People v. McCurdy

(2014) 59 Cal.4th 1063

Issues

Did the defendant invoke his *Miranda* rights while being questioned about the murder and sexual assault of a child? If so, did he then reinitiate questioning?

Facts

McCurdy, a U.S. Navy seaman, kidnapped and murdered eight year old Maria Piceno in Lemoor. Her body was found about two weeks later in a creek near Bakersfield. Two days later, McCurdy's ship was deployed to the Pacific and he was aboard. In the course of the investigation, officers identified McCurdy as the prime suspect and learned that he was now at sea near Japan. So four investigators were sent to the ship to interview him. When they arrived, McCurdy's commanding officer ordered that McCurdy be escorted to an interview room. Because this was an order, it was apparently undisputed that he was now "in custody" for *Miranda* purposes.

The investigators began by engaging McCurdy in some small talk about his decision to join the Navy, hobbies, upbringing, and so on. They then *Mirandized* him and McCurdy acknowledged that he understood his rights. Although he was not asked to expressly waive his rights, he impliedly did so when he voluntarily submitted to questioning.[1]

The subsequent interview was quite lengthy as it was conducted on and off for four days. But for our purposes, it is only necessary to discuss four things that happened:

- After McCurdy was *Mirandized* and was told the purpose of the interview, he said "They always tell you to get a lawyer." An investigator responded by saying that's "up to you" but that "it was important for him to help with [Maria's] disappearance." McCurdy began answering the investigators' questions.
- When asked if he had been molested when he was a child, McCurdy said, "I want a lawyer." But about 20 seconds later, as the investigators started to leave the room, McCurdy said, "I don't know if you guys got any other suspects," and "I want to help you guys, but I don't want to incriminate myself." The investigators then resumed the interview and McCurdy continued to answer their questions.
- The officers confronted McCurdy with a pornographic videotape that had been recovered in his storage unit at Lemoor. Shortly thereafter, McCurdy said, "I can't talk no more." But the investigators interpreted this to mean he just needed more water (he had previously asked for some). One of the investigators gave him a glass of water and McCurdy responded by asking why they thought he had rented a video that day. The questioning continued.
- In response to a question about his childhood, McCurdy said, "I'd rather not say." He repeated this four times as the investigators continued to question him about his childhood. The questioning continued.

After the interview (which was conducted on and off over four days), McCurdy was arrested, removed from the ship and transported to the United States. Before trial, he argued that all of his statements should have been suppressed. For reasons we will

[1] See *Berghuis v. Thompkins* (2010) 560 U.S. 370, 382; *People v. Nelson* (2012) 53 Cal.4th 367, 375 ["Although he did not expressly waive his *Miranda* rights, he did so implicitly by willingly answering questions after acknowledging that he understood those rights."].

discuss below, the court granted the motion as to some statements but not others. (This was probably not a major setback for prosecutors because he said nothing that seemed incriminating.) The prosecution then proceeded to trial with those statements that were admissible and other evidence. The jury found McCurdy guilty, and the judge sentenced him to death.

Discussion

On appeal to the California Supreme Court, McCurdy argued that all of his statements should have been suppressed because he began the interview by invoking his *Miranda* right to counsel and later invoked his rights several times. It is settled that a suspect's remark can constitute an invocation only if it clearly and unambiguously demonstrated an intent to immediately invoke the right to remain silent, the right to counsel, or both.[2] Consequently, the main issue was whether any of McCurdy's remarks demonstrated such an intent.

PRE-WAIVER SMALL TALK: McCurdy argued that the investigators' pre-waiver small talk violated *Miranda* because it constituted "interrogation," and that it also constituted illegal "softening up." The court quickly disposed of both arguments. First, there was no "interrogation" because the interrogation occurs only if the officers' words were reasonably likely to elicit an incriminating response."[3] But the investigators' questions plainly did not fall into this category. Second, the term "softening up" has never been defined but it arguably results if officers are about to interrogate a suspect who has indicated he does not intend to waive his rights, and the officers then engage him in a lengthy pre-waiver conversation for the purpose of causing him to believe it would be advantageous to talk; e.g., officers disparaged the victim to make it appear they were on the suspect's "side."[4] The court ruled that the officers did nothing of this sort and that the officer' pre-waiver remarks appeared to be merely "an attempt by the officers to establish a rapport with defendant."

