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[Judges and Attorneys](#)

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Waterbury.

STATE of Connecticut

v.

Joseph MITCHELL.

No. UWYCR08374011.

Feb. 3, 2011.

[PRESCOTT, J.](#)

*1 In [State v. Stoddard](#), 206 Conn. 157, 163, 537 A.2d 446 (1988), the Connecticut Supreme Court held that the Connecticut constitution imposes “a duty upon police officers who are holding a suspect for custodial interrogation to act reasonably, diligently and promptly to apprise the suspect of efforts by counsel to provide pertinent and timely legal assistance.” The motion to suppress in the case currently before this court raises the important question of whether the *Stoddard* duty requires the police to inform the suspect of the name of the attorney attempting to provide legal assistance and the fact that the attorney is present at the police station at the time of the interrogation. For the reasons set forth below, the court concludes that the police must provide such information to a suspect undergoing custodial interrogation.

In this criminal case, the defendant, Joseph Mitchell, has been charged with the sexual assault of two minors. Presently, he moves to suppress all of the oral and written statements he made to the Waterbury police department in connection with these charges on August 29, 2008. In support of his motion, the defendant claims that the statements should be suppressed on the following grounds: (1) the statements were a product of an unlawful arrest in violation of the fourth amendment of the United States constitution [FN1](#) and Article 1, § 7, of the constitution of Connecticut; [FN2](#) (2) the statements were not preceded by a knowing and intelligent waiver of his *Miranda* rights; [FN3](#) (3) the statements were an involuntary product of police coercion; (4) the statements are inadmissible because they were not electronically recorded; (5) the defendant was denied his right to counsel, in violation of the United States constitution [FN4](#) and Article 1, § 8, of the constitution of Connecticut; [FN5](#) and (6) the police violated their duty under *Stoddard*. The court heard testimony on this matter on October 18, 19 and 29. For the reasons set forth below, the defendant's motion is granted in part and denied in part. [FN6](#)

[FN1](#). The fourth amendment to the United States constitution provides: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

[FN2](#). [Article 1, § 7, of the constitution of Connecticut](#) provides: “The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.”

[FN3.](#) See *Miranda v. Arizona*, 384 U.S. 436, 467-72, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[FN4.](#) To support his position that he was denied assistance of counsel, the defendant cites to the sixth amendment to the United States constitution, which provides, inter alia, that the accused in all criminal prosecutions shall have the right to the assistance of counsel for his defense. The court notes that the fifth amendment privilege against self-incrimination is violated when an accused is denied the right to have an attorney present during custodial interrogation. See *Miranda v. Arizona*, *supra*, at 470-71.

[FN5.](#) [Article 1, § 8, of the constitution of Connecticut](#) provides in relevant part: “In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to be informed of the nature and cause of the accusation ... No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law ...”

[FN6.](#) The court orally ruled on the motion on November 24, 2010, and indicated that a full written memorandum of decision would follow in due course. This is that memorandum of decision.

I FACTS

The court finds the following facts by a fair preponderance of the evidence. On August 28, 2008, V.W., a minor, reported to the Waterbury police department that the defendant had sexually assaulted her. The next day, V.W., accompanied by her mother, met with Officer Cathleen Knapp from the Waterbury police department's sex crimes unit, and reasserted her allegations against the defendant. After speaking with V.W., Knapp, along with Detective Randy Watts, drove to Crosby High School, where the defendant was enrolled as a student. Once there, the officers spoke with the school resource officer, Mike Tripp, and sought his assistance in locating the defendant. Officer Tripp went to the defendant's classroom and asked the defendant to accompany him to the main office, where the detectives were waiting.

When the defendant arrived at the main office, Knapp introduced herself and informed the defendant that his name had “come up” in a matter that she was investigating. She asked him whether he would be willing to discuss this matter with her at the police station. The defendant subsequently agreed to accompany the officers to the station, and walked with them to the parking lot. At this point, the defendant was not under arrest and Knapp had not informed him of the nature of V.W.'s allegations. Additionally, because the defendant was eighteen years old, the police did not contact his parents.

*2 The defendant then sat in the back seat of the officers' unmarked vehicle. There was no cage or divider between the front and backseat. The defendant was not handcuffed or restrained, and had not been searched prior to entering the car. Detective Watts drove the vehicle, while Knapp rode in the front passenger seat.

