[Cite as *State v. Knight*, 2008-Ohio-4926.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 04-CA-35
Plaintiff-Appellee	:	
	:	Trial Court Case No. 02-CR-148
v.	:	
	:	(Criminal Appeal from
TYRONE A. KNIGHT	:	Common Pleas Court)
	:	
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 26th day of September, 2008.

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BROGAN, J.

{¶ 1} Tyrone Knight appeals from his convictions in the Clark County Common Pleas Court of aggravated arson and murder. In his first appeal, Knight's appointed

counsel could find no arguable merit to Knight's appeal. We, however, discovered an arguable issue and that was whether Knight's confession to police was voluntarily made. We permitted Knight's appointed counsel to withdraw and we appointed new counsel to address this issue and any other counsel wished to pursue on Knight's behalf.

{¶ 2} On February 15, 2002, Knight was involved in a heated argument with Anthony Harris at the Striver's Club in Springfield. A fight ensued between Harris and Knight and John Carson joined the fray to assist Harris. Knight left the scene in his girlfriend's car and later drove past Carson's home. Harris and Carson threw objects at the car as it passed. Early the next morning, Knight threw a firebomb at Carson's home. The home caught fire and fourteen-year-old Olajuwon "Bear" Carson died in the fire.

{¶ 3} Three days later, Springfield Police were contacted by Knight's mother because police had informed her that the Carsons were "casing" her house and that she and her son were in danger. She assured police that her son had denied responsibility for the fire. Officer James Hall arranged to pick up Knight and his mother to bring them to the police station for questioning. Knight subsequently confessed to throwing a Molotov Cocktail into the Carson home after being questioned by the police but denied intending to kill anyone.

{¶ 4} Knight was then charged and later indicted for two counts of aggravated arson and aggravated murder and twelve counts of attempted murder. Prior to trial, Knight moved to suppress the confession he gave to the police, which was overruled by the trial court. A jury subsequently convicted Knight of aggravated arson and murder. He was sentenced to a mandatory term of fifteen years to life and a five-year term on the aggravated arson conviction. The court ordered the terms be served consecutively

after considering the factors listed in R.C. 2929.14.

{¶ 5} In his first assignment, Appellant contends the trial court erred in finding that his statements to the police were voluntarily, knowingly and intelligently made. Knight contends the police coerced his confession by promising him leniency and in ignoring his request for counsel.

{¶ 6} We have reviewed the videotape of Knight's interrogation by the police and the transcript of that videotape. Knight told Detective Darwin Hicks at the outset that he was willing to talk to the police about the allegations he firebombed the Carson home. (Tr. 1, Defense Ex. A.) Knight then explained at length the altercation which occurred at Striver's Club. (Tr. 2-4, Defense Ex. A.) Knight told Detective Douglas Estep that everybody on the street were saying he was responsible for the fire, but he "wouldn't do that." (Tr. 13, Defense Ex. A.)

{¶ 7} The following exchange then occurred between Detective Barry Eggers and the defendant:

{¶ 8} "Eggers: You've got problems, okay. And I heard that you were gonna come down here to talk to us. I thought it was because you were gonna set the record straight. And I've been listening to what's going on in here and basically you're strapping yourself in the chair.

{¶ 9} "A: Well, can I talk to my lawyer then if there is something wrong like that? Do I need one or something?

{¶ 10} "Eggers: Everything you're telling us is basically sort of true except for you talking about you didn't have no beef with anybody and everybody at that bar says that you were, you were in a fighting mood. And you're in here trying to make us believe

that you were just happy-go-lucky.

{¶ 11} "A: I mean I'm not saying I was happy-go-lucky, but I don't remember me knocking anybody's drink off the table. If I did I'd have bought them another. If I did, I probably bumped it off the table by walking by or something like that. But I wasn't knocking nobody's beer –

{¶ 12} "Eggers: Here's the thing, you need to think about this. We know you never intended to kill nobody, but you come in here with this story that I wasn't there and not showing any remorse for what happened.

