STATE OF NEW MEXICO
COUNTY OF GRANT
SIXTH JUDICIAL DISTRICT COURT

FILED IN OPEN COURT
DATE 6/22/18 @ 8:45am
DISTRICT JUDGE

STATE OF NEW MEXICO,
Plaintiff

v.

D-608-CR-2017-00069
Hon. Jarod K. Hofacket

ISAIAS LOBATO-RODRIGUEZ,
Defendant.

ORDER DENYING MOTION TO SUPPRESS

THIS MATTER having come before the Court on June 20, 2018 on the Defendant's Motion to Suppress filed June 20, 2018. The Court having heard the evidence and being fully advised in the premises, **FINDS** as follows:

1. The Supreme Court has encouraged findings of fact and conclusions of law in suppression hearings. *State v. Attaway*, 1994-NMSC-011, 117 N.M. 141, 146, 870 P.2d 103, 108 holding modified by *State v. Lopez*, 2005-NMSC-018, 138 N.M. 9, 116 P.3d 80.

2. This case is set for jury trial beginning June 25, 2018.

3. Rule 5-212 NMRA requires motions to suppress be filed no less than sixty (60) days prior to trial, unless upon good cause shown, the trial court waives the time limit.

4. This case was previously set for jury trial April 24, 2018, February 26, 2018 and October 23, 2017.

5. Defendant's motion did not state any cause for the late filing of the Motion to Suppress, much less good cause.

6. At the hearing on June 20, 2018, upon questioning from the Court, the Defendant argued that the basis for the motion itself was valid and therefore the late filing should be allowed, emphasizing that it touches on the constitutional rights of the Defendant.

7. Of course, virtually all suppression motions touch on constitutional issues. Further, the rules require that all motions to suppress be filed sixty days prior to trial. The rule does not say that only frivolous motions to suppress must be filed sixty days prior to trial, but arguably valid motions may be filed at any time.

8. Clearly, rules of criminal procedure can put time limitations on the exercise of constitutionally protected rights.[1]

9. There is no argument that the State withheld information regarding the statements made by Defendant.

10. Defense counsel argued that as a public defender, he has a very heavy caseload and could not devote the time to go through the voluminous disclosure until just before he discovered the basis for the motion to suppress. While the Court has no reason to doubt defense counsel on this point, the only conclusion to draw from this argument is that defense counsel had not taken steps to prepare for trial for any of the previous trial settings.

11. Ultimately, defense counsel argued that it would be ineffective assistance of counsel to not file and argue the motion to suppress and it would ultimately be reviewed in a habeas corpus proceeding.

12. This court looks unfavorably on the ineffective assistance of counsel argument granting defense counsel the ability to avoid compliance with the Rules of Criminal Procedure, or at least a trump card to play that excuses violations of the Rules of Criminal Procedure.

13. Nevertheless, in this case, the District Attorney has conceded that necessity of getting to the merits of the Motion to Suppress.

[1] State v. Helker, 1975-NMCA-141, ¶ 7, 88 N.M. 650, 652, 545 P.2d 1028, 1030.

FACTS.

14. On March 17, 2017, at approximately 4:00 p.m., Border Patrol agent John Enriquez was traveling on New Mexico State Road 9 near Hachita, New Mexico. Near mile marker 48, he saw a grey minivan on the side of the road with the doors closed. Agent Enriquez testified that he did not notice anything remarkable about the minivan at that time.

15. Approximately 10-15 minutes later, Agent Enriquez was returning on the same road in the opposite direction and when he came upon the minivan, both front doors were open. Agent Enriquez stopped behind the vehicle and approached.

16. Agent Enriquez encountered a woman in the front seat, and soon discovered that she was deceased. The victim had a belt wrapped around her neck and around the seat. Agent Enriquez called out to see if anyone else was around, and no one replied.

17. The van had apparently collided with the barbed wire fence along the side of the road, damaging the fence to some degree.

18. At some point after 4:32 p.m.,, a gentleman, later identified as the Defendant, came walking up on the scene from the north of the road, which was described as desert landscape that had sparse vegetation.

19. Agent Enriquez inquired about the Defendant's identification and whether he was a U.S. Citizen. The Defendant indicated that he was in the country illegally and produced a Mexican passport to Agent Enriquez.

20. After admitting he was in the United State illegally, the Defendant was instructed to sit down on the ground in between Agent Enriquez's vehicle and the minivan.

21. Agent Enriquez is not fluent in Spanish, but testified that he can understand a few words and phrases, and that he had Spanish language training in the Border Patrol Academy.

22. At approximately 4:37 p.m., Border Patrol Agent Adrian Garcia arrived at the scene. Agent Garcia is fluent in Spanish.

