

Recent Case Report

Date posted: October 11, 2010

People v. Camino

(2010) __ Cal.App.4th __ [2010 WL 3836763]

Issue

While questioning a murder suspect, did officers attempt to undermine *Miranda* by utilizing the prohibited “two step” procedure?

Facts

At about 3 A.M., Camino and two other gang members, Martinez and Palacios, were standing around their car in front of a 7-Eleven store in Santa Ana. They were drinking and looking to fight some members of a rival gang known as BST. Palacios was armed with a .40 caliber handgun. When they saw three BST members emerge from an alley, Camino and Martinez approached them and, as Martinez threw his hands up “in a ‘what’s up’ kind of deal,” Palacios fired two shots at them.

The BST members retreated into the alley and Palacio yelled something like, “Let’s go get ‘em.” So they jumped into their car and drove into the alley. But because they had turned off their headlights, they couldn’t see anyone; so Palacios stepped outside the car and just started shooting at random. The BST members returned fire, which caused Camino and Martinez to speed off, leaving Palacios in the alley. A few minutes later, having circled the block a few times looking for Palacios, they found him lying in a driveway—he had been shot and was bleeding to death. As they started to get out of their car, they heard approaching sirens, so they got back inside and were about to take off when a police car turned the corner. The officer who was driving testified that he noticed a vehicle parked in the middle of the street with its lights off, so he initiated a “high risk” car stop. Although the record is unclear as to what happened next, Camino and Martinez were eventually arrested and transported to the police station for questioning.¹

When the investigators began their interview with Camino, they did not know whether he was the shooter, a victim, or a witness; they only knew that (1) he had been “stopped leaving the area where Palacio’s body was found,” (2) he “appeared to have been with [Palacio] at the time of the murder and to be friends or associated with him,” (3) there was a “possible bullet hole” in the door of his car, (4) the murder appeared to be “gang related,” and (5) Camino “had prior gang involvement.”

Because of the uncertainty as to Camino’s involvement, the investigators did not seek a *Miranda* waiver at the outset. Instead, they began by asking questions about local gangs and Camino’s tattoos. Later, after Camino denied knowing the victim, one of the

¹ **NOTE:** While the record did not indicate that Camino and Martinez were told they were under arrest, they were effectively arrested because they were transported from the scene without their consent. See *Kaupp v. Texas* (2003) 538 U.S. 626, 630 [“Such involuntary transport to a police station for questioning is sufficiently like arrest to invoke the traditional rule that arrests may constitutionally be made only on probable cause.”]; *U.S. v. Parr* (9th Cir. 1988) 843 F.2d 1228, 1231 [“[A] distinction between investigatory stops and arrests may be drawn at the point of transporting the defendant to the police station.”].

investigators told him that was “weird” because Martinez was telling them that Palacio “was with you guys all night”; and that “we talked to enough people [so] we pretty much know what happened.” Camino then gave a “complete account” of what he and his associates had done before, during, and after the shooting. At that point, there was a 30-minute break.

When the interview resumed, the investigators began by obtaining a *Miranda* waiver from Camino and then essentially asked him the same questions they had asked earlier; and Camino essentially “repeated the same information” he had given earlier. They did, however, ask one question that, as it turned out, was highly incriminating because it demonstrated Camino’s awareness that his actions constituted a “provocative act” for which he would be charged with murder:

Investigator: If two gangs come together to fight and you’re walking over there saying let’s fight and one of your homeboys has a gun, would you expect that gun to get used?

Camino: Oh, yeah.

At trial, the statement Camino gave during the first part of the interview was suppressed because the investigators had not obtained a waiver. But the statement he gave during the second part was admitted, and Camino was convicted of, among other things, second-degree murder.

Discussion

Camino argued that his second statement should have been suppressed because, although he had waived his rights beforehand, the waiver was obtained by means of the prohibited “two step” procedure. The court disagreed, but it acknowledged there was some merit to Camino’s argument, and it observed that this was a “close case.”

Before going further, it is necessary to review some law. In *Oregon v. Elstad*,² the United States Supreme Court ruled that if officers violated *Miranda* in obtaining a statement from a suspect, but later obtained a second statement in full compliance with *Miranda*, the second statement may be admissible if the *Miranda* violation was “technical” in nature.

The Court in *Elstad* made two other significant rulings: First, a *Miranda* violation that resulted from an officer’s failure to obtain a waiver (which was what happened in *Camino*) will be deemed a technical violation if the interview was not coercive. Second, the suspect’s post-waiver statement may be admissible even though he had admitted the crime or otherwise “let the cat out of the bag” when he made the pre-waiver statement. Camino did not argue that the investigators had utilized coercion at any point. Instead, he contended that their decision not to seek a waiver at the start of the interview was a tactical ploy known as the “two step”—a ploy that had been expressly outlawed by the U.S. Supreme Court.

The two step is a tactic in which officers begin an interview with an arrested suspect without obtaining a *Miranda* waiver. Then, if he confessed or made a damaging admission, they would seek a waiver and, if he waived, try to get him to repeat the first statement. The “two step” works on the theory that a suspect will usually waive his rights and repeat his statement because he will think (erroneously) that his pre-waiver statement can be used against him and, therefore, he has nothing to lose by repeating it.

² (1985) 470 U.S. 298, 318.

Although the officers had divided their interview with Camino into two parts, prosecutors argued that they did not do so for tactical reasons. Rather, it resulted from their uncertainty as to whether Camino was a victim, witness, or suspect.

While it is often difficult for the courts to determine the officers' intent in such cases, there are certain circumstances that tend to indicate that they had, in fact, tactically employed the two-step. Those circumstances are as follows:

- (1) **Detailed statement:** Before seeking a waiver, the officers obtained a highly incriminating statement from the suspect.
- (2) **Interrogation tactics:** During the pre-waiver part of the interview, the officers utilized interrogation tactics that were designed to produce an admission; e.g., "good cop/bad cop."
- (3) **Utilized earlier admission during second interview:** During the post-waiver part of the interview, the officers referred to the suspect's earlier admission or otherwise reminded him that he had already "let the cat out of the bag."
- (4) **Time lapse:** There was an insignificant time lapse between the pre- and post-waiver parts of the interview.
- (5) **Same officers:** The two parts were conducted by the same officers.
- (6) **Not revealing that the first statement was inadmissible:** Before starting the post-waiver part, the officers did not notify the suspect that anything he said during the pre-waiver part could not be used against him.

While the second and third circumstances did not seem to apply, the others were troubling to the court, especially the "completeness of the first interview which left little, if anything, of incriminating potential left unsaid." The court was also concerned that the officers did not immediately seek a waiver when it became apparent that Camino was, in fact, a suspect. Nevertheless, it decided to give the investigators the "benefit of the doubt," mainly because Camino's role in the incident was murky at the start. As the court pointed out, they "did not know under what circumstances defendant had been with Palacios at the time of his murder (or even, definitively, whether defendant had been with Palacios at all)." Consequently, the court affirmed Camino's conviction. POV