IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

v.

ARTHUR LEE SEWALL, JR.,,

Respondent.

CASE NO: 79437

APPELLANT'S REPLY BRIEF

Appeal From District Court's Order Granting In Part of Defendant's Motion to Suppress Statement Eighth Judicial District Court, Clark County

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APPELLANT'S REPLY BRIEF

Appeal from District Court's Order Granting In Part of Defendant's Motion to Suppress Statement Eighth Judicial District Court, Clark County

STATEMENT OF THE ISSUE

Whether the District Court erred in granting Respondent's Motion to Suppress Illegally Obtained Statements.

ARGUMENT

I.
THE DISTRICT COURT ERRED IN SUPPRESSING RESPONDENT'S STATEMENT BECAUSE RESPONDENT WAS NOT "IN CUSTODY"

Within the Answering brief, Respondent attempts to conflate the main issue with irrelevant matters. The sole reason the district court granted Respondent's Motion to Suppress Illegally Obtained Statements was because:

> The Court concludes that as the interview progressed, [Respondent] was entitled to his *Miranda* warnings because he stated he reasonably believed he was going to jail and detectives failed to correct his statement. [Respondent] first stated that he believed he was going to jail that night at page 39 of the surreptitious recording…[Respondent]

> made two other comments that he believed he was going to jail that night and needed to call his wife…Detectives not only refused to let him call his wife, but again failed to correct his statements about his custodial status. Under the totality of the circumstances, the Court finds that a reasonable person would believe, as the [Respondent] did, that he was not free to leave and in custody. Therefore, [Respondent] was entitled to his *Miranda* warnings after page 39 of the surreptitious recording…all subsequent statements must be suppressed.

II AA 409.

Contrary to Respondent's statements and arguments throughout his brief, the district court stated within its Findings and Conclusions that: 1) Respondent's statements were voluntary; and 2) Respondent did not invoke his right to an attorney, and was not in custody when he made the request. II AA 409-10. Therefore, any additional argument by Respondent to the contrary is irrelevant as the district court's factual findings should be given deference. Rosky v. State, 121 Nev. 184, 190-91, 111 P.3d 690, 694-95 (2005).

Additionally, the State does assert that the Detectives were not privy to the decision as to whether the Reno Police Department was going to arrest Respondent. First, the Detectives were from the Las Vegas Metropolitan Police Department, and not from Reno, so they were not sure if Respondent would be arrested for failing to register as an ex-felon. I AA 216. Moreover, Respondent was properly informed that there was a possibility the Reno Police Department could arrest him, but Detectives could not be sure. I AA 216. To answer otherwise, or give incorrect assurances, would have been deceptive. Detective Hefner explained that the decision as to

whether to arrest Respondent, or not, was of the sole discretion of the Reno Police Department. I AA 142; II AA 310. The Detectives were clear that they never coordinated with the Reno Police Department to detain him for that crime. Id.

Respondent states there were different strategies for the potential interactions with Respondent, but neglects the fact that only the Reno Police Department had the ability to arrest Respondent and it was never made clear as to when or if a warrant was created, or whether Respondent would be arrested. I AA 223. See, People v. Minjarez, 81 P.3d 348, 353-54 (Colo. 2003) ("A court may not rest its conclusion that a defendant is in custody for Miranda purposed upon a 'a policeman's unarticulated plan'… The mere existence of an arrest warrant, a police officer's undisclosed plan to take a suspect into custody, or a police officer's firm but unstated belief in the defendant's culpability do not, by themselves, establish that a defendant is in custody for Miranda purposes."); State v. Reigelsperger, 400 P.3d 1127, 1139-40. (Utah Ct. App. 2017), cert. denied, 20170579, 2017 WL 6804711 (Utah 2017) ("In addition, the detectives' intent to arrest [defendant] had not been communicated to him…An unarticulated plan to arrest a suspect has no bearing on whether a suspect is 'in custody at a particular time…'") (quoting Berkemer v. McCarty, 46 U.S. 420, 442, 104 S.Ct. 3138 (1984)). The fact that the Reno Police Department had the ability to arrest Respondent should bear little to no weight when considering the totality of the circumstances.

