People v. Brewer
(June 8, 2000) __ Cal.App.4th __

ISSUES

(1) If an officer obtains a statement from a suspect in violation of *Miranda*, can the statement be used to establish probable cause for a warrant to search the suspect's home? (2) If an officer asks an incarcerated suspect for consent to search, must the officer first obtain a *Miranda* waiver?

FACTS

During a routine traffic stop on a car driven by Brewer, a Los Angeles County sheriff's deputy saw that Brewer was in possession of marijuana buds packaged for sale and was also under the influence of marijuana. After handcuffing Brewer and placing him in a patrol car, the deputy searched Brewer's car for additional marijuana. Among other things, the deputy found an envelope containing $7,000.

A backup deputy who arrived during the search then removed Brewer from the patrol car and asked him about the money. Brewer said he was going to use it to buy a car from a dealership in Long Beach. In response to further questioning, Brewer said he did not know what kind of car he was going to buy, nor the name of the dealership. Brewer had not been *Mirandized*. He was then arrested and driven to the sheriff's station.

Shortly thereafter, a narcotics investigator met with Brewer for the purpose of seeking consent to search his home. Because the investigator did not intend to question Brewer about any of the circumstances surrounding the crime, he did not *Mirandize* him. When he asked Brewer for consent, Brewer responded, "I have about five pounds of bud in one place in my house. If I give it to you will you just leave and not bother my wife?" The investigator told Brewer he intended to search the entire house, at which time Brewer invoked his right to counsel.

The investigator then obtained a warrant to search the house. The affidavit in support of the warrant included the statements Brewer made to the backup deputy and the narcotics investigator. During the search, deputies found "additional physical evidence," which presumably included at least five pounds of marijuana. Brewer was convicted of possession of marijuana for sale.

DISCUSSION

Brewer contended the statements he had given to the backup deputy and narcotics investigator were obtained in violation of *Miranda* and, therefore, should not have been considered in determining whether there was probable cause for a warrant. This argument was based on the contention that he was "in custody" when he was questioned by the backup deputy, and that the narcotics investigator "interrogated" him when he sought consent to search.

Statement during the traffic stop

It is settled that *Miranda* applies only if officers "interrogate" a suspect who is "in custody."[(1)] Because the deputy's questions were reasonably likely to elicit an incriminating response, they constituted

"interrogation."interrogation."[(2)] So the issue here was whether Brewer was "in custody" when he was questioned.

A suspect is "in custody" for *Miranda* purposes if a reasonable person in the suspect's position would have believed his freedom of movement had been restrained to the degree associated with a formal arrest.[(3)] As noted, at the time Brewer was questioned by the backup deputy, he was in handcuffs and had just been removed from a locked patrol car. Because any physical restraint, especially handcuffing, is closely associated with a formal arrest, the courts have consistently ruled a handcuffed suspect is "in custody."[(4)] As the result, the court ruled Brewer's statements were obtained in violation of *Miranda* because he had not waived his rights.

A suspect's statement obtained in violation of *Miranda* is, of course, inadmissible to prove the suspect's guilt. This was not an issue in *Brewer* because the prosecution did not use the statements during trial. The statements were, however, used in the search warrant affidavit to establish probable cause. Was this error?

The answer, said the court, was no. Specifically, the court ruled that physical evidence obtained as the result of a *Miranda* violation will not be suppressed unless the *Miranda* violation was coercive in nature. And because there was no evidence of coercion, Brewer's statements to the backup deputy were properly included in the search warrant affidavit.

Statement at sheriff's station

As noted, shortly after Brewer was transported to the sheriff's station, a narcotics investigator met with him to see if he would consent to a search of his home. The investigator decided not to seek a *Miranda* waiver because he did not intend to question Brewer about the marijuana; all he wanted to know is whether Brewer would consent to a search. When the investigator asked for consent, Brewer's response was: "I have about five pounds of bud in one place in my house."

Brewer contended this statement was obtained in violation of *Miranda* because he had not waived his *Miranda* rights. Here the issue was not whether Brewer was "in custody"-he clearly was. Instead, the issue was whether the investigator's request for consent to search constituted "interrogation." Not surprisingly, the answer was no. It was not surprising because a simple request for consent calls for a yes or no answer-not an incriminating statement.[(5)] Consequently, the court ruled Brewer's statement to the investigator was not obtained in violation of *Miranda*.

Brewer's conviction was affirmed.

DA's COMMENT

The court's decision in *Brewer* should not be interpreted as justification to *intentionally* violate a suspect's *Miranda* rights to obtain leads or other information. The court was careful to point out that its ruling applies only if the *Miranda* violation was non-coercive. To date, most intentional *Miranda* violations have been deemed "coercive."[(6)]

(1) See *Berkemer* v. *McCarty* (1984) 468 US 420, 428; *California* v. *Beheler* (1983) 463 US 1121, 1124; *Illinois* v. *Perkins* (1990) 496 US 292, 297.

(2) See *Rhode Island* v. *Innis* (1980) 446 US 291, 301; *Arizona* v. *Mauro* (1986) 481 US 520, 526.

(3) See *Berkemer* v. *McCarty* (1984) 468 US 420, 442 ["(T)he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."]; *Stansbury* v. *California* (1994) 511 US 318, 322-3.

(4) See *New York* v. *Quarles* (1984) 467 US 649, 655; *People* v. *Morris* (1991) 53 Cal.3d 152, 198; *People* v. *Forster* (1994) 29 Cal.App.4th 1746, 1753; *People* v. *Breault* (1990) 223 Cal.App.3d 125, 135; *People* v. *Whitfield* (1996) 46 Cal.App.4th 947, 952-3; *People* v. *Turner* (1984) 37 Cal.3d 302, 319; *People* v. *Herdan* (1974) 42 Cal.App.3d 300, 307, fn.11; *People* v. *Taylor* (1986) 178 Cal.App.3d 217, 228 ["One well-recognized circumstance tending to show custody is the degree of physical restraint used by police officers to detain a citizen."].

(5) See *People* v. *Ruster* (1976) 16 Cal.3d 690, 700; *People* v. *Shegog* (1986) 184 Cal.App.3d 899, 905; *People* v. *James* (1977) 19 Cal.3d 99, 114-5. **ALSO SEE** *Doe* v. *United States* (1988) 487 US 201 [a court order requiring the target of a grand jury investigation to sign a "consent directive" authorizing banks to disclose records pertaining to his bank accounts does not violate the Fifth Amendment's prohibition against compelled testimony].

(6) See *People* v. *Montano* (1991) 226 Cal.App.3d 914, 935-6 ["It would be difficult to imagine a more egregious example of law enforcement authorities arrogating to themselves the exclusive power to decide whether a constitutional right could have more than a purely theoretical existence. No tolerance can be given to the officersµ flagrant trampling of defendant's rights, particularly because [the interrogating officers] began the interrogation with no intention of respecting those rights."]; *People* v. *Bey* (1993) 21 Cal.App.4th 1623, 1628; *People* v. *Dingle* (1985) 174 Cal.App.3d 21, 27, fn.7; *In re Gilbert E.* (1995) 32 Cal.App.4th 1598, 1602 ["This is a very troubling case, presenting a deliberate police violation of *Miranda*."]; *People* v. *Vasila* (1995) 38 Cal.App.4th 865, 869, fn.2.