When they arrived at the police station at approximately 1:20 p.m., the officers escorted the defendant through a back entrance and proceeded to an unlocked interview room within the detective bureau. Both officers then left the room. At that juncture, Watts had no further involvement with the matter. Knapp returned with Detective Dan Chalker and explained to the defendant that she was investigating allegations that he sexually assaulted V.W. She advised the defendant of his right to remain silent and his right to counsel by reading him the required *Miranda* warnings from a pre-printed advisement of rights card. Knapp asked the defendant whether he understood his rights. After receiving his oral assurance that he did, Knapp next asked the defendant to read over each of the rights himself in order to acknowledge once more that he understood them. First, however, she had the defendant read the initial lines out loud to ensure that he could read.

The defendant responded to each of Knapp's questions coherently and appropriately. He was not intoxicated, under the influence of any substance, or suffering from any mental defect. After reading the

card, the defendant placed his initials beside each enumerated right on the form, acknowledging that he had been advised of that particular right. He then signed the bottom of the card, indicating that he understood what he read.

Thereafter, Knapp asked the defendant whether he had ever had sexual contact with V.W. The defendant initially denied any. Knapp then informed the defendant that V.W. had alleged that he had been "touching" her for three years, beginning when she was ten years old, and that he forcibly raped her in June 2008. In response, the defendant admitted that he engaged in sexual acts with V.W., but maintained that such acts were consensual, and not forced.

After the defendant discussed his sexual activity with V.W., he agreed to provide a written statement. Knapp then advised the defendant of his rights by reading a pre-printed voluntary statement form. Again, the defendant read his rights and placed his initials after each one, acknowledging that he understood. Moreover, he circled and initialed on the form that he was willing to waive his rights and answer questions. He then signed the form. Commencing around 3:00 p.m., Knapp began asking the defendant questions and typed his answers in narrative form on a computer located in the interview room.

At approximately the same time, Attorney Thomas Mitchell-Hoffler, a Waterbury criminal defense attorney, received a telephone call from the defendant's mother informing him that the defendant was at the police station. Attorney Mitchell-Hoffler is the defendant's cousin, and had previously represented him in at least two unrelated criminal matters. After receiving this phone call, Attorney Mitchell-Hoffler went to the police station, arriving just before 4:00 p.m. He approached the reception window, introduced himself as the defendant's attorney, and requested to see his client. The officer at the window made a phone call to the detective bureau and had Attorney Mitchell-Hoffler wait in the lobby area.

*3 Attorney Mitchell-Hoffler then contacted his colleague, Attorney Louie Avitabile, and asked him to send a facsimile to both the Waterbury police department and the state prosecutor's office, indicating that he represented the defendant and was invoking the defendant's right to counsel during questioning. Attorney Avitabile transmitted the facsimile to the state attorney's office, the Waterbury detective bureau and the Waterbury vice squad at approximately 4:32 p.m.

While Attorney Mitchell-Hoffler was waiting in the lobby, Knapp and Chalker continued to question the defendant and prepare the written statement. The defendant signed and attested to the veracity of this statement at approximately 4:12 p.m. It was witnessed by Detective Scott Burke and notarized by Captain William Covel. The officers informed the defendant that they had to investigate further and asked him to remain in the room. They then left to interview V.W.

At approximately 4:30 p.m., Knapp returned briefly and informed the defendant that an attorney had called looking for him. She did not tell the defendant the name of the attorney or inform him that the attorney was actually present in the building. The defendant merely responded "okay," and Knapp left the interview room. He did not make any further inquiry regarding the attorney's identity.

Detective Knapp then proceeded to take a written statement from the complainant, V.W. During the course of the interview, Knapp learned that C.W., V.W.'s sister and also a minor, had alleged that the defendant had sexually assaulted her. Based on that information, Knapp believed that it was necessary to re-interview the defendant.

In the interim, Attorney Mitchell-Hoffler continued to wait in the police lobby. At approximately 6:00 p.m., he was notified that the defendant had confessed to a sexual assault. In one last attempt to reach the defendant, Attorney Mitchell-Hoffler called the detective bureau directly from his cell phone, but only reached the answering machine. He did not record a message and decided to leave the police station.

The defendant agreed to discuss the allegations involving C.W. with the police. After he signed an advisement of rights card, he admitted that he had sexual contact with C.W., but also maintained that it was consensual. Again, he agreed to provide another written statement and signed another voluntary waiver of

rights form. He signed a second written statement at approximately 8:41 p.m. Thereafter, the police obtained a warrant, and the defendant was subsequently arrested around 11:17 p.m.

No videotape or electronic recording was made by the Waterbury police department of any portion of the defendant's interrogation or while the written statements were prepared.

Additional facts are set forth below where necessary.

II DISCUSSION

A. Whether the Statements were the Product of an Unlawful Arrest

The defendant first argues that any statements that he gave to the police must be suppressed because they were the product of an unlawful arrest. Specifically, the defendant argues that he was illegally seized at his school when he was required to travel to the police station because there was no warrant for his arrest, and the police had neither probable cause nor reasonable suspicion to detain and question him. Accordingly, he argues that any statements that he made at the police station are fruits of that illegal seizure and must be suppressed. This court does not agree.