Overall, Respondent attempts to maneuver the discussion to his subjective belief and the subjective beliefs of the Detectives, but that is not the standard. Case law firmly states, "a defendant is "in custody" for purposes of Miranda v. Arizona, 384 U.S. 436 (1966) if he or she has been formally arrested or his or her freedom has been restrained to "the degree associated with a formal arrest *so that a reasonable person would not feel free to leave.*" State v. Taylor, 114 Nev. 1071, 1082, 968 P.2d 315, 323 (1998) (emphasis added). The fact is, no reasonable person would believe they were not free to leave if placed within Respondent's situation. Under the totality of the circumstances, Respondent was not in custody for purposes of Miranda.

A. Site of Interrogation

As the district court concluded, and contrary to Respondent's argument, the Detectives never pressured Respondent to go to the police station. RAB 13; II AA 409. In fact, the district court found that Detectives asked if Respondent "would voluntarily speak with them at the Reno Police Station [and Respondent] agreed…" II AA 405. Further, Detectives testified that any questioning could have occurred at Respondent's residence, upon Respondent's request. I AA 223. Next, the fact that the interview took place at the Reno Police Department does not support a finding that Respondent was in custody for purposes of Miranda. See, Silva v. State, 113 Nev.1365, 1370, 951 P.2d 591, 594 (1997).

Now, Respondent agrees that the interview room used was a "soft interview room", but argues "a reasonable person would not believe that the could just get up and walk out of that room." RAB 14. Respondent ignores that Detectives made sure Respondent knew he was free to leave. I AA 106-7, 116. Additionally, Respondent forgets that the district court stated, within its conclusions, that "the room where detectives interviewed [Respondent] was not an interrogation room." II AA 409. The fact that the questioning took place at the Reno Police Department does not automatically mean Respondent was in custody. As stated before, the room was structured as more of an "office waiting area" instead of a suspect interrogation room. During the grand jury hearing, Detective O'Kelley testified that the room was one used for interviewing victims. I AA 47.

Next, Respondent attempts to dramatize the request for using the bathroom, but the record shows that Detective Hefner only accompanied him so that he could use the restroom as well. II AA 302. Further, Respondent made the request to use the restroom, and was not denied this request. Id.

Contrary to Respondent's claim, Detective O'Kelley stated that himself and Detective Hefner were sitting opposite from the door at a round table. I AA 48. Respondent was closest to the door and he was not handcuffed to the table. Compare, Carroll v. State, 132 Nev. 269, 282, 371 P.3d 1023, 1032 (2016) (Court noted that Carroll was placed furthest from the exit). Additionally, Respondent only cited to

part of the testimony regarding the seating of Detectives and Respondent. Focusing on the still photograph, Detective O'Kelley testified that Detective Hefner's chair had wheels, and he moved around at times during the questioning. I AA 235-6. Detective O'Kelley's chair did not have wheels, so it was fixed in its spot. I AA 236. Therefore, Respondent was not blocked in the interview room at all times, and was not prevented from leaving.

Finally, while the district court found that the detectives refused to let Respondent call his wife, the State maintains that there was confusion regarding this request.[1] Looking at the transcript, Detectives never directly denied the request.

> A: I need to talk to my wife. Is that possible? Because once again and the way that I see this scenario playing out – I'm going to end up in a jail cell tonight.
>
> Q: What – n- now you're sayin'…
>
> A: Even though I'm here voluntarily…
>
> Q: Right. But to say to talk to your wife before you talk to us or I'll give – I'll give you my cellphone and you can tal (unintelligible) – or use or you got your own (unintelligible) – that is an absolute promise that you'll get to talk to her. Nobody's gonna be hooking and booking you without lettin' you be, you know, treated decently.
>
> …
>
> Q: …The guarantee with you is that you get that opportunity to talk with your wife about it regardless. I promise. As a man, I promise.

I AA 145-6.

[1] The State recognizes that the district court's Findings of Fact are entitled to deference pursuant to Rosky, 121 Nev. at 190-91, 111 P.3d at 694-95. However, the State is not challenging this finding, but is asserting that the district court made an error of law in the application of weight given to this undisputed fact.

