

Not Reported in A.2d, 2009 WL 196196 (N.J.Super.A.D.)

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,

Appellate Division.

STATE of New Jersey, Plaintiff-Respondent,

v.

Tyshon KENNEY, Defendant-Appellant.

Submitted Dec. 1, 2008.

Decided Jan. 29, 2009.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Indictment Nos. 04-12-02877 and 04-06-01369.

Yvonne Smith Segars, Public Defender, attorney for appellant (Alan I. Smith, Designated Counsel, on the brief).

Luis A. Valentin, Monmouth County Prosecutor, attorney for respondent (Patricia B. Quelch, Assistant Prosecutor, of counsel; Joseph M. Competello, Assistant Prosecutor, on the brief).

Before Judges LISA and REISNER.

PER CURIAM.

*1 Defendant shot two individuals on separate dates about two months apart. One survived; the other died. Defendant confessed to both shootings. He was indicted for murder and other offenses under Indictment No. 04-12-02877, and for aggravated assault and other offenses under Indictment No. 04-06-01369. After defendant's motion to suppress his statements to the police was denied, defendant entered a conditional plea of guilty to various charges in both indictments, preserving his right to appeal the denial of that motion. See R. 3:9-3(f).

The counts to which defendant pled guilty and the sentences imposed, which were in accordance with his plea agreement, are as follows: Under Indictment No. 04-12-02877:(1) first-degree aggravated manslaughter (amended from murder), N.J.S.A. 2C:11-3, twenty-three years imprisonment, with an 85% parole disqualifier and five years parole supervision pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2; (2) third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5b, five years imprisonment with a two-and-one-half year parole disqualifier, concurrent to count one; and (3) second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4a, ten years imprisonment with an 85% parole disqualifier and three years parole supervision pursuant to NERA, concurrent to count one; Under Indictment No. 04-06-01369:(2) second-degree aggravated assault, N.J.S.A. 2C:12-1b(1), ten years imprisonment subject to an 85% parole disqualifier and three years parole supervision pursuant to NERA, concurrent to the sentence imposed under Indictment No. 04-12-02877; (3) third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5b, five years imprisonment with a two-and-one-half-year parole disqualifier, concurrent to count two; and (4) second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4a, ten years imprisonment subject to an 85% parole disqualifier and three years parole supervision pursuant to NERA, concurrent to count two. Therefore, defendant's aggregate sentence was twenty-three years imprisonment, with a requirement that he serve 85% of that term before being eligible for parole.

Defendant argues on appeal:

THE TRIAL COURT'S RULING ADMITTING THE DEFENDANT'S INCULPATORY STATEMENTS INTO EVIDENCE SHOULD BE REVERSED BECAUSE THE DEFENDANT'S COGNITIVE AND INTELLECTUAL DEFICITS, IN CONJUNCTION WITH THE "STRESS FACTORS" THAT WERE PRESENT AND THE CONDUCT BY THE

POLICE, IMPAIRED HIS ABILITY TO MAKE A KNOWING, VOLUNTARY, AND INTELLIGENT WAIVER OF HIS MIRANDA RIGHTS.

We reject this argument and affirm.

In the early morning hours of March 3, 2004, members of the Asbury Park Police Department responded to a shooting outside of the Cameo Bar. The victim, Samuel "Now U" Hines, suffered four gunshot wounds and was dead. Defendant was a suspect. Because of a domestic dispute with his girlfriend earlier that evening, defendant was in custody at the Neptune Township Police Department. Detective Douglas Johnson of the Monmouth County Prosecutor's Office and Detective Randall Hill of the Asbury Park Police Department went to the Neptune Township Police Department. Defendant was sleeping when they arrived. The detectives woke him up and logged him out of that facility at 5:38 a.m. They transported him to the Asbury Park Police Department, where they arrived at about 5:55 a.m.

*2 The detectives did not question defendant at the Neptune Police Department or during the transport. Johnson described defendant as coherent and alert during the entire time. Defendant walked unassisted and in a normal manner. Johnson testified that defendant did not appear to be under the influence of any substances. At the Asbury Park Police Department, defendant was brought into the Juvenile Bureau to be interviewed. His handcuffs were removed, and he was immediately administered his Miranda^{FN1} rights.

FN1. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed.2d 694 (1966).