*4 “It is well settled that the fourth amendment requires that a confession which is the product of an arrest or a detention made without probable cause must be excluded from evidence ... We previously have held that the trial court must make two determinations in assessing the admissibility of a confession made during custodial interrogation following a claimed warrantless arrest: (1) whether or not the defendant has been seized; and (2) whether or not there was probable cause for the seizure ...

“[A] person has been ‘seized’ within the meaning of the [f]ourth [a]mendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave ... We have held that [t]o constitute an arrest, there must be an actual or constructive seizure or detention of the person, performed with the intention to effect an arrest and so understood by the person detained.” (Citations omitted; internal quotation marks omitted.) [State v. Damon, 214 Conn. 146, 152-53, 570 A.2d 700 \(1990\)](#).

On the other hand, “[v]oluntary interactions between the police and citizens do not implicate fourth amendment protections ... A person is not arrested nor seized under the fourth amendment if he freely chooses to enter into or continue an encounter with the police ... Police officers do not violate an individual's constitutional rights by approaching him, by asking him if he is willing to answer some questions, by putting questions to him if he is willing to listen, or by offering into evidence in a criminal prosecution his voluntary answers to such questions.” [Id.](#), at 153-54.

This court finds that the defendant was not seized when he was escorted to the main office of his school by Officer Tripp, nor when he went with the detectives to the police station. The two plainclothes police officers asked the defendant if he would voluntarily accompany them to the police station to be interviewed in connection with an investigation. The defendant was not told that he was under arrest, or that he was required to go. Thereafter, the defendant agreed to accompany the officers. This court does not credit the defendant's testimony that he requested, and was denied, assistance of counsel prior to his departure from school.^{FN7} Furthermore, the defendant never requested that he be allowed to go home or call his mother. The defendant was not handcuffed or searched prior to riding with the officers. Finally, the defendant voluntarily rode in the backseat of the officers' unmarked car, where there was not any type of divider between the front and back seats. In view of all of the circumstances, the defendant's initial encounter with the police was voluntary. Accordingly, there is no evidence that he was seized within the meaning of the fourth amendment.

^{FN7}. The defendant's classmate, Liridon Beka, testified that he heard the defendant request his lawyer as he was being physically escorted out of the school. The court does not find Beka's testimony credible.

The defendant erroneously relies on [State v. Edwards, 214 Conn. 57, 72-73, 570 A.2d 193 \(1990\)](#), to support his position that he was seized because he was transported to the police station without a warrant. In *Edwards*, the police, without probable cause or a warrant, handcuffed the suspect, relayed that he was not under arrest, and transported him to the police station to be held for investigative purposes for an indefinite period of time. *Id.*, at 70. The court held that the police may not forcibly remove a person from a place in which he is entitled to be and transport him to the police station for investigative purposes without probable cause or a warrant. *Id.*, at 72-73. In this case the defendant was not detained or seized prior to his arrival at the police station.

*5 In addition, the defendant suggests that he was seized because he was never informed by the detectives that he had the right to refuse to accompany them to the station. He compares this matter with [State v. Lapointe, 237 Conn. 694, 726, 678 A.2d 942](#), cert. denied, 519 U.S. 994, 117 S.Ct. 484, 136 L.Ed.2d 378 (1996) (defendant was not seized because, *inter alia*, he was informed that he was free to leave), [State v. Atkinson, 235 Conn. 748, 760, 670 A.2d 276 \(1996\)](#) (same), and [State v. Ross, 230 Conn. 183, 203-05, 646 A.2d 1318 \(1994\)](#), cert. denied, 513 U.S. 1165, 115 S.Ct. 1133, 130 L.Ed.2d 1095 (1995) (same), and contends that, in order to distinguish a seizure from a consensual encounter, the court must determine whether the police expressly informed the defendant that he was free to walk away.

The defendant misinterprets these cases. Certainly, it would be easier to classify a police encounter as a voluntary interaction if the defendant had been informed from the onset that he was free to leave. See [State v. Northrop, 213 Conn. 405, 415, 568 A.2d 439 \(1990\)](#) (reasonable person would feel free to leave when repeatedly told he could do so). Nevertheless, this is not the determinative factor, and does not bear the weight the defendant places on it. See, e.g., [State v. Greenfield, 228 Conn. 62, 73 n. 10, 634 A.2d 879 \(1993\)](#) (defendant understood that meeting with police was consensual, and therefore, did not need to be expressly informed that he was free to leave); [State v. Atkinson, supra, 235 Conn. at 758](#) (“[n]o definitive list of factors governs whether a reasonable person would have believed that he or she was in custody”).

