LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook, Judge

Date Feb. 8, 2023 Case No. 22CR107049

STATE OF OHIO
Plaintiff

Paul Griffin
Plaintiff's Attorney

VS

ANTHONY SCHOLZ
Defendant

Ken Lieux & Ralph DeFranco
Defendant's Attorney

This matter is before the Court on the Defendant's Motion to Suppress Statements, filed November 14, 2022; Defendant's Supplemental Motion to Suppress Statements, filed November 23, 2022; and, the State's Objection, filed November 23, 2022.

Evidentiary hearing had February 6, 2023.

The motion to suppress is not well-taken and DENIED.

IT IS SO ORDERED. See Judgment Entry.

JUDGE D. CHRIS COOK

cc: Griffin, Asst. Pros.
Lieux, Esq.
DeFranco, Esq.

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JUDGMENT ENTRY
Hon. D. Chris Cook, Judge

Date Feb. 8, 2023 Case No. 22CR107049

STATE OF OHIO
Plaintiff

Paul Griffin
Plaintiff's Attorney

VS

ANTHONY SCHOLZ
Defendant

Ken Lieux & Ralph DeFranco
Defendant's Attorney

I. INTRODUCTION

This matter is before the Court on the Defendant's Motion to Suppress Statements, filed November 14, 2022; Defendant's Supplemental Motion to Suppress Statements, filed November 23, 2022; and, the State's Objection, filed November 23, 2022.

Evidentiary hearing had February 6, 2023.

II. FACTS

The facts of this case are not in material dispute.

On July 28, 2022, members of the North Ridgeville Police Department ("NRPD"), including Sgt. Matthew Gorski ("Sgt. Gorski"), went to the Defendant's residence in Cleveland, Ohio, in order to serve him with an arrest warrant for rape.

The Defendant was arrested without incident, handcuffed, and placed in the rear of Sgt. Gorski's cruiser. Immediately after being seated in the cruiser, at approximately 1:25 p.m., Sgt. Gorski stated, "you have the right to remain silent, anything you say can be used against you in a court of law, you have the right to an attorney, if you can't afford an attorney one can be appointed to you at no charge. Do you understand your rights?" the Defendant replied, "Yes." Sgt. Gorski stated, "OK."

The Defendant was then transported from his home in Cleveland to NRPD. He was not questioned while in Sgt. Gorski's cruiser.

Once at the station, the Defendant was taken into an interview room, his handcuffs were removed, and Sgt. Gorski stated, "all right, obviously, the - - your rights still apply in here, okay? That we - - that I read to you at the scene when you were arrested. Okay?" The Defendant did not verbally respond, but nodded his head affirmatively. Sgt. Gorski then asked, "Do you know why you are in here?" The Defendant replied, "no I do not."

This exchange began at approximately 1:53 p.m., twenty-seven minutes (.27) after the Defendant was *Mirandized* in Sgt. Gorski's cruiser. The interrogation concluded at approximately 3:41 p.m., for a total of about one hour and forty-eight minutes (1:48).

At no time after the Defendant was *Mirandized* in Sgt. Groski's cruiser and reminded that the warnings still applied at the station was the Defendant ever given the specific *Miranda* warnings again.

However, towards the end of the interrogation, the following exchange occurred between the Defendant and Chief Freeman,[1]

> CHIEF FREEMAN: Okay. All right. Just a couple of quick questions. You were advised of your Miranda rights today? Yes or no?
>
> MR. SCHOLZ: Yes.
>
> CHIEF FREEMAN: You talked to us freely today? Yes?
>
> MR. SCHOLZ: (Nods head).[2]

By the time the interrogation concluded, the Defendant had made a number of incriminating statements involving his conduct with the victim.

---

[1] See Transcript of Interview, Page 58, Lines 14-19. The Court has marked this as Court Exhibit "A."
[2] Throughout the course of the interview, the Court interprets the Defendant's head movements as follows: "nods head" as an affirmative response and "shakes head" as a negative response.