Utilizing a standard waiver form, Johnson read each of the rights to defendant and asked defendant to read them himself. Defendant acknowledged his understanding of each right, and he signed the form in two locations. He did not ask any questions regarding his rights and remained, in Johnson's opinion, alert and coherent. Defendant agreed to be interviewed.

When the detectives began interviewing defendant about Hines' shooting, they learned from defendant that Hines was defendant's cousin. The detectives told defendant Hines was seriously injured and they showed him prior photos of Hines.

Defendant denied any involvement. Throughout the process, the detectives continued to show defendant the picture of Hines, and defendant reacted by pushing the picture away, not wanting to look at it, and indicating, in the opinion of the detectives, a sense of uneasiness or guilt. Eventually, the detectives informed defendant that Hines had died from the gunshot wounds and asked defendant for his assistance in finding the killer.

In response to questions about defendant's whereabouts and activities the day before, defendant said he was at his girlfriend's house with Hines and a friend. They smoked marijuana and consumed alcohol. The three men then went to the Cameo Bar. Defendant denied he was involved in an altercation at the bar, but the detectives told him there was a surveillance tape that might reveal otherwise. Defendant then acknowledged having been in a fight with a "light skinned kid," during which Hines hit the kid on the head with a beer bottle. Defendant said he then left the bar and returned to his girlfriend's house, where he and his girlfriend got into an argument resulting in his arrest by the Neptune police.

At about 8:30 a.m., Detective Sergeant Keith Coleman of the Monmouth County Prosecutor's Office arrived at the Asbury Park Police Department and informed Johnson, out of defendant's presence, that defendant's brother, Kevin Elliott, informed police that defendant had shot Hines. After receiving this information, Johnson went back into the interview room. He re-advised defendant of his Miranda rights, reading all five lines on the waiver form. He confirmed with defendant that he was still willing to speak to the police. Defendant acknowledged his understanding of the rights and his willingness to continue talking.

Without revealing the source, Johnson then confronted defendant with information that a witness reported that defendant shot Hines. Defendant continued denying any involvement with Hines' shooting.

*3 Coleman then entered the interview room. Coleman, who knew defendant and his family, greeted defendant with a handshake and a hug. Defendant continued to deny involvement. Two other patrol officers who also were personally familiar with defendant came into the interview room, each in turn, and each exchanged pleasantries with defendant, asked how his family was doing, and advised him to tell the truth.

Hill, Johnson and Coleman remained in the room with defendant. Coleman then told defendant it was his brother who had supplied the information identifying him as the shooter. The detectives denied ever suggesting to defendant that his brother was suspected of any wrongdoing or facing the possibility of any charges arising out of Hines' shooting.

At that point, defendant admitted shooting Hines, stating: "If you want me to tell you I did it okay, I did it, I did it. If you keep my brother out of it because he had nothing to do with this shit." The detectives told defendant he should not confess merely to keep his brother out of trouble, but should tell the truth. Defendant again stated he shot Hines, but that he was actually aiming at a different person at the bar and did not intend to shoot Hines.

Defendant then spontaneously stated that he was "stressing out" over having shot another individual, named Yusaf Kearny, the previous New Year's Eve, and that he had contemplated suicide on the day preceding Hines' murder. It was confirmed that an active warrant for defendant's arrest for attempted murder was outstanding regarding the Kearny shooting. Defendant also contended that when he shot Kearny he had also intended to shoot someone else. Defendant also described additional stress he was under because he had just learned that his girlfriend was pregnant.

The detectives asked defendant whether he would be willing to provide a formal typed statement. Defendant agreed. Before doing so, at about 9:00 a.m., the detectives offered defendant something to eat and drink. Defendant accepted the offer and was provided with a breakfast sandwich, pancakes and juice. At about this time, defendant's mother and brother arrived and wanted to talk to defendant. They were permitted to do so.

Defendant then proceeded to give a formal typed statement regarding the Hines murder, beginning at 10:49 a.m. A secretary from the Monmouth County Prosecutor's Office was present to take the statement. Defendant was again Mirandized at the beginning of the statement. He acknowledged his understanding of his rights. When asked whether, having been so advised, he was "willing to answer questions and give a statement voluntarily of [his] own free will," he responded affirmatively.