23. Agent Garcia asked the Defendant questions regarding his health and well-being because of the apparent car accident. The Defendant was stuttering and stating incoherent phrases that Agent Garcia could not understand.

24. Agent Enriquez informed Agent Garcia of the dead woman in the van.

25. The Defendant then stated, without any additional questions, that she was going to kidnap and kill his daughters and that he had to do it.

26. Agent Garcia asked the Defendant if he was saying that he committed the crime. The Defendant stated yes, because she wanted to kill his family.

27. Agent Garcia then read the Defendant the Miranda warnings in Spanish and inquired whether the Defendant understood them. The Defendant indicated that he did, and thereafter continued to repeat the same or similar statements.

28. Neither Agent Garcia nor Agent Eriquez asked the Defendant any questions after he was read his Miranda warnings.

29. The Defendant stated that there were other people in desert north of the van, hiding in the brush. Agent Garcia tracked the Defendant's footprints and did not find evidence of any other individuals.

30. Both agents testified that the Defendant continued to repeat his statements regarding the danger to his family and that he had to kill the victim, or statements similar to that effect.

ANALYSIS

31. In *Miranda*, the United States Supreme Court established a prophylactic rule requiring that suspects be advised of their right against self-incrimination under the Fifth Amendment when they are subjected to the inherently compelling pressures of custodial police interrogations. Thus, it is well-established that law enforcement officers are obligated to administer Miranda warnings only when a suspect is subject to a custodial interrogation or, in other words, when he/she is "(1) interrogated while (2) in custody."[2]

Custody

32. The first question to be answered is whether the Defendant was in custody.

33. Agent Enriquez testified that when the Defendant admitted to being in the United States unlawfully, he was detained because he was not free to leave. However, whether the agent, in his mind, determined that the Defendant was not free to leave is not the test.

34. "In determining whether an individual is in custody for purposes of Miranda, we 'apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest?' Because the test is an objective one, we do not consider the subjective beliefs of either the suspect or the questioning officers about whether the suspect was in custody; instead, we consider 'how a reasonable man in the suspect's position would have understood his situation.'"

[2] State v. Olivas, 2011-NMCA-030, ¶ 10, 149 N.M. 498, 502, 252 P.3d 722, 726 (quoting State v. Wilson, 2007-NMCA-111, ¶ 12, 142 N.M. 737, 169 P.3d 1184 (further internal quotation marks and citation omitted).

35. "If no formal arrest occurred prior to questioning, our appellate courts engage in a fact-specific analysis of the totality of the circumstances under which the questioning took place in order to decide whether the custody requirement is met."[3]

36. Additionally, our Supreme Court provided the following factors to guide our inquiry: "the purpose, place, and length of interrogation[,] the extent to which the defendant is confronted with evidence of guilt, the physical surroundings of the interrogation, the duration of the detention, and the degree of pressure applied to the defendant."[4]

37. The testimony indicates that Agent Enriquez directed the Defendant to sit on the ground in between the two vehicles. There was no testimony or other evidence that the agents told the Defendant he was under arrest.

38. A critical factor in many cases analyzing when a police interaction converts to a situation where a suspect's freedom of movement is restrained to a degree associated with a formal arrest is whether the suspect is placed in handcuffs.[5]

39. Tellingly, there was no testimony that the Defendant was placed in handcuffs when he was asked to sit on the ground. Defendant's Exhibit 2 indicates on page 5 of 12 that the Defendant was placed in handcuffs after he was read his Miranda rights and placed in the back of the Border Patrol vehicle, which occurred later in the interaction.

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[3] State v. Olivas, 2011-NMCA-030, ¶ 10, 149 N.M. 498, 502, 252 P.3d 722, 726 (citing State v. Smile, 2009-NMCA-064, ¶ 27, 146 N.M. 525, 212 P.3d 413, cert. quashed, 2010-NMCERT-006, 148 N.M. 584, 241 P.3d 182.))

[4] State v. Olivas, 2011-NMCA-030, ¶ 10, 149 N.M. 498, 502, 252 P.3d 722, 726 (citing State v. Munoz, 1998-NMSC-048, ¶ 40, 126 N.M. 535, 972 P.2d 847).

[5] See *Wilson*, 2007-NMCA-111, ¶ 35, 169 P.3d 1184 (holding that a suspect was in Miranda custody when the police handcuffed and placed him in a police vehicle); see also New York v. Quarles, 467 U.S. 649, 655-56, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984) (holding that a suspect was in Miranda custody when he was handcuffed and surrounded by police officers, even though he had not yet been told he was under arrest); United States v. Smith, 3 F.3d 1088, 1097-98 (7th Cir. 1993) (holding that a suspect was in Miranda custody when the suspect was frisked, placed in handcuffs, and told to sit in a specific place).