III. LAW & ANALYSIS

THE FIFTH AMENDMENT

The Fifth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution declare that no person shall be compelled in any criminal case to be a witness against himself.

State v. Arnold, 147 Ohio St. 3d 138, 2016-Ohio-1595, at ¶ 30.

As courts have long recognized, the privilege against self-incrimination is accorded liberal construction in favor of the right it was intended to secure. *Counselman v. Hitchcock,* 142 U.S. 547, 562, (1892), *overruled in part on other grounds, Kastigar v. United States,* 406 U.S. 441, (1972). The right it was intended to secure is the right of an individual to force the state to produce the evidence against him or her by its own labor, not by forcing the individual to produce it from his or her own lips. *State v. Goff,* 128 Ohio St.3d 169, 2010-Ohio-6317, ¶ 43. Although the right against testimonial compulsion provides protection to the accused, it also applies to witnesses who would incriminate themselves by giving responses to questions posed to them. *Malloy v. Hogan,* 378 U.S. 1, 11, (1964); *Ex Parte Frye,* 155 Ohio St. 345, 349, (1951).

Arnold, at ¶ 31.

The right is personal, not proprietary. The Fifth Amendment privilege always adheres to the *person,* not to the *information* that may incriminate the person. *Couch v. United States,* 409 U.S. 322, 328, (1973). As Justice Holmes succinctly stated, "A party is privileged from producing the evidence, but not from its production." *Johnson v. United States,* 228 U.S. 457, 458, (1913).

STANDARD OF REVIEW

A motion to suppress presents a mixed question of law and fact: when considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses.

Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. *State v. Oberholtz*, 9th Dist. Summit No. 27972, 2016-Ohio-8506, ¶ 5, quoting *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372; *State v. Carey,* 2018-Ohio-831, 9th Dist. No. 28689, Summit (3/7/2018) at ¶ 8.

"[A]n appellate court's review of the trial court's findings of fact looks only for clear error, giving due deference as to the inferences drawn from the facts by the trial court." *State v. Hunter*, 151 Ohio App.3d 276, 2002-Ohio-7326, ¶ 24 (9th Dist.), citing *State v. Russell*, 127 Ohio App.3d 414, 416 (9th Dist.1998), reference *State v. Soto*, 9th Dist., Lorain No. 17CA011024, 2017-Ohio-4348, at ¶ 6.

THE RIGHT TO A HEARING

If a defendant in a criminal case files a motion to suppress that complies with Crim.R. 47 by setting forth sufficient factual and legal basis for the challenge of evidence obtained as a result of a warrantless seizure, the court must afford the defendant a hearing.

> We therefore hold that in order to require a hearing on a motion to suppress evidence, the defendant must state the motion's legal and factual bases with sufficient particularity to place the prosecutor and court on notice of the issues to be decided." *State v. Shindler*, 70 Ohio St.3d 54 (1994).

Failure to include or particularly state the factual and legal basis for a motion to suppress waives that issue. See *Defiance v. Kretz*, 60 Ohio St.3d 1 (1991); *State v. Codeluppi*, 139 Ohio St.3d 165, 2014-Ohio-1574, at ¶ 10.

MIRANDA AND CUSTODIAL STATEMENTS

When a suspect is questioned in a custodial setting, the Fifth Amendment requires that he receive *Miranda* warnings to protect against compelled self-incrimination. *State v. Wesson*, 137 Ohio St.3d 309, 2013-Ohio-4575, ¶ 34, citing *Miranda, infra*, at 478-479. "Before the strictures of *Miranda* even apply, however, a defendant must have been placed into custody and subjected by either law enforcement or a person acting as an agent of law enforcement." *State v. Jackson*, 9th Dist. Summit No. 26234, 201-Ohio-3785, ¶ 9, citing *State v. Watson*, 28 Ohio St.2d 15, 26 (1971). See: *Miranda v. Arizona*, 384 U.S. 436, (1966)

"The *Miranda* requirements do not apply to admissions made to persons who are not officers of the law or their agents." *State v. Wilson*, 30 Ohio St.2d 199, 203 (1972). Further, "custody" for purposes of *Miranda* exists only where there is a "'restraint from freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983), quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977).