The court finds that at some point after he was brought to the police station, the defendant was no longer free to leave the interview room. However, the statements that the defendant made were not the product of an illegal seizure, because as discussed below, the detectives had read the defendant his *Miranda* rights prior to any interrogation. Thereafter, the defendant waived his rights and agreed to answer questions. In conclusion, the court cannot suppress the defendant's statements on the ground that they were the product of an illegal arrest.

B. Whether the Defendant Voluntarily Waived His *Miranda* Rights Prior to Interrogation

The court turns to the defendant's claim that his statements must be suppressed because he did not voluntarily waive his *Miranda* rights prior to his interrogation. “In [Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694](#), the United States Supreme Court outlined the warnings necessary to safeguard an accused's constitutional rights ... The court stated ... that, prior to any questioning, the person must be warned that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney [during questioning], and that if he cannot afford an attorney one will be appointed for him prior to any questioning. Elaborating on the above-quoted requirements, the court [explained that] [o]nce warnings have been given the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.” (Citations omitted; internal quotation marks omitted.) [State v. Cobbs, 164 Conn. 402, 417-18, 324 A.2d 234](#), cert. denied, 414 U.S. 861, 94 S.Ct. 77, 38 L.Ed.2d 112 (1973).

*6 The defendant claims that after he was taken to the police station, he was illegally interrogated by the officers because he was never advised of his *Miranda* rights. Accordingly, he argues that he never knowingly waived those rights. Instead, he insists that he only signed the written statements and the *Miranda* waiver cards under duress, after he was already interrogated. Specifically, he claims that at the conclusion of questioning, he was informed that his mother, who had recently had surgery, was bleeding

and in a “bad condition” and that he could go home to care for her only if he blindly signed a stack of paperwork.

In its brief, the state concedes that the defendant was in police custody after he was brought to the police station. However, it asserts that he was properly advised of his *Miranda* rights, which he voluntarily waived, prior to the commencement of any questioning, and therefore, his statements should not be suppressed.

In order to admit a defendant's custodial statements into evidence, a trial court must determine “not only that the defendant had been adequately warned about his *Miranda* rights but also that he had properly waived these rights” before making such statements. [State v. Weidenhof, 205 Conn. 262, 267, 533 A.2d 545 \(1987\)](#). It is the state, and not the defendant, that “bears the burden of proving, by a preponderance of the evidence, that a defendant has knowingly, intelligently and voluntarily waived the rights that inhere in the privilege against self incrimination.” *Id.* The court finds that the defendant validly waived his *Miranda* rights prior to the police commencing the interrogation.

The court does not credit the defendant's testimony regarding the police conduct. Rather, the court finds that shortly after his arrival at the police station and prior to any interrogation, the detectives informed the defendant of his *Miranda* rights. The police were not required to advise him of his rights prior to this point because questioning had not commenced. The defendant initialed the form after each right had been read to him and then signed a general acknowledgment of such rights. At that juncture, the defendant was fully aware that he had the right not to answer questions and, if he chose to answer questions, that he had the right to stop at any time and consult with an attorney.

The court further finds that the defendant's waiver was “knowingly and voluntarily.” ^{FN8} “Whether the defendant has knowingly and intelligently waived his rights under *Miranda* depends in part on the competency of the defendant, or, in other words, on his ability to understand and act upon his constitutional rights ... Factors which may be considered by the trial court in determining whether an individual had the capacity to understand the warnings include the defendant's experience with the police and familiarity with the warnings ... his level of intelligence, including his IQ ... his age ... his level of education ... his vocabulary and ability to read and write in the language in which the warnings were given ... intoxication ... his emotional state ... and the existence of any mental disease, disorder or retardation.” (Internal quotation marks omitted.) [State v. Foreman, 288 Conn. 684, 697, 954 A.2d 135 \(2008\)](#). Moreover, “the state must demonstrate: (1) that the defendant understood his rights, and (2) that the defendant's course of conduct indicated that he did, in fact, waive those rights.” (Internal quotation marks omitted.) [State v. Shifflett, 199 Conn. 718, 731-32, 508 A.2d 748 \(1986\)](#).

^{FN8}. As discussed below, the court does not find that the defendant knowingly waived his right to counsel after Attorney Mitchell-Hoffler arrived at the police station and attempted to provide him legal advice.