Defendant then described, providing significant detailed information in narrative form and in his own words, the events leading up to, including, and following his

shooting of Hines. After the eleven-page statement was concluded, defendant was video recorded reading back the statement in its entirety. He made a number of changes. He acknowledged and certified that the facts in the statement were true.

*4 The detectives then obtained a formal type-written statement from defendant regarding the shooting of Kearny on December 31, 2003. Defendant gave a nine-page formal written statement beginning at 2:54 p.m. Again, at the beginning of the statement, defendant was re-advised of his Miranda rights, and he again acknowledged them and waived them. At the conclusion of the statement, defendant was given the opportunity to review the statement and make any corrections, additions or deletions. However, defendant declined to avail himself of a videotaped read back, saying he was tired.

After defendant was indicted, he moved to suppress his statements to the police, contending that he did not voluntarily and intelligently waive his Miranda rights. Judge Cleary conducted a hearing spanning several days. She received the testimony of Johnson and Coleman in the State's case-in-chief. The defense presented defendant's mother, as well as two mental health experts, Dr. Gerald Cooke, a psychologist, and Dr. Daniel Greenfield, a psychiatrist. In rebuttal, the State presented the testimony of Dr. Timothy Michals, a psychiatrist.

The detectives described the events substantially as we have described them in this opinion. Cooke testified that defendant's school records revealed a history of behavioral and emotional problems and a severe academic deficiency associated with mental retardation. Defendant told Cooke he had begun using alcohol and marijuana at age eleven and began using ecstasy regularly since 2001. Defendant was born in 1978, and was therefore twenty-five years old at the time of these shootings.

Cooke stated that defendant's mother used crack cocaine, alcohol and marijuana when she was pregnant with defendant, which could have contributed to defendant's organic brain damage. He diagnosed various disorders, which he opined were present on March 3 and 4, 2004: cognitive disorder, mild mental retardation, learning disorder, personality disorder, mild depressive disorder, agoraphobia, drug dependency and alcohol dependency. Cooke offered no opinion as to whether or not defendant made a knowing, voluntary and intelligent waiver of his rights.

Notably, defendant's mother testified that she was nineteen years old when pregnant with defendant, and, at that time, indulged heavily in marijuana and alcohol. However, she did not begin using crack cocaine until "later on in [her] life," and became addicted to crack cocaine in 1985. This sequence of events is significant with respect to the opinions rendered by both psychiatrists. Defendant's mother also recounted instances in which defendant would hit his head on the ground during childhood temper tantrums. She said she failed to have defendant put on medication after being advised to do so by a child psychiatrist.

Greenfield agreed with Cooke's diagnoses. Greenfield was of the view that by repeatedly displaying Hines' photograph, defendant's ability to give a knowing, voluntary and intelligent waiver, which was already compromised, would have been compromised further. Greenfield also found defendant's lack of sleep, his use of drugs and alcohol, and pressure from detectives and police officers with whom defendant had a previous, familiar relationship, would have made defendant less able to resist pressure to give a statement. Finally, Greenfield stated that the suggestion that the defendant's brother would be added to the investigation "was the straw that broke the camel's back." Thus, Greenfield opined that defendant's waivers were not voluntary or intelligent.

*5 Michals had reviewed Cooke's and Greenfield's reports, and he had met with defendant on two occasions as well as with defendant's mother. Michals agreed that defendant suffers from low grade depression, polysubstance abuse, mild mental retardation and personality disorder with antisocial features. Michals disagreed, however, with a diagnosis of cognitive disorder not otherwise specified, stating that defendant had received two mental health evaluations by health care professionals prior to the events involved in this case, and neither revealed the cognitive disorder. Michals also criticized Cooke for modifying his tests by rephrasing questions for defendant, thus leading to a conclusion from a non-standardized test. Michals also disagreed that defendant's mother used crack cocaine during her pregnancy with defendant, and thus a cognitive disorder did not result from this supposed drug use.

Michals opined that defendant knowingly, intelligently and voluntarily waived his Miranda rights. He noted that defendant had not shown any inability to comprehend his Miranda rights, but rather made corrections to the statement he had given. Further, defendant's ability to change the versions of the story he supplied to the police was additional proof that defendant does not suffer from a cognitive disorder and that the waiver was knowingly, voluntarily and intelligently made. Michals dismissed defendant's stressors as a basis for rendering his waiver involuntary, and he concluded from his review of the record that there was no physical or verbal coercion applied to defendant.

