Recent Case Report

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People v. Johnson

(2010) 183 Cal.App.4th 253

Issues

(1) Did investigators utilize unduly suggestive photo and physical lineup procedures? (2) Did they obtain a valid *Miranda* waiver from the defendant?

Facts

During a two-week crime spree in 2005, Joseph Johnson, Jessica Holmes, and Corey Schroeder robbed or attempted to rob eight gas stations in the Sacramento area. Their method of operation was essentially as follows: Schroeder would case the station, Johnson would rob the attendant, and Holmes would drive the getaway car. During the last holdup, Johnson shot and killed the attendant.

The court did not explain the circumstances under which Johnson became a prime suspect. But in the course of the investigation, he was identified in three photo lineups and was arrested. He later appeared in one or more physical lineups, and was positively ID'd by victims or witnesses in five of the robberies. At trial, he was positively ID'd by victims or witnesses in six of the robberies. In addition to the identifications, there was substantial additional evidence; e.g., the murder weapon was found in his bedroom.

On appeal, Johnson challenged the identification procedures that resulted in positive IDs in live lineups and at trial. Those procedures were as follows:

Robbery #1: The victim failed to ID Johnson at a photo lineup. Five days later, he identified Johnson at a physical lineup. Johnson was the only person in the physical lineup whose picture had been included in the photo lineup.

Robbery #5: Just before conducting a photo lineup, investigators showed the victim a surveillance video of the perpetrator that was taken during the holdup. The victim then identified Johnson as the robber.

Robbery #6: The victim was shown a surveillance photo of Johnson taken during Robbery #8 (the robbery-murder) and was asked if this was the same person who had robbed her. She said yes. One week later, she identified Johnson at a live lineup.

Sacramento County sheriff's detectives also arrested Johnson's getaway driver, Jessica Holmes. Before questioning her, they gave her a *Miranda* warning which included the admonition that "anything you say can be used against you in a court of law." Holmes said that she understood her rights, at which point the detectives began to question her. They did not ask if she wanted to waive her rights. Holmes freely answered the investigators' questions and confessed to driving Johnson's getaway car.

Johnson and Holmes were tried separately. Both were convicted of murder and multiple counts of robbery. Both were sentenced to life without the possibility of parole.

Discussion

JOHNSON'S APPEAL: Johnson argued that the identification procedures pertaining to Robberies #1, #5 and #6 were unduly suggestive because the victims had been shown photos of him before they had identified him in the live lineups. In 2007, the California Supreme Court explained that an identification procedure is suggestive if it "caused defendant to 'stand out' from the others in a way that would suggest the witness should

select him."[1] And the fact that the witness had previously seen a photo of the defendant before making an identification is, of course, a relevant circumstance in determining whether the defendant "stood out." But the court in *Johnson* noted that the California Supreme Court has also ruled that "the fact that the defendant alone appeared in both a photo lineup and a subsequent live lineup does not per se violate due process."[2] Accordingly, the court ruled that because there was no indication that the identifications pertaining to robberies 1 and 6 were "impermissibly suggestive," those identifications were properly presented to the jury.

The court also ruled that the identification by the victim in robbery number 5 was properly received in evidence even though investigators had shown the victim a surveillance video just before showing him a photo lineup. Quoting from *People* v. *Ingle,*[3] the court said, "Unlike the recollections and descriptions of a human witness, the recorded memory of the video surveillance camera has little serious potential to mislead. Indeed, its opposite potential to correct and enhance the reliability of an eyewitness identification in cases like the present would appear greater than its potential to cause an incorrect result."

HOLMES' APPEAL: Holmes argued that her statements were obtained in violation of *Miranda* for two reasons. First, she contended that the detective's *Miranda* admonition was misleading because he did not tell her that anything she said "can and *will*" be used against her. But, like most other courts, the court summarily rejected the argument, saying that a *Miranda* warning is sufficient if the suspect was told that his statements "could" be used in court.[4] (It should be noted that it is misleading to tell suspects that anything they say "will" be used against them. This is because some of the things they say are not incriminating, and some things will not used by prosecutors for various reasons; e.g., irrelevant, cumulative.)

Second, Holmes argued that her *Miranda* waiver was ineffective because she did not expressly waive her rights. As noted, Holmes was not asked the question: Having these rights in mind, do you want to talk to us now? Instead, after saying she understood her rights, the investigators began asking questions, and she freely answered them. The United States Supreme Court has ruled that a *Miranda* waiver will be implied if the suspect engaged in a "course of conduct indicating waiver."[5] Over the years, such a

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[1] *People* v. *Cook* (2007) 40 Cal.4th 1334, 1355.
[2] *People* v. *Cook* (2007) 40 Cal.4th 1334, 1355.
[3] (1986) 178 Cal.App.3d 505, 513. **NOTE**: Johnson also argued that it is unduly suggestive to conduct live or photo lineups by showing the witness a group of photos at the same time instead of sequentially; i.e., one after another. The court disagreed, pointing out that "[g]roup lineups have long been an accepted identification procedure, and nothing in this case indicates we should question that format."
[4] ALSO SEE *Oregon* v. *Elstad* (1985) 470 US 298, 315, fn.4 ["The *Miranda* advice on the card was clear and comprehensive, incorporating the warning that any statements could be used in a court of law"]; *Thompson* v. *Keohane* (1995) 516 US 99, 107 [suspects must be told "that anything they say may be used against them in court."]; *People* v. *Valdivia* (1986) 180 Cal.App.3d 657, 664 ["In the latter part of the *Miranda* opinion the Court employed the overstatement 'can and will be used.' But at an earlier point the Court described the warning as being that what is said 'may be used,' and this alternative has been consistently approved by the lower courts. The courts have also upheld other formulations, including use of 'can' alone, of 'might,' and of 'could.'" Citations omitted].
[5] *North Carolina* v. *Butler* (1979) 441 US 369, 373.

course of conduct has ordinarily been found when all of the following circumstances existed:

(1) CORRECTLY ADVISED: The suspect was correctly advised of his rights.

(2) UNDERSTOOD: The suspect said he understood his rights.

(3) ANSWERED FREELY: The suspect freely answered the officers' questions, as opposed to, for example, "grudging responses to leading questions."[6]

(4) NO COERCION: There was no indication that the waiver was coerced.[7]

Having determined that all of these circumstances were present during the interview with Holmes, the court ruled that she had impliedly waived her *Miranda* rights.

The convictions of both Johnson and Holmes were affirmed. POV

[6] QUOTE FROM *People* v. *Johnson* (1969) 70 Cal.2d 541, 558 ["[M]ere silence of the accused followed by grudging responses to leading questions will be entitled to very little probative value"].

[7] See *People* v. *Lessie* (2010) 47 C4 1152, 1169 ["While defendant did not expressly waive his Miranda rights, he did so implicitly by willingly answering questions after acknowledging that he understood those rights."]; *People* v. *Johnson* (1969) 70 Cal.2d 541, 558 ["Once the defendant has been informed of his rights, and indicates that he understands those rights, it would seem that his choosing to speak and not requesting a lawyer is sufficient evidence that he knows of his rights and chooses not to exercise them."].