"Whether a suspect is in custody depends on the facts and circumstances of each case. Relevant factors include the location of the questioning, its duration, statements made

during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning." *Howes v. Fields,* 565 U.S. 499, 509 (2012).

The test is whether, under the totality of the circumstances, a reasonable person would have believed that he was not free to leave. *State v. Learch,* 9th Dist. Summit No. 26684, 2013-Ohio-5305, ¶ 8; See also: *State v. Soto,* 9TH Dist., Lorain No. 16CA011024, 2017-Ohio-4348.

The Ohio Supreme Court has recently given additional guidance,

> Drawing from *Berkemer, Farris*, and subsequent decisions of our courts of appeals, we identify the following factors that may provide guidance: questioning a suspect during a traffic stop in the front seat of a police vehicle does not rise to the level of a custodial interrogation when (1) the intrusion is minimal, (2) the questioning and detention are brief, and (3) the interaction is nonthreatening or nonintimidating.

Cleveland v. Oles, 152 Ohio St. 3d 1, 2017-Ohio-5834, at ¶ 24.

The United States Supreme Court has "adopted a set of prophylactic measures designed to safeguard the constitutional guarantee against self-incrimination." *J.D.B. v. North Carolina,* 564 U.S. 261, 269, (2011). In *Miranda*, the court held that prior to questioning, a suspect "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." 384 U.S. at 444.

If these *Miranda* warnings are not given prior to a custodial interrogation, the prosecution may not use the statements obtained from the suspect at trial. *Id.* The court clarified, however, that by "custodial interrogation", it meant "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id. In re M.H.,* 163 Ohio St. 3d 93, 2020-Ohio-5485, at ¶ 18.

ANALYSIS

In the case at bar, the gravamen of the Defendant's motion is threefold; first, that the Defendant did not knowingly, intelligently, and voluntarily waive his *Miranda* rights because, ". . . he was not given the requisite *Miranda* warnings." Second, he argues that there was no, ". . . voluntary and intelligent waiver of counsel by the Defendant . . ." And third, the Defendant argues that as he was not given *Miranda* warnings prior to the

interrogation at the station, ". . . he did not knowingly, intelligently waive his rights prior to questioning."

The Defendant's arguments lack merit.

MIRANDA WARNINGS WERE GIVEN PRIOR TO ANY QUESTIONING

At the outset, the State concedes that the interrogation of the Defendant that occurred on July 28, 2022, at NRPD, was custodial in nature. As such, the Defendant was entitled to *Miranda* warnings prior to any questioning by law enforcement.

And, the Defendant is correct that the State has the burden of demonstrating that he made a knowing, intelligent, and voluntary waiver of his constitutional right to remain silent as well as his right to counsel.

> The State must prove by a preponderance of evidence that a waiver of Miranda rights is knowingly, intelligently, and voluntarily made. *State v. Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581, ¶ 107. To determine whether a confession was involuntary, courts "'consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.'" *Id.*, quoting *State v. Edwards*, 49 Ohio St.2d 31 (1976), paragraph two of the syllabus, death penalty vacated on other grounds, 438 U.S. 911 (1978). "[W]e will not conclude that a waiver was involuntary 'unless there is evidence of police coercion, such as physical abuse, threats, or deprivation of food, medical treatment, or sleep.'" (Emphasis sic.) *Id.* at ¶ 107, quoting *State v. Wesson*, 137 Ohio St.3d 309, 2013-Ohio-4575, ¶ 35.

State v. Jackson, 9th Dist. Summit No. 28691, 2018-Ohio-1285, 4/4/2018, at ¶ 11.

In its brief in opposition, the State goes to some length to demonstrate the legal maxim that *Miranda* "does not require talismanic incantations." This legal axiom is accurate, but besides the point, as complete and accurate *Miranda* warnings were given to the Defendant as soon as he was seated in Sgt. Gorski's patrol cruiser.