Finally, Michals disagreed with Greenfield's conclusion that defendant's mild retardation prevented him from properly waiving his rights. The evidence revealed that defendant's I.Q. had been measured on two occasions, with results of fifty-five and eighty. Michals did not dispute that a mild retardation was present, but he opined that the condition did not prevent defendant from knowingly, intelligently and voluntarily waiving his Miranda rights.

On January 9, 2007, Judge Cleary rendered a thorough oral decision, comprising fifty-one transcript pages. She found the facts as we have described them. She noted that the length of interrogation was not excessive. Although a number of hours were consumed, interrogation was not constant. There were many breaks when detectives would leave the room to obtain further information. And, there was a break when defendant was given breakfast and when he was permitted to meet with his mother and brother. The judge found credible the detectives' description of defendant as alert and coherent throughout the process. The judge also considered the content of defendant's statements. As we have stated, defendant provided significant details in his own words, and, when he chose to avail himself of the opportunity, made discrete changes and corrections, all of which reflected adequate cognitive ability and voluntary conduct.

*6 The judge found that the detectives did not suggest that defendant's brother would be implicated or charged in Hines' shooting. She credited Michals' expert testimony over that given by Cooke and Greenfield. Thus, she found that, regardless of any stress under which defendant found himself during the interrogation, it did not interfere with defendant's ability to act knowingly, voluntarily and intelligently in understanding and waiving his Miranda rights. She also found that defendant's mild mental retardation was not a decisive factor.

The judge correctly applied the totality of the circumstances test, considering multiple relevant facts and circumstances pertaining to defendant and the interrogation events. See *State v. Knight*, 183 N.J. 449, 461 (2005). She was convinced beyond a reasonable doubt that, considering all such factors, the State established that defendant knowingly, voluntarily and intelligently waived his Miranda rights and voluntarily made the statements.

In reviewing a trial court's denial of a Miranda motion, we analyze police-obtained confessions using a "searching and critical" standard of review to ensure that constitutional rights have not been trampled upon. *State v. Patton*, 362 N.J.Super. 16,

43 (App.Div.2003). We will not engage in an independent assessment of the evidence as if we were the court of first instance, *State v. Locurto*, 157 N.J. 463, 471 (1999), nor will we make conclusions regarding witness credibility, *State v. Barone*, 147 N.J. 599, 615 (1997), but we instead defer to the trial judge's credibility findings. *State v. Cerefice*, 335 N.J.Super. 374, 383 (App.Div.2000).

A suspect's confession during a custodial interrogation can only be obtained if that suspect was supplied with his or her Miranda rights. Before considering the validity of a waiver of Miranda rights, it must be established that the police scrupulously honored the suspect's rights to remain silent. *State v. Burno-Taylor*, 400 N.J.Super. 581, 589 (App.Div.2008). If the suspect's words or conduct, upon being advised of his or her rights, could not reasonably be viewed as involving the right to remain silent, this requirement is satisfied and the police may continue their questioning. *Id.* at 590. The record establishes that defendant did not invoke his right to remain silent. Upon being advised of his rights, he promptly and without questions or reservations agreed to waive them. Indeed, the entire focus of defendant's attack on the admissibility of his statement rested on an asserted lack of voluntariness of the waiver of his right to remain silent.

A trial court will admit a confession into evidence only if the State has proven beyond a reasonable doubt that, based on the totality of the circumstances, the suspect's waiver of those rights was knowing, intelligent and voluntary. *Patton*, *supra*, 362 N.J. at 42. The court must specifically consider the defendant's characteristics and the nature of the interrogation, and may include in its consideration the defendant's age, education, intelligence, length of detention, advice concerning constitutional rights, whether questioning was repeated and prolonged, and whether physical punishment or mental exhaustion were involved. See *State v. Galloway*, 133 N.J. 631, 654 (1993).

*7 Courts analyze whether police conduct coerced a confession by first determining whether the conduct violated the suspect's due process rights. See *State v. Smith*, 32 N.J. 501 (1960) cert. denied, 364 U.S. 936, 81 S.Ct. 383, 5 L. Ed.2d 367 (1961). New Jersey thus places a "mandatory burden on all courts to test the admissibility of confessions not only by the ordinary rules of evidence but by the deeper constitutional requirement of fundamental fairness." *State v. Driver*, 38 N.J. 255, 282 (1962).

