

Recent Case Report

Anderson v. Terhune

(9th Cir. 2008) __ F.3d __ [2008 WL 399199]

ISSUE

Did a murder suspect invoke his *Miranda* right to remain silent when he said, “I plead the Fifth?”

FACTS

Sheriff’s deputies in Shasta County suspected that Anderson had murdered a man whose body was found by the side of a road. So after arresting him on a parole violation, they sought to question him about the killing. Anderson initially waived his *Miranda* rights, but then apparently changed his mind when the deputies tried to determine whether a methamphetamine pipe found next to the body belonged to Anderson:

Anderson: I’m through with this. I’m through. I wanna be taken into custody, with my parole . . .

Deputy: Well, you already are. I wanna know what kinda pipes you have.

Anderson: I plead the Fifth.

Deputy: Plead the Fifth. What’s that?

The deputy continued to question Anderson, who eventually confessed. The California Court of Appeal affirmed his murder conviction, ruling that the deputy’s subsequent questioning was simply an attempt to clarify whether Anderson intended to invoke, or whether he was refusing to talk about his drug use. Anderson filed a writ of habeas corpus which was reviewed en banc by the Ninth Circuit.

DISCUSSION

Officers must, of course, terminate an interview if the suspect says something that clearly and unambiguously demonstrates an intent to invoke the right to remain silent or the right to counsel. On the other hand, they may continue to question him if his words were ambiguous or equivocal.¹ For example, an invocation does not result if a suspect merely indicated he *might* want to remain silent or that he *might* want an attorney. As the California Supreme Court explained, “In order to invoke the Fifth Amendment privilege

¹ See *Davis v. United States* (1994) 512 U.S. 452, 459 [“But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning.”]; *People v. Gonzalez* (2005) 34 Cal.4th 1111, 1125 [the test is “whether, in light of the circumstances, a reasonable officer would have understood a defendant’s reference to an attorney to be an unequivocal and unambiguous request for counsel”]; *People v. Michaels* (2002) 28 Cal.4th 486, 510; *People v. McMahon* (2005) 131 Cal.App.3d 80, 95 [“[T]he Supreme Court [in *Davis*] limited the protection afforded in *Edwards* to cases where the suspect makes a clear, unequivocal request for counsel”]; *People v. Cunningham* (2001) 25 Cal.4th 926, 993 [“The suspect must unambiguously request counsel.”].

after it has been waived, and in order to halt police questioning after it has begun, the suspect must *unambiguously* assert his right to silence or counsel.”²

In determining whether an invocation was unambiguous, the courts ask whether a reasonable officer would have interpreted the suspect's words as unambiguous and unequivocal.³ For example, the courts have ruled that the following statements were not invocations:

- “I don’t know if I wanna talk anymore since it’s someone killed, you know.”⁴
- “How long would it take for a lawyer to get here.”⁵
- “My mother will put out money for a high price lawyer out of New York.”⁶
- “Maybe I should talk to a lawyer.”⁷
- “I don’t want to talk about this. You all are getting me confused. I don’t even know what you’re talking about.”⁸

In contrast to ambiguous statements such as these, Anderson’s words (“I plead the Fifth”) were fairly straightforward. Said the court, “This is not a case where the officers or the court were left scratching their heads as to what Anderson meant. Nothing was ambiguous about the statement ‘I plead the fifth.’”

In addition, the court flatly rejected the argument that the deputy’s response (“Plead the Fifth. *What’s that?*”) demonstrated confusion as to Anderson’s intent. According to the court, the deputy was “playing dumb,” and “[his] effort to keep the conversation going was almost comical. At best, the officer was mocking and provoking Anderson. The officer knew what ‘I plead the Fifth’ meant.”

Consequently, the court ruled that Anderson’s confession was obtained in violation of *Miranda*, and it ordered the district court to grant Anderson’s writ of habeas corpus.

COMMENT

What could the deputy have done? In *Michigan v. Mosley* the United States Supreme Court ruled that if officers “scrupulously honor” a suspect’s invocation of the right to remain silent, they may return and ask whether he had changed his mind.⁹ If so, they may resume the interview. Thus, the deputy could have utilized this procedure if, (1) he immediately terminated the interview when Anderson invoked, and (2) he gave Anderson some time (two hours was sufficient in *Mosley*) to think about the situation. POV

² *People v. Stitely* (2005) 35 Cal.4th 514, 535.

³ See *People v. Gonzalez* (2005) 34 Cal.4th 1111, 1126 [“The question is not what defendant understood himself to be saying, but what a reasonable officer in the circumstances would have understood defendant to be saying.”]; *People v. Marcel Roquemore* (2005) 131 Cal.App.4th 11, 27 [“The United States Supreme Court has repeatedly noted that officers’ subjective opinions are irrelevant to *Miranda*-related issues.” Citations omitted].

⁴ *People v. Wash* (1993) 6 Cal.4th 215, 238-9.

⁵ *People v. Simons* (2007) __ Cal.App.4th __ [2007 WL 2793356].

⁶ *People v. Johnson* (1993) 6 Cal.4th 1, 28.

⁷ *Davis v. United States* (1994) 512 U.S. 452, 462.

⁸ *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1238-40.

⁹ (1975) 423 U.S. 96.