed to present sufficient evidence to support a reasonable inference that Burcham violated NRS 484.3795(1)(b). The State appealed the district court's order granting the writ petition as to the felony DUI charge.[8]

DISCUSSION

NRS 484.3795(1)(a): "under the influence"

The district court held that *Cotter* states the correct interpretation of "under the influence," requiring a connection between the defendant's "intoxication and his ability to exercise physical control over his vehicle." The State initially argued that NRS 484.3795(*l*)(a) and *Cotter* require that it show Burcham's driving was only slightly impacted by

the ingestion of alcohol to establish that he was under the influence of alcohol.[9] But the State conceded in its reply brief and oral argument that *Cotter* is probably still the correct standard. Thus, the State and Burcham essentially agree that *Cotter* still requires that the State prove that the alcohol impaired Burcham to a degree that rendered him incapable of driving safely. The issue remaining for this court is whether the *Cotter* holding is still sound considering the subsequent amendments to NRS 484.3795.

***1253** This court reviews questions of law and statutory interpretation de novo, and we only look beyond the plain language of the statute if that language is ambiguous or its plain meaning clearly was not intended.[10] Therefore, where the legislative intent is clear, we must effectuate that intent.[11] "Additionally, statutory construction should always avoid an absurd result."[12]

****330** NRS 484.3795(1) sets forth six alternative means of violating the statute. The three alternatives set forth in subsections (*l*)(a)-(c) are relevant to this case. Under paragraph (a), a person must be "under the influence of intoxicating liquor," whereas under paragraphs (b) and (c), a person must have a BAC of 0.08 or more, under different circumstances. Thus, paragraphs (b) and (c) establish per se violations based on a specific BAC regardless of whether the person is impaired, whereas paragraph (a) does not require a specific BAC.[13]

This court addressed the meaning of "under the influence" in a prior version of NRS 484.3795 in *Cotter,* a case involving a defendant convicted of DUI causing substantial bodily harm based on being under the influence of a controlled substance.[14] When *Cotter* was decided in 1987, NRS 484.3795(1) set forth the offense and alternative means of committing it in a lengthy single sentence:

> Any person who, while under the influence of intoxicating liquor or with a 0.10 percent or more by weight of alcohol in his blood, or while under the influence of a controlled substance, or under the combined influence of intoxicating liquor and a controlled substance, or any person who inhales, ingests, applies or otherwise uses any chemical, poison or organic solvent, or any compound or combination of any of these, *to a degree which renders him incapable of safely driving or exercising actual physical control of a vehicle, does any act or neglects any duty imposed by law while driving or in actual physical control of any vehicle on or off the highways of this state, if the act or neglect of duty proximately causes the death of, or substantial bodily harm to, any person other than himself, shall be punished by imprisonment....*

***1254** (Emphasis added.) Based on this provision, the State argued that the phrase "to a degree which renders him incapable of safely driving or exercising actual physical control of a vehicle" applied only to the clause immediately preceding it, dealing with "any chemical, poison or organic solvent, or any compound or combination of any of these," and not to the clause under which the defendant had been convicted—being under the influence of a controlled substance.[15] Consistent with that interpretation, the State insisted that "any person who drives a vehicle under the influence of a controlled substance, and while doing so, commits any act which causes death or substantial bodily harm, is guilty of a felony DUI."[16]

This court rejected that interpretation, explaining that a "plain reading and logical application" of the provision "suggests that more than this is required, one must be under the influence of the controlled substance to a degree which renders him incapable of driving safely or exercising actual physical control of the vehicle."[17] The court concluded that the State's interpretation would "create[ ] anomalous prospects" by, for example, making "felons of drivers on lawfully prescribed medications irrespective of whether the medication had any causal relationship to the event leading to the death or injury of another."[18] Thus, this court concluded that the statute "embraces only those individuals who ingest substances mentioned in the statute to a degree that renders them incapable of safely driving or exercising actual physical control of the vehicle."[19] The ****331** *Cotter* court went on to explain that with the exception of a per se violation of NRS 484.3795, whether a driver is under the influence will "always be a question of fact, to be considered in the light of such variable circumstances as the individual's resistance to the substance, the amount ingested and the type and time of ingestion."[20] The issue here is similar but involves interpreting the amended statute.

