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Court of Appeal, Third District, California.

The PEOPLE, Plaintiff and Respondent,

v.

David Jon DILLION, Defendant and Appellant.

No. C056061.

(Super.Ct.No. 06F2441).

Dec. 11, 2008.

Edmund G. Brown, Jr., Attorney General, Paul A. Bernardino, Deputy Attorney General, Sacramento, CA, for Plaintiff and Respondent.

Susan P. Stone, Attorney at Law, Santa Barbara, CA, for Defendant and Appellant.

RAYE, Acting P.J.

*1 Here we again confront the elusive and slippery idea of just when an interrogation becomes custodial. We must decide whether defendant David Jon Dillion, an arson suspect, was in custody when he confessed to setting five fires in his neighborhood before receiving his Miranda advisements.FN1 We conclude that because the interrogating officers told him before, and many times during, his examination that he was free to go and did not employ otherwise impermissibly coercive techniques, he was not in custody at the time he dribbled out his admissions. We also conclude that his confession was voluntary. We affirm.

FN1. Miranda v. Arizona (1966) 384 U.S. 436 [16 L.Ed.2d 694] (Miranda).

FACTS

A Redding patrol officer observed the 24-year-old defendant standing in his bathrobe, somewhat inebriated at 2:30 a.m., watching a fire burn. He was about 50 feet from where a vegetation fire had been set 2 weeks earlier. Defendant told the officer he had been renovating a restaurant before it burned in a fire, and he had been at a bar earlier that evening a block away from another fire. He mentioned he was a seasonal firefighter.

The officer invited defendant to accompany him to the police investigations office for an interview but assured him he had no obligation to do so and was not required to answer any questions or to make any statements. Defendant said he did not mind because he wanted to get the matter cleared. The officer was not comfortable having defendant drive because he had been drinking. Defendant got dressed and rode with the officer in a patrol car. He was never handcuffed.

The investigations office was at a mall, not the police station, and it looked like an office building. Two plainclothes interrogators began to question defendant about 4:30 a.m. in a small interview room after once again assuring him he was free to go at any time and would be provided a ride home. The door was not locked, but it did get stuck and one of the interrogators believed it was locked.

The interrogators questioned defendant for about one hour 41 minutes before he confessed to any of the arsons. They started with friendly chatter and became increasingly accusatory. They asked him if he thought he was a person capable of setting a fire or if he had ever given serious thought to starting one and, if so, how he might do it. When he repeatedly denied their accusations, they asked him if he would be willing to take a polygraph examination.

The interrogators also confronted defendant with some of the evidence they believed demonstrated his culpability, including a possible eyewitness identification. Defendant responded, “I probably should've asked at the beginning of the interview, but am I being considered a suspect?” One of the examiners coyly stated, “Well ... I would say you're a good witness, okay? Um ... hmm ... no.” At various times during the examination, they offered him coffee, water, or soda. He opted for a cigarette and used the restroom unsupervised during several breaks.

*2 Some time later, one of the interrogators positioned himself closer to the exit of the room. After a short break, they advised defendant that based on their considerable experience, they believed he was responsible for the fires. Defendant continued to deny his complicity and requested an attorney. He was told again he was not under arrest and remained free to leave. He made several remarks about his girlfriend and how mad she would be when he returned home.

The interrogators continued to confront and cajole defendant, pointing to the unlikely proposition that he just happened to be in close proximity to five different fires within a two-week period. They appealed to his concern for his 16-month-old baby. Finally, they warned him that “we're gonna have to be a little more stern with ya.” Shortly thereafter, defendant confessed to setting a brush fire, and within approximately 21 minutes he admitted to 4 more fires.

Only then was he given his Miranda warnings. During additional examination, he again confessed to perpetrating each of the five fires. The interrogation ended at approximately 7:47 a.m., about three hours after it began.

The trial court denied defendant's motion to suppress his confessions. He thereafter entered a slow plea of guilty to four of six counts and to the enhancement that he used an accelerant as to one count. (Pen.Code, §§ 451, subd. (c), 451.1, subd. (a)(5).)

The court sentenced defendant to the stipulated term of 13 years in state prison. Defendant appeals the pretrial determination to admit his confessions.

DISCUSSION

I. WAS DEFENDANT IN CUSTODY?

Because the Fifth Amendment to the United States Constitution protects the right against self-incrimination, a suspect's statements to law enforcement during custodial interrogation cannot be introduced in a criminal trial unless they were preceded by an express admonition to the suspect outlining his constitutional rights and the consequences of waiving those rights. (People v. Mayfield (1997) 14 Cal.4th 668, 732, 60 Cal.Rptr.2d 1, 928 P.2d 485.) Custodial interrogation is considered “inherently coercive,” and therefore the right against self-incrimination is most vulnerable and fragile. (People v. Boyer (1989) 48 Cal.3d 247, 271, 256 Cal.Rptr. 96, 768 P.2d 610 (Boyer), disapproved on other grounds in People v. Stansbury (1995) 9 Cal.4th 824, 830, fn. 1, 38 Cal.Rptr.2d 394, 889 P.2d 588.) Defendant confessed before his interrogators explained his constitutional rights to him as demanded by Miranda. The prosecution, therefore, bore the burden of proving that he was not in custody in order to use his statements against him. (People v. White (1968) 69 Cal.2d 751, 759-761, 72 Cal.Rptr. 873, 446 P.2d 993.)

