People v. Storm
(August 15, 2002) __ Cal. 4th __

ISSUE

If a murder suspect invokes his *Miranda* rights and is later released, can officers seek to question him about the murder?

FACTS

Storm was suspected of killing his wife whose body was found at a roadside turnout in San Diego County. Sheriff's homicide detectives asked Storm if he would be willing to take a polygraph examination. He agreed to do so, and on November 19th he drove to the sheriff's office for the test. Before it began, the polygraph examiner advised him of his *Miranda* rights which he waived.

During the test, Storm claimed he didn't have anything to do with his wife's murder. According to the polygraph, this was a lie. In fact, the examiner told Storm that the probability he was lying was over 99%. Storm responded, "I wanna help you guys close your case but I better talk to an attorney first."

The examiner then asked Storm to make a statement "for his own comfort." Storm replied that his wife was suicidal, that she begged him to kill her, that they had discussed it, but he ultimately refused to do so. When the examiner asked for details, Storm said, "Okay. But seriously I think I shouldn't talk about it 'til I've consulted with somebody." The examiner continued to ask questions, and Storm continued to deny that he killed his wife, saying twice, "I'm not sayin' I did it."

Eventually, he said that he thought he would be charged with "assisted suicide, at the least. At the most I'm lookin' at homicide." At that point, one of the detectives who was secretly monitoring the interview stopped it because he believed that Storm had earlier invoked his right to counsel. And since there was insufficient evidence to arrest Storm without his statements to the examiner, he was allowed to leave.

Two days later, on November 21st, the detectives went to Storm's apartment and questioned him again about the murder. During the interview, Storm made several incriminating statements. He was arrested the next day after the detectives obtained a warrant.

Based largely on his November 21st statements, Storm was convicted of first degree murder.

DISCUSSION

All of Storm's statements to the polygraph examiner on the 19th were suppressed on grounds they were made after Storm had invoked his *Miranda* right to counsel when he said, "I better talk to an attorney first" and, later, "I think I shouldn't talk about it 'til I've consulted with somebody." Consequently, the only issue on appeal was the admissibility of the admissions he made when he was questioned on the 21st at his apartment.

Although Storm acknowledged he was not "in custody" on the 21st, he claimed the invocation he made on the 19th carried over to the 21st. In other words, he contended that when a suspect invokes his *Miranda* right to counsel, all further questioning is prohibited, even questioning that occurs after the suspect is released.[1]

The California Supreme Court disagreed, ruling that questioning after an invocation of the *Miranda* right to counsel is permitted if, (1) the suspect was released from custody, and (2) the

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[1] **NOTE:** If this argument were carried to its logical conclusion it would mean that officers would be forever barred from seeking to question a suspect who, any time in his lifetime, had invoked the *Miranda* right to counsel. This is because the *Miranda* right to counsel is not offense specific; i.e., if it is invoked, officers may not question the suspect about *any* crime. See *Arizona* v. *Roberson* (1988) 486 US 675. Thus, a ruling that an invocation survives a suspect's release from custody might have created a class of "question proof" criminals in California.

release was for a sufficient amount of time and under circumstances giving him an opportunity to consult with an attorney if he so desired.[2] Said the court:

> So long as there was a true break in custody, affording defendant a reasonable time and opportunity to consult counsel while free of custodial influences, the police thereafter had the right to recontact him without undue delay.

The court emphasized that a mere technical break in custody won't do. "We do not suggest," said the court, "the police can avoid [a *Miranda* violation] simply by allowing the suspect to step outside the station house at midnight on a Saturday, then promptly rearresting him without affording any realistic opportunity to seek counsel's assistance free of the coercive atmosphere of custody." This was not a problem in *Storm* because he had been released for two days, both weekdays.[3]

There were two other issues. First, Storm urged the court to rule that a release from custody should be ineffective if it was merely a pretext to avoid the *Miranda* invocation. But because there was no evidence that Storm's release was a ruse, the court refused to address the issue.

Second, he argued that officers who contact a suspect after a break in custody must always obtain a *Miranda* waiver even if the suspect was out of custody. As the court pointed out, however, *Miranda* waivers are required only if the suspect is in custody when he is questioned; and there is no reason to impose a different rule merely because an out-of-custody suspect previously invoked.

Fruit of the poisonous tree?

Storm's backup argument was that, even if the detectives were free to question him on the 21st, his answers to their questions should have been suppressed as the "fruit" of the alleged *Miranda* violation on the 19th. He reasoned that when a suspect incriminates himself during questioning conducted in violation of *Miranda*, any subsequent statement must be considered the direct result of the violation because the suspect's decision to speak with officers will be based largely on his conclusion that he has nothing to lose—that he already "let the cat out of the bag."