In 1995, the Legislature amended NRS 484.3795, primarily to include a per se violation based on a prohibited BAC within two ***1255** hours of driving and an affirmative defense to that provision based on consumption of alcohol after driving.[21] But at the same time, the Legislature placed the alternative means of violating the statute into separate paragraphs and included the "to a degree" language only in

paragraph (e), which deals with the ingestion of chemicals, poisons, or organic solvents.[22] As a result, NRS 484.3795(1) is currently structured in relevant part to provide that a person who:

> (a) Is under the influence of intoxicating liquor; [or]
>
> (b) Has a concentration of alcohol of 0.08 or more in his blood or breath; [or]
>
> ....
>
> (e) Inhales, ingests, applies or otherwise uses any chemical, poison or organic solvent, or any compound or combination of any of these, *to a degree which renders him incapable of safely driving or exercising actual physical control of a vehicle; ...*
>
> ....
>
> and does any act or neglects any duty imposed by law while driving or in actual physical control of any vehicle ... if the act or neglect of duty proximately causes the death of, or substantial bodily harm to, a person other than himself, is guilty of a category B felony....

(Emphasis added.) The legislative history behind this amendment is silent regarding why the Legislature broke the subsection into multiple paragraphs, but the overall intent of the law was "to crack down on drunk driving."[23] Because the "to a degree" language is now found in paragraph (e), regarding chemicals, poisons, and organic solvents, and is separated from the other acts by semicolons,[24] the 1995 amendments have some impact on the reasoning employed in *Cotter*. But the basic premise in *Cotter* remains sound—the phrase "under the influence" requires impairment, resulting in the inability to drive safely.

Plain meaning

"Under the influence" has a commonly understood, plain meaning consistent with the *Cotter* interpretation. As the United ***1256** States Court of Appeals for the Third Circuit has explained, for over half a century, courts have recognized that "under the influence" means "driving in a state of intoxication that lessens a person's normal ability for clarity and control."[25] The focus of this language in drunk driving statutes is the effect of the alcohol, rather than the amount of alcohol consumed.[26] Similarly, the Supreme Court of Hawaii rejected defining "under the influence" as any slight level of intoxication.[27] The plain meaning of "under the influence" ****332** focuses on the influence of alcohol on a person such that they are unable to drive safely, which is consistent with the legislative intent and public policy behind drunk driving statutes. As this court has explained in addressing the important interest of traffic safety, "the State has a legitimate interest in preventing people from driving after ingesting any substance that will render them incapable of driving safely."[28] Consistent with that interest, the legislative intent behind the 1995 amendments to NRS 484.3795 was to "crack down on drunk driving."[29]

Given the plain meaning of "under the influence," we conclude that the *Cotter* standard still applies to NRS 484.3795(*l*)(a). To find a defendant was "under the influence," the fact-finder must determine that the alcohol affected the defendant "to a degree that renders them incapable of safely driving or exercising actual physical control of the vehicle."[30] This ensures that there is a causal relationship between the influence of the drugs or alcohol and the event causing death or injury to the victim.[31] This remains a question of fact to be considered in light of the totality of the circumstances.[32] Because the 1995 amendments structurally changed ***1257** NRS 484.3795, our affirmation of the *Cotter* standard rests on the plain meaning of "under the influence" as well as the legislative intent and public policy to keep intoxicated drivers off the roads.

Due process

We also conclude that the plain meaning expressed in *Cotter* satisfies due process concerns. A statute is void for vagueness and therefore violates the Due Process Clause "if it fails to sufficiently define a criminal offense such that a person of ordinary intelligence would be unable to understand what conduct the statute prohibits."[33] Because the phrase "under the influence" is commonly understood to mean being under the effect of alcohol to the extent that one cannot drive safely, it puts the ordinary person on notice that driving in such a condition is prohibited.[34] Therefore NRS 484.3795(*l*)(a)'s plain meaning satisfies due process.

Sufficiency of the evidence

We conclude that the district court properly applied the plain meaning of "under the influence" and ruled that the State must prove "a connection" between the intoxication and the defendant's inability to drive safely. However, the district

court concluded that the State did not offer sufficient evidence to the grand jury to support Burcham's indictment for being "under the influence." We disagree.