40. The Defendant was in that position, seated on the ground between the vehicles, for less than five minutes before Agent Garcia arrived. Agent Garcia asked about the Defendant's physical well-being upon arriving at the scene and the Defendant made his statements to Agent Garcia shortly thereafter.

41. The purpose of the questions by Agent Garcia was to determine if the Defendant was injured. Agent Garcia's only questions were regarding the Defendant's physical well-being.

42. The purpose of the questions by Agent Enriquez was to identify the Defendant, and to determine whether he was a United State citizen.

43. There was no indication that the agents' purpose in having the Defendant sit on the ground between the vehicles was for any reason other than that to which the agents testified. The agents both testified that they typically do not investigate cases of this type, and it is standard procedure to hand the investigation over to New Mexico State Police, which is what was done in this case. The agents had no subjective motive, and no objective motive was suggested, to investigate the Defendant regarding the murder.

44. The Defendant was confronted with no evidence of guilt by the agents, and the agents asserted no pressure to the Defendant before he made his statement.

45. The duration was very short. In reviewing case law, interrogations lasting well over an hour, even in more confrontational situations such as police stations or in the back of a squad car, do not rise to a custodial interrogation, so the few minutes in this case fall significantly short of the duration necessary to find that the Defendant was in custody.

46. There are insufficient factors present to conclude that the Defendant was in custody.

Interrogation

47. Nevertheless, the parties seemed to have erroneously accepted Agent Enriquez's statement that the Defendant was not free to leave as sufficient to find the Defendant in custody and spent much of the suppression hearing presenting evidence and argument that the Defendant was not interrogated.

48. "'Interrogation' under Miranda certainly encompasses express questions from police to obtain an incriminating response. But, it is not limited to such express questions. "Interrogation" also includes "any words or actions," according to the United States Supreme Court, "that the police should know are reasonably likely to elicit an incriminating response[.]" In this regard, because Miranda is designed to provide a suspect in custody with additional protection against "coercive police practices, without regard to objective proof of the underlying intent of the police[,]" the focus is primarily on the suspect's perception. 'A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation' regardless of the police officer's actual intent." [6]

49. General fact finding questions by investigating officers to people on the scene who may know something of what transpired do not require Miranda warnings.[7]

50. "Because the primary purpose of Miranda warnings is to prevent the introduction of compelled, involuntary incriminating statements, interrogation 'must reflect a measure of compulsion above and beyond that inherent in custody itself,' and a statement given freely and voluntarily without any compelling influences does not violate Miranda."[8]

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[6] State v. Widmer, 2018-NMCA-035, ¶ 19, cert. granted (Apr. 30, 2018) (quoting Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).

[77] See State v. Chambers, 1972-NMSC-069, ¶ 18, 84 N.M. 309, 312, 502 P.2d 999, 1002

[8] State v. Smile, 2009-NMCA-064, ¶ 33, 146 N.M. 525, 536, 212 P.3d 413, 424 (quoting Rhode Island v. Innis, 446 U.S. 291, 299–300, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)

51. Additionally, an interrogation " 'occurs when an officer subjects an individual to questioning or circumstances which the officer knows or should know are reasonably likely to elicit incriminating responses.' Miranda does not apply 'in those situations where [a defendant] volunteers statements' either by making a statement 'which the police did not attempt to elicit' or by making a statement that is 'unresponsive to the questions asked."[9]

52. Agent Garcia inquired about the Defendant's physical well-being. Agent Enriquez told Agent Garcia about the deceased woman in the car,[10] and the Defendant stated that he had to kill her because she was going to kidnap and kill his family, or words to that effect.

53. The Defendant's statement was not responsive to Agent Garcia's question regarding his physical well-being.

54. The Defendant's argument that Agent Enriquez mentioning the deceased woman in front of the Defendant created a circumstance in which the Agent's knew or should have known would elicit an incriminating response is not persuasive.

55. At this point in the encounter, the agents appear to merely sharing information and trying to figure out what happened. The testimony indicated that the agents were led to believe there were other individuals present and that the agents were attempting to determine whether the Defendant was being smuggled into the United States.

56. Agent Garcia had only arrived on the scene minutes prior, and Agent Enriquez had interacted with the Defendant for less than ten minutes. It is hard to fathom a scheme they could have concocted in that time to elicit incriminating responses from the Defendant by Agent

[9] State v. Smile, 2009-NMCA-064, ¶ 33, 146 N.M. 525, 536, 212 P.3d 413, 424 (quoting State v. Fekete, 120 N.M. 290, 300, 901 P.2d 708, 718 (1995).