Custody, for these purposes, means a “ ‘ “formal arrest or restraint on freedom of movement” ‘ “ where the restraint is “ ‘of the degree associated with a formal arrest.’ “ (Boyer, supra, 48 Cal.3d at p. 271, 256 Cal.Rptr. 96, 768 P.2d 610, quoting California v. Beheler (1983) 463 U.S. 1121, 1125 [77 L.Ed.2d 1275].) Defendant was not placed under formal arrest at the scene of the arson. Rather, he was asked if he would answer some questions at the police investigations office. Because he was explicitly told he did not have to accompany the officers, he did not have to answer their questions, and he was free to leave at any time, he was not in custody when he arrived at the office for questioning.

*3 Nor was his freedom curtailed at the outset of the interrogation. Again, he was expressly told he could leave and that, if at any time during the examination he

wanted to go home, he would be provided a ride. Thus, as the interrogation began, he was not in custody.

Defendant insists, however, that as the interrogation dragged on, his interrogators became more stern and accusatory, he tired, and the interrogators identified him as the perpetrator, he no longer enjoyed the freedom of movement necessary to avoid an inherently coercive atmosphere. In deciding whether the interrogation became custodial before he was advised of his Miranda rights, we must examine the totality of the circumstances.

The single most important circumstance in this case is the fact defendant was told at least six times that he was free to leave and did not have to answer their questions. There is nothing in the record to undermine the clarity of what defendant was explicitly told. In other words, there were no subtle indicia of an arrest. He was not handcuffed. He was not locked in a room. He was not restrained. The officers did not ignore a request to leave. Rather, he was offered refreshments and given unsupervised breaks. Objectively, defendant remained free to terminate the interrogation and simply did not avail himself of the opportunity.

It is true that the interrogation became intense and uncomfortable. The interrogators suspected defendant was the perpetrator of multiple fires and truthfully told him so. And it took nearly two hours of skilled interrogation to convince defendant to tell the truth. But effective interrogation is not, by definition, custodial. Defendant seems to imply that as the interrogation became more focused, uncomfortable, and prolonged, he no longer retained the freedom to leave despite the repeated assurances of his interrogators to the contrary.

Under slightly different circumstances, of course, an interrogation might become custodial when the suspect, for all practical purposes, no longer can leave the interrogation. Defendant cites the facts of Boyer, supra, 48 Cal.3d 247, 256 Cal.Rptr. 96, 768 P.2d 610 to demonstrate that his situation, like Mr. Boyer's, “quickly ripened into a full-blown arrest inside the station house.” (Id. at p. 268.) Boyer, in fact, is easily distinguished.

First, we point out that Boyer involved the Fourth, not the Fifth, Amendment, and as the court explained, “Because of the particular interests protected by the Fourth Amendment, a statement must be suppressed, even when knowing, voluntary, and intelligent, if it is the direct product of an illegal arrest or detention.” (Boyer, supra,

48 Cal.3d at p. 267, 256 Cal.Rptr. 96, 768 P.2d 610.) Also unlike the case before us, the defendant was informed of his Miranda rights. Thus, the right sought to be protected was not against self-incrimination but against unlawful detention.

Nevertheless, the prosecution in Boyer, as in this case, argued that the encounter with the police was consensual and did not constitute a detention or arrest and the defendant was not in custody. There are notable, in fact dispositive, distinctions between the two cases. Boyer was never told he could leave and was led to believe he could not. (Boyer, supra, 48 Cal.3d at pp. 267-268, 256 Cal.Rptr. 96, 768 P.2d 610.) The police falsely told him they knew he was the killer and had all the necessary evidence. (Id. at p. 268, 256 Cal.Rptr. 96, 768 P.2d 610.) They evaded all questions he asked as to whether he was under arrest. (Ibid.)

*4 Defendant, by contrast, was told repeatedly he could leave and was provided the opportunity to do so. He chose not to and, as the trial court found, his comments suggested that he indeed felt free to leave. While his subjective assessment of his freedom is not determinative, it is yet another circumstance we can consider in evaluating the totality of the circumstances that would lead a reasonable person to believe his freedom had been curtailed.

In sum, defendant is right that he was a suspect subjected to skillful interrogation. But that alone does not trigger the need for a Miranda advisement, for as long as he could freely leave the interrogation the circumstances were not inherently coercive and the dangers the Fifth Amendment were designed to minimize did not arise.