In reviewing a district court's order granting a pretrial petition for writ of habeas corpus for lack of probable cause, this court determines "whether all of the evidence received at the grand jury proceeding establishes probable cause to believe that an offense has been committed and that the defendant [ ] committed it."[35] This court will not overturn the district court's order unless the district court committed substantial error.[36]

The grand jury does not determine guilt or innocence, but instead decides ****333** whether probable cause supports the indictment.[37] The grand jury has a duty to "weigh all evidence submitted to them."[38] NRS 172.155(1) requires that the grand jury, prior to indicting ***1258** the accused, find probable cause to believe that an offense has been committed and that the person charged committed the crime. Further, "[t]he finding of probable cause may be based on slight, even 'marginal' evidence."[39] Therefore, the State's burden is not to present to the grand jury evidence that establishes guilt beyond a reasonable doubt, but "enough evidence to support a reasonable inference" that the defendant committed the crime charged.[40] "[T]he State is not required to negate all inferences which might explain his conduct, but only to present enough evidence to support a reasonable inference that the accused committed the offense."[41]

We conclude that the State presented sufficient evidence to support a reasonable inference that Burcham was driving under the influence and caused Whisman's death. A witness to the collision testified that she and Whisman, who was stopped in the lane next to her, had been stopped at the red light for at least one minute. Burcham, who was speeding, failed to stop at the red light and rear-ended Whisman, pushing his car through the intersection and into a ditch. Burcham smelled of alcohol, his eyes were bloodshot and watery, he admitted to drinking the night before, and he had a BAC of 0.07 within an hour of the collision. Based on the foregoing, the grand jury could reasonably have inferred that Burcham was under the influence to the degree that the alcohol made him incapable of driving safely. Thus, we conclude that the district court substantially erred by dismissing Burcham's indictment for being "under the influence" pursuant to NRS 484.3795(*l*)(a).

NRS 484.3795(1)(b): BAC of 0.08 or more

The district court ruled that the State presented no evidence to establish probable cause that Burcham had a BAC of 0.08 or more while driving, pursuant to NRS 484.3795(*l*)(b). The State contends that circumstantial evidence, based on "simple math," supported a reasonable inference that Burcham's BAC was 0.08 or more at the time of the collision and that expert testimony is not required at a grand jury proceeding. Burcham contends that the State was required to present expert testimony in support of its theory that he was driving with a BAC of 0.08 or more at the time the accident occurred. For the reasons set forth below, we reject Burcham's contention that the State was required to present expert testimony on this issue at the grand jury proceeding. We further conclude that the grand jury could have reasonably inferred that ***1259** Burcham's BAC was 0.08 or higher when he collided with Whisman's car.

Retrograde extrapolation and expert testimony in grand jury proceedings

In *Anderson v. State,* this court recognized the use of retrograde extrapolation to estimate a defendant's BAC at the time of an accident.[42] In that case, a forensic chemist testified that the standard metabolism rate of alcohol is approximately 0.02 percent per hour, and he extrapolated backwards to estimate that the defendant's BAC was 0.128 when he was driving.[43] This court, however, has not addressed whether the State must present expert testimony or explain the extrapolation technique to a grand jury. We conclude that the presentation of such evidence is unnecessary in grand jury proceedings in light of the State's evidentiary burden.

Burcham erroneously relies on a Texas Court of Criminal Appeals case, *Mata v.* ****334** *State.*[44] to support his argument that the State may not rely on retrograde extrapolation unless it presents an expert to testify on the technique. Burcham contends that *Mata* supports his proposition that expert testimony is required here because of the complexity of applying retrograde extrapolation in any given case. Specifically, Burcham points out that several factors affect the accuracy of retrograde extrapolation including: the length of time between drinking and the test; the number of tests and the time between each; and characteristics of the defendant such as age, weight, tolerance, the amount of alcohol consumed, and whether the person had eaten.[45]

We conclude that *Mata* is unpersuasive here because the *Mata* court addressed whether expert testimony on retrograde extrapolation was reliable in a jury trial,[46] not whether expert testimony should be required when the State relies on retrograde extrapolation in grand jury proceedings. Mata is also distinguishable because the nature of the information regarding the BAC tests were different from the case at bar. In *Mata,* the defendant took two BAC tests minutes apart, over two hours after he was driving.[47] Because these tests were so close in time, the tests only served as a single test for determining whether *Mata* was still absorbing alcohol, meaning his BAC was rising, or was eliminating alcohol, ***1260** meaning his BAC was dropping.[48] This contributed to the difficulty in estimating what his BAC was when he was driving. The *Mata* court held that an expert could create a reliable BAC estimation based on two BAC tests, taken a reasonable time after driving if a reasonable time elapsed between the tests, even with minimal knowledge about the defendant's personal characteristics.[49] IN THIS CASE, BURCHam took one bAc test about one HOur after the collision and another about one hour later, which was lower. Thus, in this case, it was easier to infer that Burcham's BAC was dropping and to estimate that his BAC could have been 0.08 when he was driving.