"THEY ALWAYS TELL YOU TO GET A LAWYER": This comment, which came after McCurdy was *Mirandized*, was plainly not an unambiguous invocation because, as the court explained, "A reasonable officer in these circumstances would understand that defendant was expressing the abstract idea an attorney might be in his best interest, but he did not actually request one."

"I WANT A LAWYER": Although this was an invocation, it is settled that officers may continue to question a suspect who invoked if the questioning was initiated by the suspect and both of the following circumstances: (1) the suspect's decision to initiate

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[2] See *Davis v. United States* (1994) 512 U.S. 452, 459 ["Invocation of the *Miranda* right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney. But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning."]; *Berghuis v. Thompkins* (2010) 560 U.S. 370, 381 ["[T]here is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel at issue in *Davis*."].

[3] See *Rhode Island v. Innis* (1980) 446 U.S. 291, 301.

[4] See *People v. Scott* (2011) 52 Cal.4th 452, 478 [no softening up as the officers "had no prior relationship with defendant [and] did not seek to ingratiate themselves with him by discussing unrelated past events and former acquaintances. No did they disparage his victims."]; *P v. Honeycutt* (1977) 20 C3 150.

questioning was made freely, not as a result badgering or coercion;[5] and (2) it reasonably appeared that the suspect wanted to open up a general discussion about the crime, as opposed to merely discussing incidental or unrelated matters, or "routine incidents of the custodial relationship."[6] Applying these requirements to the facts, the court ruled that McCurdy had initiated further questioning about the crime when, as the investigators started to leave the room, he stopped them by saying, "I don't know if you guys got any other suspects." Said the court, "[D]efendant's statement about other suspects could fairly be said to represent a desire to start a generalized discussion about the officers' investigation." The court also rejected McCurdy's argument that the investigators were required to re-*Mirandize* him at that point because his remark had somehow "undermined" his earlier implied *Miranda* waiver.

"I CAN'T TALK NO MORE": As noted, when McCurdy was asked about a pornographic videotape that was found in his storage unit in Lemoor, he replied "I can't talk no more. Although this remark might be deemed an invocation if viewed in the abstract, an investigator testified that he interpreted it as merely a request for more water since McCurdy had been having problems with his voice. The court agreed that, under the circumstances, this was a reasonable interpretation, especially since McCurdy freely responded to the question about the videotape immediately after he received the water.

"I'D RATHER NOT SAY": Finally, when McCurdy was asked about his childhood, he responded, "I'd rather not say," and this was followed by four similar remarks as the officers continued to question him about his childhood. The trial court ruled that these words constituted an unambiguous invocation, and that the officers should not have continued to question him. But this was not prejudicial to McCurdy because the trial court had already ruled that McCurdy invoked and had ordered the prosecution not to use any of his subsequent statements in its case-in-chief. Consequently, the violation was harmless because it could not have affected the jury's verdict.

McCurdy's conviction and death sentence were affirmed. POV

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[5] See *People v. Davis* (2009) 46 Cal.4th 539, 596 ["a defendant's decision to talk with police cannot be a product of police interrogation, badgering, or overreaching"]; *People v. McClary* (1977) 20 Cal.3d 218, 226 ["[A] change of mind on the part of the defendant prompted by the advice of counsel, his own psychological make-up, or similar facts is not proscribed by *Miranda*."].

[6] *Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1045. Also see *People v. Thompson* (1990) 50 Cal.3d 134 [defendant's statement "could reasonably be interpreted by the officer as opening a generalized discussion, and that the officer understood the request in that light"].