To be sure, the warnings were given quickly and Sgt. Gorski did not pause after each individual warning to inquire if the Defendant understood them – but the law does not require him to do so. What the law does require is that the warnings be conveyed in a manner that reasonably informs a suspect that he has a right to remain silent, that anything he says can be used against him in a court of law, that he has the right to an attorney, and that if he cannot afford an attorney, one will be provided to him without cost. *Florida v. Powell,* 559 U.S. 50, 60 (2010); *Miranda v. Arizona, supra.*

These exact rights were conveyed to the Defendant by Sgt. Gorski and importantly, the Defendant stated "yes" when asked if he understood them. Moreover, there is nothing to indicate that the Defendant did not understand his rights, that he was impaired, unclear, coerced, or in any way confused about what was happening.

THERE WAS A VOLUNTARY AND INTELLIGENT WAIVER OF COUNSEL

The Defendant next argues that there was no voluntary and intelligent waiver of counsel. This argument also fails as not once during the entire encounter with NRPD did the Defendant ever request counsel.

While it is true that the Defendant did not *affirmatively* waive counsel, that is, he did not articulate or verbalize that he did not want an attorney or sign any attorney waiver form, his waiver can be implied by the circumstances surrounding his conduct and his decision to converse with law enforcement after being advised of his *Miranda* rights.

> A *Miranda* waiver need not be in writing to be valid. *North Carolina v. Butler*, 441 U.S. 369, (1979). Nor must the accused specifically state that he waives his rights. *Id.* at 375–376; *Treesh v. Bagley*, 612 F.3d 424, 434 (6th Cir.2010).
>
> Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent. *Berghuis v. Thompkins*, 560 U.S. 370, 384, (2010); *see also State v. Martin*, 151 Ohio St.3d 470, 2017-Ohio-7556, ¶ 100–101.

State v. Myers, 154 Ohio St. 3d 405,2018-Ohio-1903, at ¶ 68.

This Court reviewed the entire bodycam video[3] of the initial encounter between the Defendant and Sgt. Gorski and there is no evidence of any of the *Edwards* factors or *Wesson* criteria that indicates that the Defendant failed to understand his rights.

The same can be said of the second encounter when Sgt. Gorski, prior to beginning his interrogation of the Defendant, reminded him that the *Miranda* warnings (his "rights") that were previously given "still applied." At this second inquiry and discussion of *Miranda*, the Defendant nodded his head affirmatively.

[3] State's Exhibit "1."

As for his argument that he did not waive counsel, *Myers* is instructive as well.

> Myers notes that he was never "given" an attorney on that day. "*Miranda* does not require that attorneys be producible on call, but only that the suspect be informed, as here, that he has the right to an attorney before and during questioning, and that an attorney would be appointed for him if he could not afford one." *Duckworth v. Eagan*, 492 U.S. 195, 204, (1989).

Myers, supra, at ¶ 72.

As noted, the Defendant was advised of his right to counsel and that if he could not afford an attorney, one would be provided at no cost. He stated to Sgt. Gorski that he understood this right while sitting in the cruiser and nodded his head affirmatively at the police station when reminded of it. He then participated in an almost two-hour conversation with multiple police officers without ever once seeking to invoke the right to counsel.

> *MIRANDA* WARNINGS DID NOT NEED TO BE REPEATED AT THE POLICE STATION

Finally, the Defendant argues that as he was not given *Miranda* warnings prior to the interrogation at the station, ". . . he did not knowingly, intelligently waive his rights prior to questioning."

This argument is equally without merit.

As noted by the State, once law enforcement adequately advises a suspect of his or her *Miranda* rights, they need not re-administer the warnings before subsequent interrogations.