*7 The state has met its burden of demonstrating that the defendant understood and waived his rights. The defendant was an eighteen-year-old high school senior with previous exposure to the criminal justice system. There was no evidence of cognitive impairment or mental deficiency. On the contrary, the court finds that the defendant had the mental capacity and maturity to understand the consequences of his decision to waive his *Miranda* rights. Likewise, the defendant was not under the influence of any drugs or alcohol. The interrogations were not excessively prolonged or accompanied by coercive police tactics. Moreover, the defendant was not deprived of food or sleep or not allowed to use the restroom. Finally, his consent and waiver is best evidenced by the forms that he signed. As our Appellate Court has noted, “a defendant's express written and oral waiver is strong proof that the waiver is valid.” (Internal quotation marks omitted.) [State v. Perez, 78 Conn.App. 610, 624, 828 A.2d 626 \(2003\)](#), cert. denied, [27 Conn. 901, 859 A.2d 565 \(2004\)](#).

Accordingly, there is no merit to the defendant's argument that his statements must be suppressed because he did not knowingly and voluntarily waive his *Miranda* rights.

C. Whether the Defendant's Statements Were Voluntary

The defendant next claims that his statements must be suppressed because they were a product of coercive police conduct. He first asserts that he was subject to impermissible police tactics when he was taken from the high school and not permitted to call an attorney. He also asserts that the interrogations were coercive because he was held in custody for twelve hours, isolated in the interview room, not allowed to speak to his attorney, not allowed to access his cell phone and not permitted to leave the police station. Furthermore, he argues that the comments about his mother's well-being further compounded the coercive environment to the point that he believed that he had no choice other than to sign the paperwork presented to him. Therefore, he asserts that he never actually read the content of the documents that he was signing. As a result, he contends that any statements he gave must be suppressed.

“[T]he use of an involuntary confession in a criminal trial is a denial of due process of law ... Whether a confession is voluntary and admissible is a question of fact to be decided by the trial court ... In order to be voluntary a confession must be the product of an essentially free and unconstrained choice by the maker ... If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of the confession offends due process ... The determination of whether a confession is voluntary must be based on a consideration of the totality of the circumstances surrounding it.” (Citations omitted; internal quotation marks omitted.) [State v. Rodriguez, 56 Conn.App. 117, 120-21, 741 A.2d 326 \(1999\)](#).

*8 Based on the findings set forth above, the court finds that there is no evidence that the police's conduct was sufficiently coercive to overbear the defendant's will. Accordingly, his statements were voluntarily given.

D. Whether the Defendant's Statements are Inadmissible Because They Were Not Electronically Recorded

The defendant next asserts that any statements that he made to the police must be suppressed because his interrogation was not electronically recorded. He argues that both the United States and Connecticut constitutions require the electronic recording of interrogations when the interrogation occurs at a place of detention and recording is otherwise feasible. In his argument, the defendant concedes that our Supreme Court has held otherwise.

Although the court appreciates that the defendant has extensively briefed this issue, his arguments must fail. First, our Supreme Court has already concluded that “there is no federal precedent in support of the proposition that the federal constitution imposes a recording requirement ... The federal Courts of Appeal that have considered a similar claim have uniformly rejected it.” [State v. Lockhart, 298 Conn. 537, 550, 4 A.3d 1176 \(2010\)](#). Additionally, the Supreme Court has recently reiterated its position that the Connecticut constitution does not mandate electronically recording interrogations in order to make them admissible. [Id., at 577](#).

Finally, even if this court somehow agreed with the defendant's claim that this rule should be modified, “[i]t is axiomatic that a trial court is bound by Supreme Court precedent ... Although the concerns raised [at] the trial court might ultimately have merit ... revision of Supreme Court precedent is not the trial court's function.” [Jolly, Inc. v. Zoning Board of Appeals, 237 Conn. 184, 195, 676 A.2d 831 \(1996\)](#). Therefore, the defendant's claim fails.

E. Whether the Defendant was Denied Assistance of Counsel

The defendant next claims that his statements to the police must be suppressed because they were made in violation of his state and federal constitutional rights to assistance of counsel. Specifically, he argues that his request to speak to an attorney before being escorted out of his high school was denied, and that later, his request to have counsel present during the interrogation was also denied.

As a factual matter, the court is not persuaded. “It has been more than thirty years since the United States Supreme Court decided in *Miranda* ... that the right of an accused to have an attorney present during custodial interrogation by the police was an essential component of the fifth amendment privilege against

self-incrimination. In *Miranda*, the court held that when an accused person indicates in any manner at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning, and the police must stop the interrogation ... [However] an accused's request for counsel under *Miranda* must be objectively unequivocal." (Citations omitted; internal quotation marks omitted.) [State v. Anonymous](#), 240 Conn. 708, 720-21, 694 A.2d 766 (1997).