This court has deemed one officer's opinion testimony as sufficient to support an indictment. In *Zampanti v. Sheriff,*[50] this court held that a police officer's opinion that what the defendant possessed was marijuana was sufficient, by itself, to establish probable cause. In that case, the defendant represented to the officer that the substance in his possession was marijuana.[51] But this court held that even if that admission was not considered, the officer's testimony that the defendant's vehicle smelled of marijuana and the substance looked like marijuana was sufficient to support the indictment.[52] Although expert testimony generally would be required at trial to prove beyond a reasonable doubt that the substance was marijuana, we concluded that such testimony was not required at the grand jury.[53]

Similarly, in this case, the two BAC tests suggested that Burcham's BAC was dropping and that it could have therefore been 0.08 when he was driving. We conclude that because the State's burden at a grand jury proceeding is to present slight or marginal evidence to support an inference that the accused committed the crime charged, specific scientific evidence and expert testimony concerning retrograde extrapolation are not required.[54] Such a requirement would place a tremendous burden on the State to produce, during grand jury proceedings, evidence addressing the many factors involved with retrograde extrapolation, as ****335** discussed above.[55] ***1261** We further conclude that the State is not required to provide the grand jury with an instruction regarding retrograde extrapolation. We now address whether the State offered sufficient evidence to support Burcham's indictment for driving with a BAC of 0.08 or higher.

Sufficiency of the evidence

The State presented two BAC tests, the first of which was taken about an hour after the collision. The tests were taken an hour apart and revealed that Burcham's BAC was decreasing and was 0.07 within one hour of the collision. We conclude that the grand jury reasonably could have inferred that Burcham's BAC was 0.08 or higher when he collided with Whisman's car. It is the grand jury's duty to weigh the evidence, and it could have found the State's evidence regarding Burcham's BAC credible enough to support an inference warranting indictment. Thus, the district court erred when it dismissed Burcham's indictment pursuant to NRS 484.3795(*l*)(b).

CONCLUSION

For the reasons set forth above, we conclude that Cotter[56] expresses the proper standard for NRS 484.3795(*l*)(a) in requiring that the State establish that the defendant was impaired to such a degree that he was incapable of driving safely. We conclude that the State presented sufficient evidence to support a reasonable inference that Burcham was under the influence when he collided with Whisman's car.

Regarding a per se violation of NRS 484.3795(*l*)(b) or (c), we conclude that, in a grand jury proceeding, the State need not provide expert testimony or its own explanation about retrograde extrapolation when the defendant's BAC is lower than the legal limit, if the BAC was taken twice, within a reasonable amount of time after driving, and there was a reasonable amount of time between the tests. The grand jury could have reasonably inferred from Burcham's BACs that his BAC was 0.08 or more at the time of the collision. Thus, sufficient evidence supports the grand jury's indictment based on the theory that he violated NRS 484.3795(*l*)(b). Therefore, we conclude that the district court erred when it partially granted Burcham's writ petition and dismissed the charge

for violation of NRS 484.3795. Accordingly, we reverse the judgment of the district court and remand this matter to the district court for proceedings consistent with this opinion.

We concur: MAUPIN, C.J., HARDESTY and PARRAGUIRRE, JJ.

***1262** CHERRY, J., with whom DOUGLAS and SAITTA, JJ., agree, concurring in part and dissenting in part:

I agree with the majority that *Cotter v. State*[1] expresses the proper standard for NRS 484.3795(*l*)(a) in requiring that the State establish that the defendant was impaired to such a degree that he was incapable of driving safely. I further conclude that the district court erred in its finding that insufficient evidence was presented at the grand jury proceeding to bind Burcham over for trial on the State's first theory that Burcham violated NRS 484.3795(*l*)(a) by driving under the influence and causing the victim's death.[2] I therefore concur with the majority on that issue.