{¶ 13} "A: I'm not saying, I'm not saying that I'm not–that I don't feel bad about what happened to the–I know what happened.

{¶ 14} "Eggers: Well, you know, like I'm saying, we know you didn't mean to kill nobody. You have got to get his–you have got to set the record straight. Our evidence, we've been working this since it happened and our evidence clearly shows that you are the person responsible for this fire. But in my mind I don't think that you meant to kill anybody. But the only way you're gonna convince us of that is if you come in here and tell us the truth. And you coming here with this story is not gonna cut it. Nothing you have said matches up to what anybody else says so that makes you out a liar.

{¶ 15} "A: I'm not trying to lie to you officer.

{¶ 16} "Eggers: What I'm telling you is you need to set the record straight with these guys and show some remorse for what happened to this little boy.

{¶ 17} "A: Officer, I do, believe me I do feel remorse for this guy, this little boy.

{¶ 18} "Eggers: I believe you, I believe you, but I also believe that you are the one responsible for that fire. Like I said all the evidence shows that you are that person. Everybody on the street knows it's you. Everybody.

{¶ 19} "A: And they saying that I did it–

{¶ 20} "Eggers: That's because it's true, and you know it's true. And you sitting here with this story that I didn't do it, I didn't do it, is gonna get you aggravated murder. We've been doing this for a long time. We did our homework.

{¶ 21} "A: May I find representation?

{¶ 22} "Eggers: Do what?

{¶ 23} "A: If I need representation, I'll find that?

{¶ 24} "Eggers: What do you mean?

{¶ 25} "A: By a counselor or something.

{¶ 26} "Eggers: Is that what you are saying that you need an attorney?

{¶ 27} "A: I don't know.

{¶ 28} "Eggers: Well only you can say. What I'm telling you is the evidence clearly shows you are the person responsible for this and when I heard you wanted to come in here, I thought you were coming here to set the record straight. I thought that was what it was about. Because like I said, nobody in here believes that you meant for anybody to die.

{¶ 29} "Estep: This is the only chance you're gonna get to tell us what happened out there. This is the only chance you're gonna get. And like he said, this is the time to tell the truth. This is the time to tell us what happened so we know in our minds what went on out there, instead of what a lot of other people are telling us. And

we've got some stuff that we haven't told you yet, we just want to see what you were gonna say. That's why he stepped in here, because we knew the direction we thought you were gonna go but you didn't go there. We know what–we know what happened out there is more than you think we know. And that's why we've been looking for you. That's why I wanted you to come down here.

{¶ 30} "Eggers: And there is no reason for all these people at the bar to lie on you, none.

{¶ 31} "Estep: You did the right thing by coming down here today on your own. We didn't have to go out and find you, you come down here, so that–you're on the right foot here but you're just–you stopped short of everything.

{¶ 32} "A: So what is it that–just ask me.

{¶ 33} "Eggers: All I want you to do is set the record straight and like I said, the only way you're gonna convince the prosecutor that you're sorry for what happened is to tell the truth or he's gonna charge you with aggravated murder and try to put you in the chair. But like I said, I don't believe and Doug does not believe that when this happened that you felt anybody would ever die over it. And that makes a difference. But what makes a bigger problem for you is for you to come in here and try to say aw, I had a beef with these guys but hey I was okay with it. That's not Tyrone. That is not Tyrone Knight and you know it. Everybody in that bar knows what you're about and it's not what you just came in here and described.

{¶ 34} "A: I never had a beef with John.

{¶ 35} "Eggers: I'm not saying you did, you had a beef with Anthony and John got in it. And you're not used to taking an ass whipping.

{¶ 36} "A: Oh, I didn't feel I did, but I'm not–that's beside the point.

{¶ 37} "Eggers: You're not used to getting an ass whipping and you took one this night and it pissed you off. It made you furious, and I can understand that. Because that's not what Tyrone is used to. We've talked to everybody about you man. Tyrone doesn't take an ass whipping and just let it go. You have got to set the record straight here. Cause like I said I know you didn't mean for this little boy to die. But if you come in here and continue this story about how you went to Columbus. I'm telling you I got you on tape. (Inaudible)

{¶ 38} "A: I did go to Columbus though.