*9 Again, the court does not credit the defendant's testimony that he unequivocally requested counsel prior to his interrogation by the detectives. In fact, the court credits Knapp's testimony that the defendant never requested to speak to an attorney, even after, as discussed below, he was informed that an attorney had called for him. Accordingly, there is no merit to the defendant's claim that his statements must be suppressed because he was denied assistance of counsel.

F. Whether the Defendant's Statements Must be Suppressed Pursuant to *Stoddard*

Finally, the court addresses the defendant's claim that, pursuant to [State v. Stoddard, supra, 206 Conn. at 157](#), his statements must be suppressed because the police violated their duty to reasonably and timely inform him that an attorney was attempting to invoke on his behalf. Specifically, the defendant argues that he was not adequately informed that Attorney Mitchell-Hoffler was at the police station, and ready to provide him with assistance of counsel.

In *Stoddard*, the Connecticut Supreme Court held that the police must promptly inform a suspect of his counsel's timely efforts to provide pertinent legal assistance, even after the suspect has waived his *Miranda* rights. "Armed with that information, the suspect must be permitted to choose whether he wishes to speak with counsel, in which event interrogation must cease, or whether he will forego assistance of counsel, in which event counsel need not be afforded access to the suspect." [Id.](#), at 166-67.

Under federal constitutional law, the Connecticut Supreme Court recognized that a suspect was not required to be informed of his counsel's efforts to reach him. [Id.](#), at 159-60 (citing [Moran v. Burbine](#), 475 U.S. 412, 427, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)). Nevertheless, our Supreme Court concluded that the constitution of Connecticut, article first, § 8, provides greater protection, primarily because "[t]his state has had a long history of recognizing the significance of the right to counsel, even before that right attained federal constitutional importance." [State v. Stoddard, supra, 206 Conn. at 164](#).

In order to trigger the police's duty to inform the suspect, the *Stoddard* court imposed a threshold standard for counsel's efforts. "What is required of counsel is a reasonably diligent, timely and pertinent request to consult with a client. A request is diligent if all necessary steps have been taken to notify the police clearly in the ordinary course of business, timely if made prior to the giving of incriminatory statements, and pertinent if counsel clearly indicates that access to the suspect is sought for the general purpose of providing legal assistance." [Id.](#), at 171.

The state concedes, and this court agrees, that Attorney Mitchell-Hoffler's request was diligent. Not only did he personally arrive at the police station to invoke the defendant's right to counsel, he had his colleague send facsimiles to the Waterbury police department demanding that any questioning cease. Furthermore, he waited a significant amount of time in the lobby, and he personally attempted to contact the detective bureau prior to leaving.

*10 Nevertheless, the state argues that counsel's request to see the defendant was not pertinent under the *Stoddard* standard because he failed to indicate that he sought access for the general purpose of providing legal assistance to the defendant. For support, the state relies on *State v. Mills*, Superior Court, judicial district of New Haven, Docket No. 132873 (February 5, 2004, Blue, J.) ([36 Conn. L. Rptr. 542, 546](#)), wherein the court held that an attorney's mere request to see a suspect, without specifically stating that it was for the purpose of providing legal assistance, did not trigger the duty to inform the suspect of counsel's efforts.

Mills is irrelevant because the facts in this case merit a different conclusion. The court finds based on the testimony that Attorney Mitchell-Hoffler knew what was at stake if he did not convey to the police department that he represented the defendant. For instance, he testified that he had learned from a previous experience with the same police department that in order to invoke the protections under *Stoddard*, he was required to clearly communicate that he was attempting to provide legal assistance to a detained suspect. As a result, when he arrived at the police station, he identified himself as the defendant's counsel and clearly communicated his request to speak with him so that he could provide legal assistance. Indeed, members of the Waterbury Police Department plainly understood the purpose of Attorney Mitchell-Hoffler's visit to the police station. Accordingly, his request was pertinent.

The state also asserts that counsel's request to see his client was not timely. Thus, it argues that the police were not under any obligation to inform the defendant of his attorney's efforts to contact him. As described above, the defendant provided four different statements; two oral and two written. Attorney Mitchell-Hoffler arrived at the police station and asked to see his client just before 4:00 p.m. Thus, the court finds that counsel's efforts were not timely with respect to the first oral statement regarding V.W., which was obtained prior to 3:00 p.m.

The same is not true, however, for the other statements. The defendant was in the process of dictating his first written statement when his attorney arrived at the police station and asked to speak with him. Therefore, his request was timely as to the three subsequent statements.

In summary, the court concludes that Attorney Mitchell-Hoffler met the threshold standard imposed by *Stoddard*. Accordingly, as explained above, this triggered the police's duty to inform the defendant of his counsel's efforts. This court does not credit the defendant's testimony that, even though he was informed that Attorney Mitchell-Hoffler was at the police station, he was not allowed to consult with him. Instead, the court finds that at approximately 4:30 p.m., the police informed the defendant that an attorney had called for him, but never told him that the attorney was in the building, or identify the attorney by name.