As the court pointed out, however, this contention has already been rejected by the United States Supreme Court. In *Oregon* v. *Elstad*[4] the Court ruled that if officers obtain a statement in violation of *Miranda,* a subsequent statement will be admissible if, (1) the subsequent statement was obtained in full compliance with *Miranda*, and (2) both statements were made freely and voluntarily.

The court in *Storm* ruled that the first requirement was inapplicable because Storm was not "in custody" when he was questioned on the 21st and, therefore, there was no need to comply with *Miranda*. As for the voluntariness of Storm's statements on the 19th and the 21st, the court ruled there was no absolutely evidence of coercion. Consequently, Storm's conviction was affirmed.

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[2] **ALSO SEE** *People* v. *Inman* (1986) 186 Cal.App.3d 1137, 1143; *In re Bonnie H.,* (1997) 56 Cal.App.4th 563, 583.

[3] **NOTE:** The dissent in *Storm* expressed concern that the court's ruling will result in "pretext" releases for the purpose of negating a *Miranda* invocation. The majority responded that this should not be a problem because the ploy would be too risky. Said the court: "[S]chemes to violate *Miranda* deliberately, then to manipulate the break-in-custody exception in hopes of obtaining valid confessions, are fraught with risks and difficulties that diminish their allure. After all, any such scheme necessarily involves the suspect's release. This, in turn, leaves the suspect free to learn information (including the invalidity of his prior statement) that would encourage him to refuse further cooperation when recontacted. (Indeed, in this case, defendant, who was not being observed by police, was at large and presumably free to take flight.) Moreover, even if a later statement is obtained, the issue will inevitably arise whether its validity is tainted by the prior illegality. Considerations of this kind lead us to believe the dissenters exaggerate the enthusiasm with which police would embrace the 'subterfuge' they envision."

[4] (1985) 470 US 298.

DA's COMMENT

The court summarily ruled that Storm invoked his *Miranda* right to counsel when, after being notified of the polygraph results, he said, "I better talk to an attorney first."[5] Because a suspect cannot invoke his *Miranda* rights unless he is "in custody," this ruling implies that Storm was "in custody" at that point.[6] An examination of the circumstances surrounding the interview, however, reveals that Storm was not "in custody" then. In fact, he may never have been "in custody" on the 19th.[7]

It is settled that a suspect who voluntarily comes to a police station for questioning is not automatically "in custody" for *Miranda* purposes.[8] As the California Supreme Court observed in *People* v. *Stansbury*,[9] "A reasonable person who is asked if he or she would come to the police station to answer questions, and who is offered the choice of finding his or her own transportation or accepting a ride from the police, would not feel that he or she had been taken into custody."

The question, then, was whether anything happened after Storm arrived at the station that would have reasonably indicated he was in custody. The court did not appear to think so. As it pointed out:

> [Storm] arrived at the station on his own, was treated courteously, was not deprived of human comforts or necessities, and was not worn down by lengthy interrogation. . . . [The polygraph examiner] employed no interrogation techniques involving actual physical or psychological coercion. He merely offered a sympathetic ear and encouraged defendant to keep talking.

The only circumstances that even remotely suggested that Storm was "in custody" were, (1) he was *Mirandized*, and (2) the examiner told him there was a 99% probability he was lying about his role in his wife's death. (Storm made no incriminating statements after he said he thought he might be charged with homicide.)

As for advising Storm of his *Miranda* rights, although this circumstance is marginally relevant, it has never been considered significant.[10] In fact, most courts view *Miranda* warnings as a circumstance tending to *reduce* coerciveness.[11]

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[5] **NOTE:** The court simply said, "Insofar as defendant's first statement was obtained in violation of *Edwards* [*Edwards* v. *Arizona* (1981) 451 US 477], it was inadmissible in the prosecution's case-in-chief."

[6] See *McNeil* v. *Wisconsin* (1991) 501 US 171, 182, fn.3 ["We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than custodial interrogation . . . "]; *People* v. *Farnam* (2002) 28 Cal.4th 107, 180-1 [detainee's refusal to answer questions was not an invocation of the right to remain silent because he was not "in custody"] ; *People* v. *Beltran* (1999) 75 Cal.App.4th 425, 431; *People* v. *Avila* (1999) 75 Cal.App.4th 416, 422-4; *People* v. *Calderon* (1997) 54 Cal.App.4th 766, 770 ["(T)he antipathy expressed in *McNeil* towards the anticipatory invocation of the *Miranda* rights is consistent with *Miranda's* underlying principles. **NOTE:** Technically, the California Supreme Court affirmed the suppression order when it said, "Insofar as defendant's first statement was obtained in violation of *Edwards* [*Edwards* v. *Arizona* (1981) 451 US 477], it was inadmissible in the prosecution's case-in-chief." But because it upheld Storm's conviction on grounds that the invocation did not prevent the detectives from re-contacting Storm, it was unnecessary for the court to examine whether, or at what point, Storm was "in custody" for *Miranda* purposes.