The seminal Ohio Supreme Court case on this issue is *State v. Powell,* 132 Ohio St. 3d 233, 2012-Ohio-2577. In *Powell,* the Supreme Court stated,

> Police are not required to readminister *Miranda* warnings to a suspect when a relatively short period of time has elapsed since the initial warnings. *State v. Treesh,* 90 Ohio St.3d 460, 470, (2001). Courts look to the totality of the circumstances when deciding whether initial warnings remain effective for subsequent interrogations. *State v. Roberts,* 32 Ohio St.3d 225, 232, (1987). *Roberts* adopted the following criteria for determining whether the totality-of-the-circumstances test is met:
>
> > "(1) [T]he length of time between the giving of the first warnings and subsequent interrogation, * * * (2) whether the warnings and the

> subsequent interrogation were given in the same or different places, * * * (3) whether the warnings were given and the subsequent interrogation conducted by the same or different officers, * * * (4) the extent to which the subsequent statement differed from any previous statements; * * * [and] (5) the apparent intellectual and emotional state of the suspect." (Citations omitted.) *Id.* at 232, quoting *State v. McZorn,* 288 N.C. 417, 434, 219 S.E.2d 201 (1975).

Powell, at ¶ 119.

In Powell, more than 30 hours elapsed between the initial *Miranda* warnings and Powell's second interview. Admission of a defendant's statement has been upheld when a similar amount of time had passed after *Miranda* warnings. *See State v. Brewer,* 48 Ohio St.3d 50, 59, (1990) (statement admitted that was made one day after defendant was advised of his *Miranda* rights by a different police department); *State v. Barnes,* 25 Ohio St.3d 203, 208, (1986) (statement admitted that was made about 24 hours after defendant was advised of his *Miranda* rights).

The *Powell* decision gives further guidance on how to determine if *Miranda* warnings are sufficient or have become stale,

> Review of the other *Roberts* criteria shows that the *Miranda* warnings were not stale. Powell remained in continuous custody during the interval between the two statements. Gast conducted both interviews at the same location. Moreover, Powell's second statement was primarily a more detailed retelling of the story he had already voluntarily told in his first statement, even though some new information was provided. Finally, the videotape interview shows that Powell was mentally alert on November 13.

Powell, at ¶ 121.

The facts applicable in the case at bar are much more favorable to the State than those in *Powell,* where over 30 hours elapsed between the initial *Miranda* warnings and subsequent interview.

Here, the Defendant was interviewed less than twenty-seven (27) minutes after being *Mirandized.* He was given those warnings once in Sgt. Gorski's cruiser and reminded of them again at the station. Both warnings were given by the same officer and there was only one actual interrogation. Moreover, there is no indication in either encounter, in the

patrol cruiser or at the station, that the Defendant was emotionally or intellectually compromised.[4]

Finally, recall that the Defendant was actually asked a third time if he was advised of his *Miranda* rights and if he voluntarily spoke to the officers.[5] In this instance, as in the first two, he replied in the affirmative.

IV. CONCLUSION

In the case at bar, members of the North Ridgeville Police Department executed an arrest warrant in Cleveland, Ohio, and arrested the Defendant without incident. As soon as the Defendant was taken into custody and placed in the back of a police cruiser, he was advised of his *Miranda* rights – rights which he acknowledged he understood.

The Defendant was then transported to the North Ridgeville Police Department, placed in an interview room, uncuffed, and reminded that the *Miranda* rights were still in effect. As before, the Defendant acknowledged that he was aware of his rights by nodding his head affirmatively.

The total time between being *Mirandized* and interrogated was approximately twenty-seven (.27) minutes and the entire interview lasted less than two (2) hours.

During the course of the interview, the Defendant never once asked to terminate the interview or for counsel, and in no way was mistreated, coerced, or pressured by law enforcement. When asked a third time if he was given his rights and voluntarily spoke to law enforcement, he again replied affirmatively.

The record in this case, including the videos that show the entire encounter with high def clarity and the certified transcript, all demonstrate that the Defendant was properly *Mirandized*, understood his rights, and voluntarily waived same.

The motion to suppress is DENIED.

JUDGE D. CHRIS COOK

[4] This Court also reviewed the video (Exhibit "2,") of the station house interview.
[5] Transcript of Interview, Page 58, Lines 14-19.