II. WAS THE CONFESSION VOLUNTARY?

The prosecution also bore the burden of proving the confession was voluntary. (Colorado v. Connelly (1986) 479 U.S. 157, 163 [93 L.Ed.2d 473].) The trial court found the prosecution had sustained its burden. Although we independently assess the ultimate legal issue of voluntariness, we too conclude the confession was not coerced given the totality of the circumstances in which it was made. (People v. Williams (1997) 16 Cal.4th 635, 659-660, 66 Cal.Rptr.2d 573, 941 P.2d 752; People v. Bradford (1997) 14 Cal.4th 1005, 1041, 60 Cal.Rptr.2d 225, 929 P.2d 544.)

Defendant complains that he was young, tired, depressed, and drunk. At 24 years old, he was, in fact, an adult who had earned a GED diploma, had passed a firefighting certification course, had held various jobs, and had experience with law enforcement and probation. Although we acknowledge he had been up all night after drinking and was challenged by the realities of life, we reject the notion that he was unduly susceptible to succumbing to his interrogators' suggestions that he had committed the arsons if, in fact, he had not. The transcript of his interrogation does not suggest he was disintegrating during the course of the examination or experiencing any undue influence. He remained coherent, intelligent, and responsive.

Nor do we believe that the officers' encouragement to tell the truth as a means of avoiding federal prosecution tainted the examination. As defendant accurately points out, " 'advice or exhortation by a police officer to an accused to "tell the truth" or that "it would be better to tell the truth" unaccompanied by either a threat or a promise, does not render a subsequent confession involuntary.' [Citation.]" (People v. Hill (1967) 66 Cal.2d 536, 549, 58 Cal.Rptr. 340, 426 P.2d 908.) "[I]nvestigating officers are not precluded from discussing any 'advantage' or other consequence that will 'naturally accrue' in the event the accused speaks truthfully about the crime. [Citation.]" (People v. Ray (1996) 13 Cal.4th 313, 340, 52 Cal.Rptr.2d 296, 914 P.2d 846.)

The officers never promised defendant he would avoid federal prosecution. They did, however, suggest that his willingness to tell the truth, sooner rather than later, might lessen the chance of a federal prosecution. And they did point out the distinction between a serial arsonist and someone with emotional problems starting a few small fires with little appreciation for the damage they might cause. People v. Vasila (1995) 38 Cal.App.4th 865, 45 Cal.Rptr.2d 355 (Vasila) provides a fitting contrast.

*5 In Vasila, the "defendant's invocation [of the right to remain silent] was ignored; he indicated he was fatigued to the point that he did not trust his own judgment, and his interrogators made both implied threats and blatant promises." (Vasila, supra, 38 Cal.App.4th at p. 875, 45 Cal.Rptr.2d 355.) The defendant was promised he would avoid federal prosecution and be released on his own recognizance "if he told them where the guns were hidden." (Id. at p. 874, 45 Cal.Rptr.2d 355.) He was also told he could be held without the opportunity to make a phone call. (Id. at p. 877, 45 Cal.Rptr.2d 355.) Not surprisingly, the Court of Appeal held that the defendant's ensuing confession was coerced. (Ibid.)

By way of contrast, we return to the distinguishing feature of this case. Defendant, unlike Mr. Vasila, was told repeatedly that he was free to leave. This assurance was not predicated on what he said. Rather, the assurance was unequivocal-from before he left his apartment to the time he received his Miranda warnings he was free to leave no matter what he said. While the interrogators suggested, more than once, that he might be able to avoid federal prosecution, they never promised he would. The interrogators were, to be sure, persistent and effective. But unlike their counterparts in Vasila, their techniques did not become coercive because they did not employ trickery or deceit, they did not become unduly aggressive or threatening, and they continued to remind defendant he did not have to participate in the interrogation at all. As a result, we conclude the record does not demonstrate that defendant's will had been overcome or his confession was involuntary.

III. SLOW PLEA AGREEMENT

Defendant entered a slow plea as follows: “I understand that a Judge will review documentary evidence [asterisk omitted] and find me guilty of Counts 1, 2, 3 and 4 ... and the special allegation ... (use of an accelerant). I understand that I will receive a 13-year prison sentence.” The trial court found him guilty of six counts, found the use enhancement to be true, and imposed a 13-year term in state prison. Defendant contends, and the Attorney General agrees, that the convictions on counts 5 and 6 violate the terms of the negotiated plea.

A “slow plea” is “an agreed-upon disposition ... which does not require the defendant to admit guilt but results in a finding of guilt on an anticipated charge and, usually, for a promised punishment.” (People v. Tran (1984) 152 Cal.App.3d 680, 683, fn. 2, 199 Cal.Rptr. 539.) Because the slow plea is an agreed-upon disposition, the Attorney General encourages us to reverse the convictions on counts 5 and 6 because they were not part of the slow plea agreement. So be it.

DISPOSITION

The judgment is reversed on counts 5 and 6, and affirmed in all other respects.

We concur: ROBIE and CANTIL-SAKAUYE, JJ.

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People v. Dillion

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