Further, the district court did not determine whether Respondent requested to call his wife before or after making a statement. The State maintains that the request was to call his wife after making a statement.

> Q1: Are you sayin' that you'd like to talk to you wife before you go on – before you make any decision? I mean the only issue, I mean, Dean's right, we'll let you talk to your wife. Uh, we'll let you w- talk to your wife quite a bit after we're done. Um...
>
> Q: We're not gonna put a time limit.
>
> Q1: I - the only reason I mention - I'm saying anything right now about that and your wife is that (unintelligible) that's hit her - w- what's...
>
> A: Well it's gonna hit her like it's hitting me.
>
> Q1: Yeah - yeah and I don't think she's gonna be able to - to give you much help. I think she's just gonna add to your - your stress and your burden right now. You follow what I'm saying?
>
> A: I understand what you're saying.
>
> Q: Yeah so let - let's get it over and done with and there's no, I mean, literally not a time limit on how much time you (unintelligible) talk with her. We'll let you do that. And that's simple. I mean, again the date, time, location, who's present and (unintelligible) we'll just let you explain it. And we won't even interrupt you unless we think we need to interrupt you. We're gonna let you lay it out.

I AA 146-8. Still, this is just one factor under the totality of the circumstances in the consideration as to whether Respondent was in custody.

B. Objective indicia of arrest.

Respondent continues to myopically focus on the subjective belief of the Detectives as a means to show what a reasonable person would believe. This is clearly contrary to Nevada law and common sense. State v. Taylor, 114 Nev. 1071,

1082, 968 P.2d 315, 323 (1998) (Officer's or suspect's subjective view does not determine if the suspect is in custody).

This Court has stated that the objective "indicia of arrest" are comprised of the following:

> 1) whether the suspect was told that the questioning was voluntary or that he was free to leave; (2) whether the suspect was not formally under arrest; (3) whether the suspect could move about freely during questioning; (4) whether the suspect voluntarily responded to questions; (5) whether the atmosphere of questioning was police-dominated; (6) whether the police used strong-arm tactics or deception during questioning; and (7) whether the police arrested the suspect at the termination of questioning.

Carroll, 371 P.3d at 1033, citing Taylor, 114 Nev. 1071, 1082 n.1, 968 P.2d 315, 323 n.1.

i. Respondent voluntarily accompanied Detectives, was free to leave at any point, and was not under a formal arrest.

Respondent himself confirmed, and the district court agreed, that Respondent's presence and responses were voluntary. I AA 115, 145; II AA 409.

As to Respondent's issue with the search warrant, the district court determined he was not "in custody" until page 39 of the Surreptitious Recording. II AA 409-10. Therefore, Respondent was not in custody at the time Detectives mentioned the search warrant, and Respondent would have been free to leave after its execution. All Respondent is attempting to do is gloss over the fact that he never asked to leave or terminate the questioning. Moreover, there were no factual findings that the delay

in executing the search warrant was intentional. What the record does show is Respondent was voluntarily present and freely answered questions. I AA 115, 145.

Contrary to Respondent's arguments, a request for an attorney is not the same as asking to leave an interview room. Additionally, the district court already determined that Respondent did not invoke his right to an attorney, as he was not in custody at that time of the questioning. II AA 409. Respondent's assertions, against the factual findings and conclusions of the court, is against Nevada case law. Again, an officer's subjective believe is irrelevant in the determination as to whether a suspect is in custody. Respondent understood that if he did not want to speak with Detectives at any point, all he had to say was "I'm done talking". I AA 126.

Finally, Detectives informed Respondent that he was free to leave on numerous occasions throughout the questioning. I AA 106-7, 116. Respondent also agrees that he was not formally under arrest, so this factor weighs in the State's favor. AOB 20.

ii. Respondent was free to move, was never physically restrained, and was permitted to leave the room.

First, Respondent was instructed to turn off his cellphone, but not for nefarious purposes as he would like this Court to believe. Detectives explained that it is common to ask a suspect to turn off his/her phone, because even when phones are on silent, they can still vibrate and cause noise. I AA 214. Still, Respondent was able

to keep his phone on his person and Detectives also turned off their personal cellphones. Id.