*11 The question, therefore, is whether, by providing this minimal information, the Waterbury police department satisfied its duty under *Stoddard*. The court concludes that it did not. Although *Stoddard* discusses the police's duty in general terms, the decision does not provide specific guidance regarding exactly what information must be given to a suspect undergoing custodial interrogation. Moreover, subsequent appellate and trial court decisions have not addressed the precise question raised by the present case. However, several aspects of the *Stoddard* decision, and the principles underlying it, compel the conclusion that, when applicable, a suspect undergoing custodial interrogation must be informed of the name of the attorney attempting to provide legal assistance and the fact that the attorney is present at the police station at the time of the interrogation.

First, the court in *Stoddard* stressed the serious “due process concerns raised by police interference with counsel's access to a custodial suspect.” [State v. Stoddard, supra, 206 Conn. at 166](#). The court also recognized the “unique ability” of counsel to safeguard the constitutional rights of a client undergoing custodial interrogation, and that this “recognition is in service of the traditional belief that an accused may be convicted only if exacting measures have been taken to assure that the accused has been treated with scrupulous fairness by law enforcement officials.” (Internal quotation marks omitted.) *Id.*

Second, the *Stoddard* opinion repeatedly references a requirement that the police inform the suspect of counsel's efforts to speak to him or her: “The police may not preclude the suspect from exercising the choice to which he is constitutionally entitled by responding in less than forthright fashion to the efforts by counsel to contact the suspect. The police, because they are responsible for the suspect's isolation, have a duty to act *reasonably*, diligently and promptly to provide counsel with *accurate* information and to apprise the suspect of the efforts by counsel.” (Emphasis added.) *Id.*, at 167. This language, by itself, indicates that the *Stoddard* duty extends beyond a bare bones requirement that the police inform the suspect that “a lawyer called for you” because that information alone is neither complete nor entirely accurate in the circumstances presented by this case.

Third, the *Stoddard* court, in rejecting the claim that a third party such as an attorney should not be permitted to invoke a personal constitutional right of suspect, emphasized the significance of the suspect knowing that the availability of counsel is not just some conceptual privilege. As the *Stoddard* court stated: “Faced with a concrete offer of assistance ... a suspect may well decide to reclaim his or her continuing right to legal assistance. To pass up an abstract offer to call some *unknown* lawyer is very different from refusing to talk with an *identified attorney actually available* to provide at least initial assistance and advice ... A suspect indifferent to the first offer may well react quite differently to the second.” (Emphasis added; internal quotation marks omitted.) *Id.*, at 168. Indeed, later in the opinion, the *Stoddard* court opined that, “because counsel was a member of a firm that had previously represented the defendant, the defendant could reasonably have been expected to respond to counsel's offer of assistance.” *Id.*, at 176.

*12 Fourth, *Stoddard* makes clear that the accuracy and detail of the information provide to the suspect is an important factor in assessing the voluntariness of any waiver of the right to counsel. As the court noted, a waiver is only effective if it is knowingly and intelligently made, and “accomplished with sufficient awareness of the relevant circumstances and likely consequences.” (Internal quotation marks omitted.) *Id.*, at 173. Obviously, if the police do not relay critical information to the suspect, a suspect's decision to waive the right to counsel cannot be made with a full knowledge of the relevant circumstances.

Accordingly, the court concludes that the police must provide a suspect with sufficiently relevant information in order to decide whether he will waive his right to counsel. This includes, at a minimum, whether an attorney is seeking to provide assistance of counsel, the name of the attorney, if known, and whether he is present in the building. Because the Waterbury police department did not do so in this case, the court concludes that it violated the defendant's constitutional rights as recognized in *Stoddard*.

This conclusion, however, does not end the inquiry. In *Stoddard*, the court declined to impose a per se rule that all statements obtained in violation of the duty to inform a custodial suspect of counsel's efforts must be suppressed. *Id.*, at 174. “The decision to speak or to stand mute is a personal right of the suspect. That decision, made on the basis of full knowledge of all relevant circumstances, belongs exclusively to him ... Had the police officials ... properly responded with the communication, the defendant might conceivably have taken the advice of counsel to remain silent ... By the same token, the suspect might have chosen to cooperate with the police and waive the presence of counsel.” (Citations omitted.) *Id.*, at 174-75.

