Recent Case Report

U.S. v. Washington

(9th Cir. 2006) 462 F.3d 1124

ISSUE

Does a suspect invoke *Miranda* if he refuses to talk with officers, but agrees to listen to a presentation of incriminating evidence?

FACTS

Washington and at least three other men robbed a bank in Commerce, California. Two of the robbers were later arrested, and they told FBI agents that Washington was their lookout. Washington was arrested and transported to the FBI office in Westwood.

Before *Mirandizing* him, an agent explained that he was arrested on the basis of information from several people who were cooperating in the investigation. The agent then asked Washington if he, too, would like to cooperate. Washington responded by saying he wanted "more information," presumably more information about the FBI's sources and what they were saying.

The agent was agreeable, but first he *Mirandized* him. The ever-crafty Washington did not, however, expressly waive his rights. Instead, he merely said he was "willing to listen" to what the agent had so say. He then signed a waiver form in which he acknowledged only that he had agreed "to listen without an attorney present."

The agent then showed him the booking photos of his accomplices and told him what they had said about his role in the robbery. Apparently realizing he was finished, Washington responded, "I can't do no time, but I know I am." The agent then delivered the *coup de grace,* showing him bank surveillance photos of Washington as he conscientiously carried out his lookout duties outside the bank. Washington responded, "Anybody can see that's me in the picture." (Although he later told the agents "that's not me in the picture," he "grinned and nodded his head in the affirmative" when the agent pointed out the absurdity of his comment.)

Washington's responses to the agent's presentation were admitted into evidence at this trial, and he was convicted.

DISCUSSION

Washington argued that his statements should have been suppressed because they were obtained in violation of *Miranda*. Specifically, he contended that he invoked his right to remain silent when he refused to talk with the agent, even though he said he was willing to listen to him.

As we discussed in the Winter 2006 edition of *Point of View*, it used to be the rule that an invocation of the right to remain silent would occur if the suspect indicated he was unwilling to discuss his case "freely and completely."[1] But now, the courts take a more

[1] See, for example, *People* v. *Burton* (1971) 6 Cal.3d 375, 382.

realistic approach, having recognized that a suspect's refusal or reluctance to discuss a particular subject or answer a certain question does not necessarily demonstrate a desire to terminate an interview. For example, the courts now interpret a suspect's request to say something "off the record" as a limited invocation that requires the suppression of only the part of his subsequent statement that reasonably appeared to be "private."[2]

Apparently trying to resurrect the old "freely and completely" limitation, Washington argued that a suspect's refusal to talk should be construed as an invocation, even if he also expressed a willingness to listen. With little discussion, the court disagreed:

> Washington's statement that he would listen to the agents cannot possibly be construed as a request for the FBI agents not to speak to him or for him to remain silent. He simply did not invoke his right to remain silent.

Consequently, the court ruled "it was not a violation of Washington's rights for the FBI agent to inform him of the evidence against him."

The court also pointed out that even if Washington had invoked, the agent was not precluded "from informing [him] about evidence against him or about other information that may help him make decisions about how to proceed with his case."

Washington's conviction was affirmed.

COMMENT

Officers who want to interview a suspect do not ordinarily violate *Miranda* if, before obtaining a waiver, they provide him with a quick and factual summary of the evidence against him.[3] In some cases, however, the courts have ruled that the officers' recitation constituted unlawful pre-waiver interrogation because it was, in reality, a goad or prod to get the suspect to waive his rights.[4]

In light of *Washington*, however, it appears that officers who want to question a reluctant—but not-invoking—suspect could begin by asking if he would like to know about the evidence that has been uncovered so far. If he says yes, they could do what the FBI agents did in *Washington*; i.e., ask him to waive his "right" not to listen to them. If he does so, officers should be able to provide a longer and more plain-spoken account of the evidence than they could have done without such a waiver.

Keep in mind, however, that a full *Miranda* waiver will be required before asking any questions. POV

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[2] See *People* v. *Johnson* (1993) 6 Cal.4th 1.

[3] See *People* v. *Patterson* (1979) 88 Cal.App.3d 742 [officers sought a waiver from the suspect after telling him that his accomplice "had already made a statement, and that based on the statement the officers had a "pretty good " case against the suspect]; *People* v. *Gray* (1982) 135 Cal.App.3d 859, 863 [before seeking a waiver, officers told the suspect about "considerable evidence pointing to his involvement in the death"]; *People* v. *Dominick* (1986) 182 Cal.App.3d 1174 [officers sought a waiver from the defendant after telling him that "the victim of the stabbing had identified his picture as one of the persons who had raped her and murdered her friend."]; *People* v. *Thomas* (1990) 219 Cal.App.3d 134, 143.

[4] See *In re Albert R.* (1980) 112 Cal.App.3d 783, 790 ["[P]olice statements may amount to custodial interrogation without being phrased in questioning form."]; *People* v. *Boyer* (1989) 48 Cal.3d 247, 274-5 ["[B]y confronting defendant once again with a discrepancy in his story, [the officer] effectively invited defendant to make an incriminating response."]; *U.S.* v. *Padilla* (9th Cir. 2004) 387 F.3d 1087, 1093 [telling a suspect it was his "last chance to cooperate" was interrogation].