Respondent again attempts to make illogical leaps by arguing that his request to call his wife means he was unable to move freely about the room. AOB 20. The record shows Respondent had the ability to move about freely as shown by the condition of the room. Additionally, Respondent was never physically restrained and was permitted to leave the room. II AA 303. Clearly, Respondent was never prevented from leaving. II AA 266.

iii. Respondent freely and voluntarily responded to questions.

Not only did Respondent voluntarily accompany Detectives to the station, he voluntarily answered their questions. As noted *supra*, Respondent's responses were voluntary and Respondent then answered the officer's questions freely. I AA 115, 145. The district court also concluded that Respondent's statements were voluntary. II AA 409.

Respondent attempts to dispute the already determined voluntariness of his responses, but this argument again fails for the reasons stated above. Additionally, the district court clearly concluded: "Detectives did not yell, threaten or deceive [Respondent]. Though Detectives mentioned the murder of [Respondent's daughter] and appealed to his sense of empathy, this was not coercive." II AA 409. Therefore,

there was no "emotional and psychological manipulation" and the record shows Respondent voluntarily responded to the Detective's questions.

iv. The atmosphere was not police-dominated and there was no use of strong-arm tactics.

Detectives never raised their voices at or threatened Respondent, which was confirmed when Respondent's confession was recorded:

> Q2: I also wanted to clarify Art, uh, would it be fair to say that we'd been decent with you? We haven't pressured you, we haven't intimidated you, yelled at you, been mean to you, threatened you in any way?
> A: That is correct.

I AA 172. This created an environment that was not police dominated.

Additionally, Detectives did not engage in strong-arm or coercive tactics. Detectives were honest about what potentially could happen with the misdemeanor warrant. Next, even though Detectives suggested that there were jurisdictions that would test fire a firearm before destroying it, the purpose of saying so was to inform Respondent of the possibility that his weapon had been test fired.

Respondent argues that when Detective Hefner said, "Um, you know, you-you did ask for an attorney and whatever comes after that we can't use", this was coercive and an impermissible police tactic. AOB 23, I AA 126. All Respondent is attempting to do again is inject additional arguments, contrary to the district court findings. The district court determined that there was no coercion on the part of Detectives. II AA 410. See, Oregon v. Mathiason, 429 U.S. 492, 495–96, 97 S. Ct.

711, 714, 50 L. Ed. 2d 714 (1977) (Officer's false statement about discovering Mathiason's fingerprints at the scene had "nothing to do with whether respondent was in custody for purposes of the Miranda rule."); Carroll, 132 Nev. at 280, 371 P.3d at 1031. ("Deception by police does not automatically render a confession involuntary.") Again, the district court concluded that Detectives did not threaten or deceive Respondent. II AA 409. The issue here is limited, despite Respondent's misguided attempts to expand it.

v. Respondent was not arrested by the Las Vegas Metropolitan Police Department at the conclusion of the interview.

The only factor that weighed in favor of custodial status was that Reno Police Department officers, after the interview, arrested Respondent on his failure to register as an ex-felon. Still, the record shows that this was an arrest made independent from the facts of this case.

Respondent merely asserts that the focus of the analysis is not who arrested Appellant, but that he believed he was being arrested. This factor looks at whether Respondent was arrested at the conclusion of the interrogation. Carroll, 132 Nev. at 283, 371 P.3d at 1033. Respondent was not arrested by these detectives in this case. The action of a different law enforcement agency acting independently in an unrelated case are irrelevant.

/ / /

C. The Length of the Interview was Short and Form of the Questioning Methodical.

The length and form of the questioning also indicated that Respondent was not in custody. As stated *supra*, the interview was not long, and the questioning was methodical. II AA 273. The district court found that the interview lasted about two (2) hours. II AA 405. Moreover, Respondent was not coerced into being questioned at the Reno Police Station. Contrary to his false assertion, Respondent's question about a potential arrest was not raised "throughout the questioning". II AA 409. Therefore, the length and form of questioning also suggest that Respondent was not in custody for purposes of Miranda.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the District Court's grant in part of the Motion to Suppress Illegally Obtained Statements be REVERSED.

Dated this 6th day of January, 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 3,090 words and does not exceed 15 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 6th day of January, 2020.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on January 6, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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