Accordingly, based upon “the totality of the circumstances ... [t]he critical question is whether the information not conveyed by the police would likely have changed the defendant's appraisal and understanding of the circumstances ... Of particular, but not exclusive, relevance are such facts and circumstances as the relationship of the suspect to the attorney, the nature of counsel's request, the extent to which the police had reasonable notice of counsel's request and the conduct of the suspect.” (Citations omitted.) *Id.*, at 175. “[T]his determination is much like the ultimate determination of whether a defendant knowingly and voluntarily waived his *Miranda* rights. Indeed, the question of whether, notwithstanding a *Stoddard* violation, the defendant would nonetheless have spoken with the police, is simply part of the *Miranda* voluntariness calculus.” [State v. Cobb, 251 Conn. 285, 358, 743 A.2d 1251 \(1999\)](#), cert. denied, [531 U.S. 841, 121 S.Ct. 106, 148 L.Ed.2d 64 \(2000\)](#).

“[T]he state has the burden of proving by a preponderance of the evidence that the efforts of counsel, if properly communicated, would not have altered the defendant's decision to speak with the police.” (Internal quotation marks omitted.) [Id.](#), at 355-56. “The inquiry here is not what happened, based on the evidence presented and the permissible inferences drawn therefrom. The inquiry here is what would or would not have happened if something that did not happen had happened.” [Id.](#), at 356.

*13 At the outset it is important to note that the defendant's initial decision to waive his *Miranda* rights is not a determinative factor for the court. As noted above, “*Miranda* warnings refer only to an abstract right to counsel. That a suspect validly waives the presence of counsel only means that for the moment the suspect is foregoing the exercise of that conceptual privilege ... Faced with a concrete offer of assistance however, a suspect may well decide to reclaim his or her continuing right to legal assistance ... A suspect indifferent to the first offer may well react quite differently to the second.” (Citation omitted; internal quotation marks omitted.) [State v. Stoddard, supra, 206 Conn. at 168](#).

Moreover, it is inconsequential whether the failure to disclose the attorney's identity and availability was a product of the interrogating officers' honest mistake because they were unaware of Attorney Mitchell-Hoffler's efforts. The "lack of knowledge on the part of the interrogating officers is not dispositive because it is for the police, as an entity, to establish and maintain adequate procedures that will facilitate the reasonably prompt communication between an attorney and a suspect." *Id.*, at 172.

The court has considered the totality of the circumstances, and concludes that the state has failed to meet its burden of proving by a preponderance of the evidence that the efforts of counsel, if properly communicated, would not have altered the defendant's appraisal and understanding of the circumstances.

In this case, the defendant had a long-term relationship with Attorney Mitchell-Hoffler, who was not only his cousin, but had previously represented him in other criminal matters. Compare *State v. Cobb*, [supra](#), 251 Conn. at 363 (notwithstanding *Stoddard* violation, statements made to the police would not be suppressed because defendant had no relationship with attorneys seeking to speak with him).

Second, the court concludes that if the defendant had known that Attorney Mitchell-Hoffler was downstairs and immediately available to provide him legal assistance, he may very well have invoked his right to counsel. This conclusion is buttressed by the fact that the defendant was left alone in the interview room for a substantial period while the police questioned the complaining witness. Yet, the defendant had no idea that during this interval, Attorney Mitchell-Hoffler was waiting to speak with him. In that situation, it is reasonable to conclude that, even if he suspected that his situation was futile, the defendant may have chosen to avail himself of the opportunity to speak with his counsel about his legal predicament, rather than sit alone and in uncertainty for that period of time.^{FN9}

^{FN9}. To be sure, the court is not suggesting that the Waterbury Police Department had an affirmative duty to ascertain the precise nature of the relationship between the defendant and Attorney Mitchell-Hoffler. Instead, the police must simply share what they know about counsel's efforts. Otherwise, the failure to disclose would preclude "the suspect from exercising the choice to which he is constitutionally entitled." *State v. Stoddard*, [supra](#), 206 Conn. at 166-67.

Finally, the court has no reason to believe that the defendant in this case was motivated to immediately relieve his conscience by confessing to the sexual assaults to any degree that would have resulted in him waiving his right to a lawyer who was personally known to him, who had previously represented him in the past, and who was just two floors away at the most critical time. In sum, the court concludes that the state has failed to meet its burden to establish that the defendant would have waived his right to counsel if informed of the relevant facts regarding Attorney Mitchell-Hoffler's efforts. Therefore, the court must grant the defendant's motion to suppress the second oral statement and both written statements.

III CONCLUSION

*14 For the foregoing reasons, the court denies the defendant's motion to suppress his first oral statement regarding V.W., and grants the defendant's motion to suppress his second oral statement and both written statements obtained on August 29, 2008.

Conn.Super.,2011.

State v. Mitchell

Not Reported in A.3d, 2011 WL 726113 (Conn.Super.)
