

11-03: Miranda Rights and Request to Reconsider

Case: O'Brien v. State, 36 FLW D574a (Fla. 1st DCA)

Date: March 16, 2011

Subject: Defendant's statements to police, and derivative evidence suppressed when the statements were obtained only two hours after a clear invocation of *Miranda* right to counsel, and before being provided with an attorney. Police asking him if he wanted to "reconsider" his invocation violated prevailing law.

FACTS: Deputies arrested O'Brien at his home on a charge relating to sexual battery of a child. After being advised of his *Miranda* rights, O'Brien unequivocally indicated his desire to have an attorney present during questioning, and the deputy ceased any further interrogation. The defendant was placed in a patrol car. After approximately 40 minutes, a sergeant approached O'Brien as he sat in the cruiser, and told the defendant that they needed information involving the crime, asking him if he wanted to "reconsider" his request for counsel, and telling O'Brien that the deputies would "appreciate it." The sergeant also informed O'Brien that "what happened is going to come out one way or another." Approximately 2 hours later, O'Brien was transported to the Sheriff's Office, where a different detective re-advised him of his *Miranda* warnings. This time the defendant waived his right to counsel, made incriminating statements, and informed police where he had hidden a laptop computer containing evidence. O'Brien moved to suppress his statements and the laptop, arguing that the statements were made only after police unlawfully reinitiated questioning after he invoked his Fifth Amendment right to counsel. The trial court denied the motion. O'Brien was convicted, and this appeal ensued.

RULING: The 1st DCA reversed the trial court. O'Brien was unlawfully questioned after making a clear invocation of his right to counsel. The waiver of his rights was initiated by the police and not the defendant.

DISCUSSION: The court restated the holding in *Edwards v. Arizona*, 451 U.S. 477, 484 (1981), that the accused who invokes his right to counsel "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication..." Under *Edwards*, "...a valid waiver of this right can be found only if the individual is the one responsible for reinitiating contact with the police (emphasis added). This view was recently affirmed by the U. S. Supreme Court in *Maryland v. Shatzer*, 130 S.Ct 1213, 1219 (2010), wherein the court explained that "a voluntary *Miranda* waiver is sufficient at the time of an initial attempted interrogation to protect a suspect's right to have counsel present, but is not sufficient at the time of subsequent attempts if the suspect initially requested the presence of counsel." (Emphasis added), (See FDLE Case Law Update 10-02 on *Shatzer*.) But, "if the accused initiates further conversation, is reminded of his rights, and knowingly and voluntarily waives those rights, any incriminating statements made during this conversation may be properly admitted." *Welch v. State*, 992 So.2d 206 (Fla. 2008.) In the instant case, the admissions were a product of the sergeant asking O'Brien to "reconsider" his invocation of counsel, and encouraging him to make statements regarding the offenses. This tactic rendered O'Brien's subsequent *Miranda* waiver involuntary. See also *Youngblood v. State*, 9 So.3d 717 (Fla. 2d DCA 2009.) The erroneous admission of O'Brien's statement and laptop evidence meant the conviction must be reversed.

COMMENTS: Pursuant to the holding in *Shatzer*, the subject who invokes his Fifth Amendment right to counsel during custodial interrogation must be released from custody for at least 14 days before law enforcement can re-approach him for questioning. Under *Edwards*, this prohibition applies to questioning about any offenses, even if they are not related to the offense for which the subject is in custody. The only exception is if the subject is the one who initiates the communication.

John E. Kemner
Regional Legal Advisor
Florida Department of Law Enforcement
Jacksonville Regional Operations Center

Officers should consult with their agency legal advisors to confirm the interpretation provided in this Update and to determine to what extent the case discussed will affect their activities.