A suspect's confession is considered involuntary if it is the product of psychological or physical coercion. *Galloway*, *supra*, 133 N.J. at 654. Unlike cases of physical coercion, however, the use of psychological techniques is not in and of itself

coercive; rather, courts must analyze whether the confession was the result of the defendant's change of mind and not a broken will. *Ibid.* A confession is voluntary if it is the product of an essentially free and unconstrained choice where the defendant's will has not been “ ‘overborne and his capacity for self-determination critically impaired.’ ” *State v. P.Z.* 152 N.J. 86, 113 (1997) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26, 93 S.Ct. 2041, 2047, 36 L. Ed.2d 854, 862 (1973)). Cases which hold that a defendant's will has been overborne typically require the defendant to demonstrate a showing of “very substantial psychological pressure.” *Galloway*, *supra*, 133 N.J. at 656.

Our Supreme Court examined whether a defendant was subject to substantial psychological pressure in *State v. Cook*, 179 N.J. 533 (2004). There, a twenty-four-year-old man was interrogated over a two-day period for his connection in the death of a fifteen-year-old girl. *Id.* at 542-46. The defendant was repeatedly Mirandized, although the interrogation was frequently interrupted by breaks for the defendant to eat, sleep, smoke cigarettes and compose himself after certain emotional outbursts. *Id.* at 543-45. Ultimately, the defendant admitted to killing the girl, which the police memorialized in a written statement. *Id.* at 545. At the defendant's Miranda hearing, the court found that the defendant had understood his Miranda warnings, and that he had knowingly and intelligently waived his rights. *Id.* at 546. The court also found it consistent with common sense and understandable that the defendant would become more emotional as his statements became more inculpatory. *Ibid.* We affirmed, as did the Supreme Court, which, upon analyzing whether the defendant's will was overborne, held that the trial court applied the proper standard for evaluating the defendant's condition during the interrogation. *Id.* at 562-65.

In *State v. Cabrera*, 387 N.J.Super. 81 (App.Div.2006), we addressed whether police coercion existed during the custodial interrogation of a mildly retarded, non-English-speaking criminal defendant. There, an eighteen-year-old Mexican citizen, who could not read, write or understand the English language, was questioned regarding his possible involvement in the sexual assault of a four-month-old. *Id.* at 87-91. The defendant was interviewed without any restraints over the course of ten hours, during which time he was Mirandized at several points in both Spanish and English. *Id.* at 91-92. During this time, the defendant never asked for an attorney, and was offered food and access to the bathroom. *Id.* at 92. Investigators placed pictures of the injured victim in front of the defendant, and watched his reaction. *Id.* at 93-94. After suffering several emotional collapses, the defendant gave a formal statement, after which he reviewed the statement in Spanish with a translator and initialed each page. *Id.* at 95-97.

*8 The defendant's expert witness opined that the defendant's I.Q. was approximately sixty-five, and as such he had a limited capacity to address ambiguous, complex, or emotionally charged matters. *Id.* at 97. The trial court found the statements admissible, concluding that the defendant knowingly, intelligently and voluntarily waived his Miranda rights. *Id.* at 98. We affirmed, noting that the defendant was not continuously questioned, was not unduly tired, was provided food and drink, and was given repeated warnings of his rights. *Id.* at 98-100. We did not deem the investigators' use of psychological techniques substantial psychological pressure such as would violate the defendant's rights. See *id.* at 102-03. The facts in the case before us are similar and lead us to a similar conclusion.

Relying on *State v. Miller*, 76 N.J. 392 (1978), defendant argues that the interrogation "technique" of utilizing officers who knew defendant and encouraging him to tell the truth was the kind of solicitous police conduct our Supreme Court has found violative of a suspect's rights. We disagree.

In that case, a defendant accused of murdering a seventeen-year-old girl confessed after an interrogating officer appealed to the suspect by offering to help him with medical treatment if the suspect would tell the truth. *Id.* at 403-04. While defendant claims the Court stated that this "technique" was "misleading and unfair," the Court actually stated that, while falling within a shadowy area,

the questioning lasted for just less than an hour. While there is an indication that defendant was becoming distressed near the end, this would be a normal reaction as the enormity of what defendant had done was being brought home to him.