[7] **NOTE:** Although the trial judge suppressed all of Storm's statements to the polygraph examiner, he paradoxically ruled that Storm was *not* "in custody" because he "appeared voluntarily at the station and was free to leave at any time" and, therefore, the "*Miranda* rules were not technically applicable."

[8] See *Stansbury* v. *California* (1994) 511 US 318, 322-3; *California* v. *Beheler* (1983) 463 US 1121, 1125; *Oregon* v. *Mathiason* (1977) 429 US 492, 495; *Minnesota* v. *Murphy* (1984) 465 US 420, 430.

[9] (1995) 9 Cal.4th 824, 831-2.

[10] See *People* v. *Boyer* (1989) 48 Cal.3d 247, 272.

[11] See *Berkemer* v. *McCarty*(1984) 468 US 420, 433, fn.20 ["(C)ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare."]; *Withrow* v. *Williams* (1993) 507

As for telling Storm the polygraph indicated he was lying, an examination of the circumstances reveals this was not a turning point. For one thing, the examiner did not react to the polygraph result as if it constituted proof that Storm had murdered his wife. As the court observed, after telling Storm of the test result, the examiner "invited" Storm to view the results; the examiner "suggested that they should 'chat' and 'try to figure out what happened,'" that the examiner was "willing to listen" to Storm; the examiner "expressed sympathy" for Storm's past troubles and opined that "talking was the best way to deal with problems."

Furthermore, the U.S. Supreme Court has ruled that confronting a suspect with incriminating evidence does not automatically render a suspect "in custody." In *Oregon* v. *Mathiason*,[12] the Court ruled that a burglary suspect who voluntarily came to the police station for questioning was not in custody for *Miranda* purposes even after, (1) officers falsely told him his fingerprints had been found at the scene of the crime, and (2) officers told him that his truthfulness would be considered by the judge, which is tantamount to saying that he will be charged with the crime.

The circumstances in *Storm* were similar to those in *Mathiason*, but much less confrontational. There was no direct accusation that he had murdered his wife, and no parading of evidence that he had done so. The overall tone of the interview could fairly be described as cordial. Furthermore, as noted by the dissent, the questioner was a "polygraph operator," not a police officer.[13]

Consequently, Storm's admission to the polygraph examiner that he killed his wife probably should have been admissible because, until then, he was not "in custody." Furthermore, the statement he made on the 21st was admissible, not only because the release from custody would have nullified an invocation, but also because no invocation occurred inasmuch as he was never "in custody."

US 680, 693; *Frazier* v. *Cupp* (1969) 394 US 731, 739; *United States* v. *Washington* (1977) 431 US 181, 188 ["Indeed, it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled."]; *Fare* v. *Michael C.* (1979) 442 US 707, 727; *Colorado* v. *Spring* (1987) 479 US 564, 576; *Davis* v. *North Carolina* (1966) 384 US 737, 740-1; *People* v. *Hill* (1992) 3 Cal.4th 959, 981; *In re Aven S.* (1991) 1 Cal.App.4th 69, 77; *People* v. *Memro* (1995) 11 Cal.4th 786, 827; *In re Aven S.* (1991) 1 Cal.App.4th 69, 76; *People* v. *James* (1984) 157 Cal.App.3d 381, 385; *People* v. *Bradford* (1997) 14 Cal.4th 1005, 1045.

[12] (1977) 429 US 492, 495. ALSO SEE *People* v. *Stansbury* (1995) 9 Cal.4th 824, 831-2 ["A reasonable person who is asked if he or she would come to the police station to answer questions, and who is offered the choice of finding his or her own transportation or accepting a ride from the police, would not feel that he or she had been taken into custody."]; *California* v. *Beheler* (1983) 463 US 1121; *People* v. *Holloway* (1990) 50 Cal.3d 1098, 1115; *Green* v. *Superior Court* (1985) 40 Cal.3d 126; *People* v. *Mazza* (1985) 175 Cal.App.3d 836; *People* v. *Conrad* (1973) 31 Cal.App.3d 308, 319 [defendant walked into a police station and said he wanted to turn himself in; officer asked a few, brief questions to determine the crime defendant committed]; *Bains* v. *Gomez* (9th Cir. 2000) 204 F.3d 964, 972-3. **COMPARE:** *People* v. *Boyer* (1989) 48 Cal.3d 247, 271-2 [although the defendant voluntarily accompanied officers to the station, the officers' subsequent conduct indicated the defendant was "in custody."]; *People* v. *Fierro* (1991) 1 Cal.4th 173, 217.

[13] **NOTE:** It should also be noted that the California Supreme Court had ruled that Storm was not "in custody" when he was questioned about the murder at his home on the 21st. Thus, it had determined that the polygraph examiner's telling Storm on the 19th that he had lied about his role in the murder was not enough to render the November 21st interview "custodial."