{¶ 39} "Eggers: I know you did. I know you did. You've got to set the record straight here. I thought that's why you were coming here. You know the story about you not knowing who this other guy was, come on, we know who it was. We know who the other guy is, we've talked to him. We're not gonna tell you everything we know unless we go to the box. When we go to the box, that's when you'll find out what we got. But then I'm afraid it's gonna be too late for you. Then it's gonna be–

{¶ 40} "Estep: We also want to know who else was involved with doing this Tyrone. I mean I threw some names out there and there is a reason why I threw those out there.

{¶ 41} "Eggers: I can look at you and I can tell this is eating you up because deep down inside you got some morals about you. I know you feel bad about this and it's gonna eat you up until you let it go. I've been lied to by the best of them and I know you're not a sociopath.

{¶ 42} "A: Can I ask you for something?

{¶ 43} "Eggers: Sure.

{¶ 44} "A: Can we take a break?

{¶ 45} "Eggers: Absolutely.

{¶ 46} "A: Somebody staying with me so I can go outside with my mother and we all just stand outside.

{¶ 47} "Eggers: Sure. Listen to me Tyrone–

{¶ 48} "A: That's all I want.

{¶ 49} "Eggers: Nobody is telling you, you're under arrest. You're free to go anywhere you want, okay. But you need to understand, we did our homework and this is your opportunity tonight to let us know what was going on in your head when this happened, okay. Cause the only one that knows is you, all right. You want to talk to your mom. What do you want to do. Like I told you, we know you never intended for anybody to die. But the only way we're gonna know that for sure is if you tell us what was going on. I know you were furious, you were upset. You took an ass beating. I mean you can come here and make it sound like it wasn't much but listen to me man. They told me, Fee told us they beat you down and they chased you down the street and that pissed you off and then you called later and said this ain't over. And when you told her this ain't over, she believed it because you were furious.

{¶ 50} "A: To tell you the truth, I don't remember calling her and telling her that it wasn't over, but just–

{¶ 51} "Eggers: We got the phone records, you called her eight times–

{¶ 52} "A: Did I?

{¶ 53} "Eggers: Over an hour period. Most of those times, she hung up on

you and that made you even more furious.

{¶ 54} "A: Will you please just tell me that, what time was the last call?

{¶ 55} Eggers: I'd have to have the records right here in front of me. I don't want to sit here and lie to you.

{¶ 56} "A: So us–

{¶ 57} "Estep: Just tell us what happened, Tyrone, I mean that's the only thing that's gonna help anything here. I mean we're not here to you know–

{¶ 58} "Eggers: We're not here to judge you, we're not here to strap you in the chair. We're here to get the facts and your story does not jive in any of this, okay. The only thing your story is doing is making you look like a cold-blooded killer.

{¶ 59} "A: No, I am not.

{¶ 60} "Eggers: And I know you're not.

{¶ 61} "Estep: You came down here on your own and if you know what happened I figured you'd tell us and then–it makes you–you know you can't believe how much that's gonna help you.

{¶ 62} "A: Can we take a break?

{¶ 63} "Eggers: Sure, yeah, anything you want.

{¶ 64} "A: I'm not going nowhere.

{¶ 65} "Eggers: And I believe you.

{¶ 66} "A: We staying here.

{¶ 67} "Eggers: You know, you know you've got to get this off your chest.

{¶ 68} "A: We staying here. Just let an officer come out with me.

{¶ 69} "Eggers: Is this because you want to smoke? I mean if you want to

smoke, I'll let you smoke right here.

{¶ 70} "A: I–

{¶ 71} "Eggers: But if you want to go out, you can do that too.

{¶ 72} "A: I want to smell the air, smell the air.

{¶ 73} "Eggers: But you know we've got to get this straight.

{¶ 74} "A: It's gonna get straight. I'm gonna tell you the honest to God.