....

It is evident from the record in this case that the officer's remarks had no appreciable impact on defendant and certainly did not contribute to an "overbearing of his will." Defendant ... had been arrested on previous occasions and had a prior conviction for which he had been imprisoned. He was in no way deluded or misled into believing that the state trooper was acting in any capacity other than as an interrogating police officer in the investigation of a serious crime.

[*Id.* at 404.]

As in Miller, defendant was no stranger to the criminal justice system. He had multiple arrests and four indictable convictions. He had been previously Mirandized. Furthermore, the officers familiar with defendant merely encouraged defendant to tell the truth. They did not offer any assistance in exchange for a confession. It was abundantly clear that they were acting as police officers, questioning defendant about very serious crimes.

Defendant further argues that his personality disorders, as testified to by Greenfield and Cooke, impaired his ability to properly waive his rights, and the trial court improperly discounted this evidence. We have no occasion to interfere with Judge Cleary's credibility determinations or her evaluation of the relative weight to be given to the testimony and opinions of each expert. See *Locurto*, supra, 157 N.J. at 471. After recounting each witness's testimony in detail, the judge grounded her decision upon the totality of the circumstances as required by *Galloway*, supra, 133 N.J. at 654. With respect to the experts, she found

*9 the court testimony by Dr. Greenfield is that there were certain stressors. He had a pregnant girlfriend, that his friend died, that he was wanted for other shootings.... Those are factors that can be considered. But in reviewing the testimony I find that they did not overbear on the Defendant's will.

Now as to his education and intelligence. There is testimony and all the experts agree that the Defendant suffers from mild to moderate mental retardation. Now a defendant's I.Q. is merely a factor in the totality of the circumstances to be considered.... This principle is supported not only in New Jersey but other jurisdictions.

Judge Cleary then cited cases from Pennsylvania, New York and North Carolina, all of which found mild to mentally retarded defendants maintained the capacity to waive their Miranda rights. See *Commonwealth v. Tucker*, 335 A.2d 704 (Pa.1975) (finding defendant with an I.Q. of seventy-five to seventy-nine with a second grade reading level was fully capable of waiving his constitutional rights); *People v. Tigner*, 48 A.D.2d 762 (N.Y.App.Div.1975) (finding that, although defendant was mildly mentally retarded, he retained the ability to know and understand his Miranda warnings); *State v. Ortez*, 631 S.E.2d 188 (N.C.2006) (finding a defendant with an I.Q. of fifty-five to seventy-one knowingly, intelligently and voluntarily waived his constitutional rights).

The judge also compared two cases from New Jersey: *State v. Flower*, 224 N.J.Super. 208 (Law Div.1987), which rejected a State psychiatrist's opinion that any person with a mental age of six or seven could understand and appreciate Miranda warnings; and *State v. Carpenter*, 268 N.J.Super. 378 (App.Div.1993), which showed that, unlike *Flower*, where the trial judge observed defendant in the courtroom before arriving at the conclusion that he could not understand his rights, the trial judge in *Carpenter* relied on the defendant's experiences in the criminal justice system and "streetwise" knowledge to conclude that he could understand his rights despite a seventy-one I.Q.

Judge Cleary then noted that defendant's I.Q. ranged from fifty-seven to eighty, and although that places him in the range of mild to moderately mentally retarded, defendant exhibited "street smarts" and had helped his younger brother get an apartment when he was just fifteen. The judge also agreed with Michals' opinion that, although defendant does have a personality disorder, it is not of the type that would cause an inability to understand his constitutional rights. The judge also relied on her colloquy with defendant at the commencement of the Miranda hearing, and his keen understanding of legal concepts and impressive vocabulary. Finally, she relied on the tape of defendant in which he reviewed his statement and made changes.

Judge Cleary's factual findings are well supported by the record. She correctly applied the controlling legal principles in concluding that, based on the totality of the relevant circumstances, defendant's will was not overborne and that he knowingly, voluntarily and intelligently waived his Miranda rights before voluntarily making his statements to the police. There is no basis for reversal of her order denying defendant's motion to suppress his statements.

*10 Affirmed.

N.J.Super.A.D.,2009.

State v. Kenney

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