[10] The testimony is that Agent Enriquez did not speak Spanish fluently, and that the Defendant did not speak English. No testimony was provided indicating in what language Agent Enriquez spoke to Agent Garcia, but presumably it was in English. There is no clear logical leap the court can find that the Defendant understood the interaction.

Enriquez informing Agent Garcia that there was a woman who was deceased in the van. If the agents believed that the Defendant had committed the murder, mentioning the presence of the deceased's body in the vehicle could hardly be considered earth-shattering news to the Defendant, confronting him with evidence of guilt that he could not have otherwise suspected the agents had discovered.

57. After the Defendant voluntarily stated that the he had to do it because she was going to kidnap and kill his family in response to Agent Garcia's questions regarding the Defendant's physical wellbeing, Agent Garcia asked the Defendant, "are you saying you committed this crime," or words to that effect and the Defendant answered yes.

58. It is impossible to conceive that the Defendant himself, either subjectively, or a reasonable person in his shoes, felt that Agent Garcia's clarifying question was something that the Defendant was not permitted to refuse to answer. Likely such a concern would never cross the Defendant's mind since he was volunteering that exact information immediately prior to the question.

59. The Court finds that this question by Agent Garcia was not sufficient to convert the interaction with the Defendant into a custodial interrogation. Agent Garcia's question was simply a clarification of what the Defendant had just volunteered, and his response to the question only confirmed Agent Garcia's understanding of the Defendant's voluntary statement. It is straining the encounter to an almost unrecognizable degree to characterize the entire interaction and Agent Garcia's clarification as coercive police behavior.

60. Thereafter Agent Garcia read the Defendant his Miranda rights, and the Defendant continued to repeat his responses. The Agents did not ask any other questions of the Defendant.

61. The Defendant relies on *State v. Filemon V.*[11] for the proposition that a mid-stream Miranda warning is ineffective to cure violations, and that statements prior to the Miranda warning and after the Miranda warning must be suppressed.

62. However, in *Filemon V.*, the defendant therein was subjected to extensive questioning after the law enforcement officers had a voluntary statement from the defendant that he committed the crime. The defendant had made statements to juvenile probations officer implicating himself and a "full confession" to a law enforcement officer. Only then was he advised of his Miranda rights in a perfunctory manner and a different law enforcement officer continued the questioning to obtain an identical post-Miranda warning confession.

63. In the present case, the agent asked a single question to clarify the Defendant's voluntary statement, and upon hearing the Defendant's response, immediately read the Defendant his Miranda rights and made certain the Defendant understood them.

64. Significantly, the Agents did not ask the Defendant any other questions. The Defendant continued to volunteer the same statement over and over, that he had to kill her because she threatened to kidnap and kill his family.

65. This situation is not remotely similar to the coercive police tactics found in *Filemon V.* where the officers were found to have used coercive police tactics to compel an involuntary confession.

66. Indeed, in the present case, all of the incriminating statements by the Defendant were voluntary, and not in response to any questions from the agents regarding the deceased woman. There is little to suggest anything that the agents did in this investigation was coercive or an attempt to compel an involuntary confession.

[11] State v. Filemon V., 2018-NMSC-011, ¶¶ 44-48, 412 P.3d 1089, 1098–100

67. The conduct of the Border Patrol agents in this matter is not the sort of police misconduct, or coercive and compelling behavior intended to elicit incriminating statements that Miranda and its progeny was trying to prevent or remedy.

The Court therefore **CONCLUDES**

68. The Defendant was not in custody until he was read his Miranda rights, handcuffed and placed in the back of the Border Patrol squad car. Any questions prior to that time do not rise to custodial interrogation, therefore the agents were not obligated to administer Miranda warnings and the Defendants statements are not subject to suppression.

69. Even if the Defendant was in custody, the Defendant was not subject to interrogation, and gave voluntary statements that were not in response to any questions by Agent Garcia or Agent Enriquez. Any questions asked by the agents were not interrogation because they were not compulsive or designed to obtain incriminating statements.

70. The single question by Agent Enriquez clarifying the Defendant's voluntary statement does not arise to interrogation because it was simply clarifying Defendant's voluntary statements.

71. The voluntary statements before and after the Defendant was given his Miranda warnings are not subject to suppression under *Filemon V.* because the conduct of the agents was not coercive or designed to compel the Defendant into giving an involuntary incriminating statement, and the Miranda warnings were not given after improper, extensive interrogation in an attempt to cure or sanitize improper police behavior.

IT IS, THEREFORE, ORDERED, that the Motion to Suppress is DENIED.

Jarod K. Hofacket
District Court Judge

I hereby certify that on the 22nd day of June, 2018, a copy of the foregoing was delivered to George Zsoka and George Harrison.

Trial Court Administrative Assistant