{¶ 75} "Estep: We'll appreciate that.

{¶ 76} "Eggers: Because like I said, we're gonna show where everything you've said so far is not accurate, okay. So what I'm gonna do is we're gonna go over this again.

{¶ 77} "A: Can you tear that up.

{¶ 78} "Estep: I can't tear it up.

{¶ 79} "Eggers: Well, we can't tear it up, but I mean if it's not accurate then we–all you've got to is tell us it ain't accurate.

{¶ 80} "Eggers: Okay, before you are asked any questions you must understand your rights,

{¶ 81} "1. You have a right to remain silent, anything you say can be used against you in court.

{¶ 82} "2. You have a right to talk to a lawyer for advice before we ask any questions and to have him with you during questioning.

{¶ 83} "3. If you cannot afford to hire a lawyer, one will be appointed for you before any questioning if you wish.

{¶ 84} "4. If you decide to answer questions now without a lawyer present, you still have the right to stop answering at any time.

{¶ 85} "5. You also have the right to stop answering at any time until you talk to a lawyer.

{¶ 86} "Eggers: You understand you're not under arrest, right?

{¶ 87} "A: Yeah.

{¶ 88} "Eggers: You understand you don't have to talk to us, correct?

{¶ 89} "A: Right.

{¶ 90} "Eggers: Okay, It says: I have read this statement of my rights or I have been informed orally of my rights and I understand what my rights are. I'm willing to make a statement and answer questions at this time without the services of a lawyer. I understand and know what I am doing. No promises no threats have been made to me. No pressure or coercion of any kind has been used against me. Now I understand you didn't want to sign this before and that's perfectly okay. But the only thing this says by signing it is that you understand what it says. It doesn't say you're admitting to anything. So I mean if you still don't want to sign it that's fine. I guess it's up to you. Okay, and I'm really not concerned whether you sign it or not.

{¶ 91} "A: I'm not, I'm not. I'm signing but I'm just thinking–

{¶ 92} "Eggers: The only thing you are saying by signing is that yeah, it's been read to me and I understand it. That's all the signature means.

{¶ 93} "Eggers: It's 1135 hours and Tyrone went outside and pulled himself together and we're gonna continue from here. I guess at this point we might as well let you tell us what happened there."

{¶ 94} Knight then admitted to Detective Eggers that he threw the firebomb at the Carson home. (Tr. 30-32 Defense Ex. A.) He told Eggers he didn't mean for the boy to die. Then the following colloquy occurred between Eggers and the defendant:

{¶ 95} "Eggers: Well if it means anything, we don't think that he even knew the house was on fire. It not like he was trapped and–it looks like he probably slept all the way through it.

{¶ 96} "A: So I know that she probably all gonna be tripped out but–how I said, it's a life for a life, take mine.

{¶ 97} "Eggers: Well, and that's not for us to decide. Only God can judge you.

{¶ 98} "A: I'm just saying, I did what I had to do, I asked him, I asked him to give me the strength to make it right. I said if you give me a test and make it right, just give me a chance to make it right and I'll make it right. But I didn't know what–I didn't know what I was gonna tell you when I came in here. I didn't know if I was supposed to get a lawyer before I came here. I didn't know if I was to sign anything before I came in or when I was in here. I didn't know what to do, so I'm only doing what I can do–like you said, make it right. I–before Friday and I was gonna be in here before Friday. I was coming before Friday.

{¶ 99} "Eggers: Well it takes a big man to come in here and tell on himself.

{¶ 100} "A: I was on my way.

{¶ 101} "Eggers: And what I said when I heard you were coming in here from talking to you last time, I thought you were coming in here to make this right. And that's why it kind of surprised me that you came in here and was telling that story,

but we got around that.

{¶ 102} "A Well I didn't like, I just didn't tell the whole truth.

{¶ 103} "Eggers: Do you want some time with mom.

{¶ 104} "A: It's over with."