As to the State's second theory that Burcham had a BAC of 0.08 or more at the time of the collision, I would hold that the State presented insufficient evidence at the grand jury proceeding to establish probable cause that a "per se" violation of NRS 484.3795 occurred. In particular, I would abide by the holding in the Texas Court of Criminal Appeals case[3] that the State may not rely on retrograde extrapolation unless it presents ****336** an expert to testify on the technique as well as the many variables involved. Even though the Texas case involved evidence of retrograde extrapolation presented during a jury trial, I submit that the principles involved are equally valid at a grand jury proceeding or a preliminary hearing. I do not believe the district court committed substantial error by granting Burcham's petition for a writ of habeas corpus on the State's theory that Burcham had a BAC of 0.08 or more at the time of the collision.[4] I therefore dissent from the majority's decision to reverse that portion of the district court's order.

We concur: DOUGLAS and SAITTA, JJ.

All Citations

124 Nev. 1247, 198 P.3d 326

Footnotes

1 103 Nev. 303, 738 P.2d 506 (1987).

2 1995 Nev. Stat., ch. 188, § 1, at 312.

3 *Cotter,* 103 Nev. at 305, 738 P.2d at 508 (internal quotation marks omitted).

4 *Sheriff v. Hodes,* 96 Nev. 184, 186, 606 P.2d 178, 180 (1980).

5 The grand jury also indicted Burcham for violating NRS 484.377(5) (felony reckless driving) and NRS 200.070 (involuntary manslaughter), neither of which are at issue in this appeal.

6 Burcham also argued in the petition that he should have been charged with vehicular manslaughter rather than involuntary manslaughter. Because the district court disagreed and denied the petition as to the involuntary manslaughter charge, that charge is not at issue in this appeal.

7 The State explained its "simple arithmetic" as follows: Because Burcham's BAC at 7:15 a.m. showed a concentration of 0.07, and his test approximately one hour later at 8:22 a.m. showed a concentration of 0.04, his BAC was dissipating at a rate of 0.03 per hour. Therefore, as the first BAC was taken approximately half an hour after the collision, then his BAC at the time of the collision could be computed by adding one-half of 0.03, or 0.015, to 0.07, to determine that his BAC at the time of the collision was 0.085.

8 The State argues on appeal that the instruction it gave the grand jury defining "under the influence" was proper. Because the State raises this for the first time on appeal, we do not address the issue. *State v. Taylor,* 114 Nev. 1071, 1077, 968 P.2d 315, 320 (1998).

9 The State contended that *Etcheverry v. State,* 107 Nev. 782, 821 P.2d 350 (1991), supports this conclusion that a slight impact is enough. We conclude that *Etcheverry* is distinguishable from the issue here because the primary issue there was the effect of a purported superseding cause and because the defendant per se violated NRS 484.3795. *See id.* at 783–84, 821 P.2d at 350–51. Thus, the definition of "under the influence" was not at issue in *Etcheverry.*

10 *State v. Quinn,* 117 Nev. 709, 712–13, 30 P.3d 1117, 1120 (2001).

11 *Sheriff v. Luqman,* 101 Nev. 149, 155, 697 P.2d 107, 111 (1985).

12 *State v. Webster,* 102 Nev. 450, 453, 726 P.2d 831, 833 (1986).

13 *See Williams v. State,* 118 Nev. 536, 548–49, 50 P.3d 1116, 1124 (2002) (explaining that NRS 484.3795(*l*)(f), which applies to a person who has a prohibited level of a controlled substance in his or her blood, does not require impairment and that NRS 484.3795(*l*)(d), which applies to a person who is under the influence of a controlled substance, does not require a specific level of a controlled substance).

14 103 Nev. 303, 738 P.2d 506 (1987).

15 *Id.* at 305, 738 P.2d at 508.

16 *Id.*

17 *Id.* (internal quotation marks omitted); *accord Anderson v. State,* 109 Nev. 1129, 1134 & n. 1, 865 P.2d 318, 320 n. 1, 321 (1993) (holding the following jury instruction a proper statement of law: "A person is under the influence of intoxicating liquor when as a result of drinking such liquor his physical or mental abilities are impaired to such a degree that renders him incapable of safely driving.").

18 *Cotter,* 103 Nev. at 305–06, 738 P.2d at 508.

