

Recent Case

U.S. v. Lopez

(6th Cir. 2008) __ F.3d __ [2008 WL 2520451]

ISSUES

(1) Did an officer's questions to a suspect constitute permissible "booking" questions under *Miranda*? (2) Did the officer utilize the prohibited "two step" *Miranda* procedure?

FACTS

Officers in Louisville, Kentucky learned that drug traffickers would be transporting cocaine to a certain house from somewhere out of state. When two suspects arrived at the house carrying 16 kilograms of cocaine, officers arrested them and obtained a warrant to search another house in Louisville to which the vehicles were registered.

Lopez was one of the people who was in the house when the officers arrived. After handcuffing him, an officer asked him a couple of questions: When did you arrive here? And how did you get here? Lopez responded that he had arrived from Mexico the previous Sunday. At that point, the officer *Mirandized* him and asked if he had been transporting cocaine on the trip. He said yes. When Lopez's motion to suppress his statements was denied, he pled guilty.

DISCUSSION

Lopez contended that his statements should have been suppressed because they were obtained in violation of *Miranda*. The court agreed, rejecting the government's argument that the officer's initial questions constituted routine booking inquiries, and ruling that the post-waiver question resulted from the officer's use of the illegal "two-step" procedure.

ROUTINE BOOKING QUESTIONS: It is basic *Miranda* law that officers must obtain a waiver before interrogating a suspect who is "in custody." Although Lopez had not been placed under arrest before he was questioned, he was obviously in custody for *Miranda* purposes because he had been handcuffed.¹ The question, then, was whether the officer's questions constituted "interrogation."

As a general rule, officers "interrogate" a suspect if they ask questions that are reasonably likely to elicit an incriminating response.² Accordingly, so-called "routine booking questions" are exempt from *Miranda* because, by definition, they merely call for basic identifying data or biographical information needed to complete the booking or pretrial services process. Falling into this category are questions about the suspect's name,

¹ See *People v. Pilster* (2006) 138 CA4 1395, 1405 [handcuffing "is a distinguishing feature of a formal arrest."]; *People v. Taylor* (1986) 178 CA3 217, 228 ["One well-recognized circumstance tending to show custody is the degree of physical restraint used by police officers to detain a citizen."].

² See *Rhode Island v. Innis* (1980) 446 US 291, 301 ["the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response."].

address, date of birth, place of birth, phone number, occupation, social security number, employment history, and arrest record.³

It was therefore apparent to the court that the officer's pre-waiver questions did not qualify as booking inquiries for two reasons: (1) the questions did not seek biographical information, and (2) they were reasonably likely to elicit an incriminating response:

The officers who questioned Lopez did know that the shipment of cocaine involved in the arranged buy had arrived from outside the state during the previous week. Consequently, asking questions about when and how Lopez arrived at a household ostensibly linked to a drug sale, as well as his origin, are relevant to an investigation and cannot be described as related only to securing the house or identifying the defendant.

THE "TWO STEP": The government argued that, even if Lopez's pre-waiver answers were suppressed, his admission that he transported cocaine was obtained lawfully because, just seconds earlier, he had waived his rights. But the court ruled that, despite the waiver, the admission was obtained unlawfully because it resulted from the officer's use of the illegal "two step" procedure.

The "two step"—also known as "Question first. Warn later" or "*Miranda*-in-the-middle"—is a tactic whereby officers attempt to obtain an incriminating statement from an arrested suspect before seeking a waiver. If they succeed, they *Mirandize* him and, if he waives, ask him the same questions as before. If things work out, he will make a post-*Miranda* statement that is virtually identical to the illegal pre-*Miranda* statement. The idea is that a suspect will likely do so because he had previously "let the cat out of the bag" and, therefore, had nothing to lose by repeating the admission. In 2004, however, the U.S. Supreme Court ruled in *Missouri v. Seibert* that such a procedure is unlawful if it was done intentionally.⁴

In determining whether officers utilized a two-step interrogation, the Court said the following circumstances would be relevant: (1) the completeness of detailed involved in pre-waiver questioning; (2) the overlapping content of the statements made before and after the waiver; (3) the timing and setting of the interrogation, (4) the continuity of police personnel during the pre- and post-waiver interrogations, and (5) the degree to which the interrogator's questions treated the post-waiver round as continuous with the first.⁵

Applying these criteria to the facts, the court in *Lopez* said that the "third, fourth, and fifth factors, in particular, inform our determination that the warning in this case was ineffective, as the same officers conducted the interrogation in the same location without

³ See *Rhode Island v. Innis* (1980) 446 US 291, 301 [questions "normally attendant to arrest and custody" are not "interrogation"]; *People v. Farnam* (2002) 28 Cal.4th 107, 180 [not "interrogation" to seek the identity of a suspect "found under suspicious circumstances or near the scene of a recent crime"]; *People v. Powell* (1986) 178 Cal.App.3d 36, 39 ["The booking procedure has been described as essentially a clerical process. The limited information needed at a booking procedure is required solely for the purposes of internal jail administration, not for use in connection with any criminal proceeding against the arrestee. When use of this information is confined to those proper purposes, its elicitation cannot be considered incriminatory."]; *People v. Palmer* (1978) 80 Cal App.3d 239, 256 ["[T]he *Miranda* rules do not apply to routine questions relating to personal identification and background information].

⁴ (2004) 542 US 600.

⁵ See *Missouri v. Seibert* (2004) 542 US 600, 615.

any break between the two sets of questions. The interrogation was continuous—the break lasted for the amount of time it took the investigators to read Lopez the *Miranda* warning.”

Especially important, however, was the second factor because, although there was technically no direct overlap between the pre- and post-waiver questions, the pre-waiver questions effectively set the stage for the critical post-waiver question: Did you transport the cocaine from Mexico? As the court pointed out, “While the exact questions did not overlap, the post-*Miranda* question resulted from the knowledge gleaned during the initial questioning—that Lopez had driven from Mexico to Kentucky.”

Consequently, the court ruled that all of Lopez’s statement were obtained in violation of *Miranda*. POV