{¶ 105} Knight's mother, Danita Knight, testified her son was twenty-three years old at the time of the interview. She testified that Detective Eggers called and told her that their lives were in danger because the Carsons were casing their house, and that it would be best that she and her son come down to the police station. (Tr. 72, Suppression Hearing.) She testified she knew that Tyrone was alleged to have started the fire and she suggested that he go to the police and explain what happened at the Carson house. (Tr. 81, Suppression Hearing.)

{¶ 106} Knight did not testify at the suppression hearing, but his counsel presented a transcript of the videotape interview in his defense. At his sentencing, it was determined Knight had a prior record and prior experience with the police.

{¶ 107} The State must prove by a preponderance of the evidence that a defendant's confession is voluntary. *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619 (1972). In making that determination, a court should consider the totality of the circumstances. *State v. Basher* (1978), 53 Ohio St.2d 135. A suspect's decision to waive his privilege against self-incrimination is made voluntarily absent evidence that his will was overborne and his capacity for self-determination was critically impaired because of coercive police conduct. *State v. Otte*, 74 Ohio St.3d 555, 1996-Ohio-108.

{¶ 108} In *State v. Brown*, 100 Ohio St.3d 51, 55, 2003-Ohio-5059, cert. denied, 124 S.Ct. 1516 (2004), the Ohio Supreme Court elaborated on the test for

voluntariness:

{¶ 109} "In determining whether a pretrial statement is involuntary, a court 'should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.' "

{¶ 110} Appellant was 23 years of age at the time he made his confession to the police. The videotape indicates Knight was an intelligent young man. Knight was not under arrest when he gave his statement to the police and although the police were not required to give Knight the *Miranda* warning, they did so before questioning him and later again during the interrogation. Danita Knight suggested her son talk to the police and he expressed a willingness to do so. (Def. Ex. A at 1.) The questioning occurred over a two-hour period, but the police permitted Knight an opportunity to take small breaks. Knight was informed by Detective Eggers that he was not under arrest and that he was free "to go anywhere you want." (Def. Ex. A at 25.) Detective Eggers told Knight that he wasn't being truthful with him and he was "strapping [himself] in the chair." (Def. Ex. A at 23.) Eggers informed Knight that the police had evidence that he was responsible for the fire but he believed Knight did not intend to kill anybody. (Def. Ex. A at 23.) Eggers told Knight that it was time to tell the truth. Eggers told Knight to tell the truth or the prosecutor would charge him with aggravated murder and try to put him in the chair. (Def. Ex. A at 24.) After Knight admitted setting the fire, he told Detective Eggers that he had asked God to give him the strength to make it right and he intended to come to the police before he eventually did. (Def. Ex. A at 44.)

{¶ 111} In *State v. Cooey* (1989), 46 Ohio St.3d 20, 28, the Ohio Supreme Court stated that admonitions to tell the truth directed at a suspect by police officers are not coercive in nature. Cooey claimed that a police officer "threatened" him by warning him that if he had lied, he had "buried" himself. The court held these were neither threats nor promises, but permissible admonitions to tell the truth. See also, *State v. Wiles* (1991), 59 Ohio St.3d 71. Police assertions that the suspect had theretofore been lying or would have no later chance to tell his side of the story do not automatically render a confession involuntary. *United States v. Gamy* (9th Cir. 2002), 301 F.3d 1138; *United States v. Wolf* (9th Cir. 1987), 813 F.2d 970 .

{¶ 112} The California Supreme Court has held that while the fact a statement was obtained despite the defendant's invocation of the right to counsel is one of the circumstances bearing on the voluntariness of a defendant's statement, it is not dispositive. *People v. Bradford* (1997), 14 Cal.4th 1005, 1041; 929 P.2d 544. Recently the same court held a defendant's statement voluntary despite his repeated invocations of his right to counsel. *People v. Jablonski* (2006), 37 Cal.4th 774, 126 P.3d 938. It is reasonably clear that a request for counsel by the accused who is not in police custody is but one factor to consider in determining whether his statement is voluntary. In this case, Knight, at best, made two equivocal requests for counsel. When asked by Detective Eggers whether Knight was saying he needed an attorney, Knight replied he didn't know.