19 *Id.* at 306, 738 P.2d at 508 (internal quotation marks omitted).

20 *Id.*

21 Hearing on S.B. 273 Before the Senate Transportation Comm., 68th Leg. (Nev., April 20, 1995).

22 1995 Nev. Stat., ch. 188, § 1, at 312.

23 Hearing on S.B. 273 Before the Senate Transportation Comm., 68th Leg. (Nev., April 20, 1995).

24 NRS 484.3795(1)(e).

25 *Government of Virgin Islands v. Steven,* 134 F.3d 526, 528 (3d Cir.1998) (holding that given this commonly understood meaning, the Virgin Islands' statute was not void for vagueness); *accord State v. Cummings,* 101 Hawai'i 139, 63 P.3d 1109, 1116 (2003) (Moon, C.J., dissenting) (arguing that a charge of driving under the influence was not deficient because it lacked the additional phrase, "in an amount sufficient to impair the person's normal mental faculties or ability to care for oneself and guard against casualty").

26 *Steven,* 134 F.3d at 528.

27 *State v. Mata,* 71 Haw. 319, 789 P.2d 1122, 1128 (1990).

28 *Sereika v. State,* 114 Nev. 142, 149, 955 P.2d 175, 180 (1998); *accord Steven,* 134 F.3d at 528 (holding that the general purpose of drunk driving statutes is to keep drivers off the road who have diminished capacity as a result of ingesting alcohol).

29 Hearing on S.B. 273 Before the Senate Transportation Comm., 68th Leg. (Nev., April 20, 1995).

30 *Cotter v. State,* 103 Nev. 303, 306, 738 P.2d 506, 508 (1987) (internal quotations omitted).

31 *See id.* at 305–06, 738 P.2d at 508.

32 *Id.* at 306, 738 P.2d at 508.

33 *Nelson v. State,* 123 Nev. 534, ——, 170 P.3d 517, 522 (2007).

34 *Government of Virgin Islands v. Steven,* 134 F.3d 526, 528 (3d Cir.1998); *see State v. Cummings,* 101 Hawai'i 139, 63 P.3d 1109, 1116–18 (2003) (Moon, C.J., dissenting).

35 *Sheriff v. Hodes,* 96 Nev. 184, 186, 606 P.2d 178, 180 (1980).

36 *Sheriff v. Provenza,* 97 Nev. 346, 347, 630 P.2d 265, 265 (1981).

37 *Hodes,* 96 Nev. at 186, 606 P.2d at 180.

38 NRS 172.145(1).

39 *Hodes,* 96 Nev. at 186, 606 P.2d at 180 (quoting *Perkins v. Sheriff,* 92 Nev. 180, 181, 547 P.2d 312, 312 (1976)).

40 *Id.*

41 *Kinsey v. Sheriff,* 87 Nev. 361, 363, 487 P.2d 340, 341 (1971).

42 109 Nev. 1129, 1132, 865 P.2d 318, 319–20 (1993).

43 *Id.*

44 46 S.W.3d 902 (Tex.Crim.App.2001), *overruled on other grounds by Bagheri v. State,* 87 S.W.3d 657, 660–61 (Tex.App.2002).

45 *Id.* at 916.

46 *Id.* at 915–16.

47 *Id.* at 904, 905.

48 *Id.*

49 *Id.* at 916.

50 86 Nev. 651, 652–53, 473 P.2d 386, 386–87 (1970).

51 *Id.* at 652, 473 P.2d at 386.

52 *Id.* at 653, 473 P.2d at 387.

53 *Id.* at 653, 473 P.2d at 386–87.

54 *See Sheriff v. Hodes,* 96 Nev. 184, 186, 606 P.2d 178, 180 (1980).

55 *Mata v. State,* 46 S.W.3d 902, 916 (Tex.Crim.App.2001), *overruled on other grounds by Bagheri v. State,* 87 S.W.3d 657, 660–61 (Tex.App.2002).

56 103 Nev. 303, 738 P.2d 506 (1987).

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3 *Mata v. State,* 46 S.W.3d 902, 915–16 (Tex.Crim.App.2001), *overruled on other grounds by Bagheri v. State,* 87 S.W.3d 657, 660–61 (Tex.App.2002).

4 *Sheriff v. Provenza,* 97 Nev. 346, 347, 630 P.2d 265, 265 (1981).

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