{¶ 113} Coercive police activity is a necessary predicate to finding that a confession is not voluntary. In this case, it is significant that Knight's mother suggested he go to the police and explain his involvement in the fire. It is also significant that

Knight admitted he wanted to make things right and had intended to come speak to the police before the police called his mother. Any pressure Knight felt from his own conscience to square things with his victim was not the result of police coercion. *Colorado v. Connelly* (1986), 479 U.S. 157, 107 S.Ct. 515. We are satisfied that the State proved that Knight's confession was a voluntary one. There is no indication that Knight's will was overborne or that his capacity for self-determination was critically impaired because of police coercive conduct. *State v. Otte*, supra. The Appellant's first assignment of error is Overruled.

{¶ 114} In his second assignment, Knight contends the trial court erred in sentencing him to consecutive sentences after making certain statutory findings without the intervention of a jury. Knight, however, did not object to the procedure followed by the trial court and he has thus forfeited an appeal on the *Foster* issue. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642. The second assignment of error is also Overruled.

{¶ 115} The Judgment of the trial court is Affirmed.

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FAIN, J., concurs.

DONOVAN, J., dissenting:

{¶ 116} I disagree. Knight's confession was improperly induced, involuntary and inadmissible as a matter of law. First, I would find that Knight was in custody for purposes of *Miranda*. Although he was *Mirandized*, Knight clearly invoked his right to speak with an attorney and was denied that fundamental right in violation of the Ohio and U.S. Constitutions. Furthermore, the "torture of fear" was introduced by Detective

Eggers in order to overbear his will by threats of the electric chair. The electric chair was not a legal possibility, as lethal injection has been the only means of execution available to the State of Ohio since 2001. R.C. § 2949.22, 2001 H 362 eff. 11-21-01.

{¶ 117} I must note that there are a number of disturbing facts revealed by this record that should not be overlooked. First, the printed transcript of Knight's confession provided by the State to defense counsel, as well as part of this record on appeal, reveals that the videotaped confession played at the motion to suppress hearing was not completely and accurately transcribed. Conspicuously absent from the printed text is Knight's second request for counsel. This is the only portion that appears to be redacted. This glaring omission was not explained by the State, addressed by defense counsel, nor was it addressed by the court in any oral or written findings. Secondly, although Knight raised genuine issues on the subject of "custody" and "violation of his right to counsel" in the hearing on the motion to suppress, the court failed to address any of these issues in a written opinion analyzing the facts and applicable law. I'd note also that the cross-examination of officers, during this very critical and non-frivolous suppression hearing, was minimal and deficient in many respects.

{¶ 118} It is difficult to overlook the fact that Knight was twice *Mirandized* in deciding the issues of custody and voluntariness. Why *Mirandize* Knight at all if he was not in custody? This was not a routine nor nonintrusive inquiry by law enforcement. Although Knight initially came to the station voluntarily along with his mother, he was transported to the station by an officer in a police vehicle. He was then separated from his mother and interviewed by three members of law enforcement in a small room. Knight was told he was the only suspect. The tenor of this interrogation was never

simply non-accusatory, but, in fact, focused on Knight as the suspect. When Knight requested a break, this request was initially ignored and questioning continued. Although the majority characterizes Knight as intelligent and experienced with the police, the pre-sentence report reveals his criminal history prior to this arrest was minimal, primarily misdemeanor convictions, and his education level was twelve (12) years with some limited military service. The record herein supports a finding that Knight's intellect and level of sophistication was considerably lower than that of his interrogators.

{¶ 119} I recognize that the majority, based in part on law from the State of California, dismisses the second invocation for counsel as both equivocal and one made in a non-custodial setting. Thus, they conclude that any violation of the right to counsel is just one factor bearing upon voluntariness, not one which is dispositive. However, if Knight was, in fact, in custody, the analysis is entirely different. The ultimate inquiry is whether there was a formal arrest or a restraint on freedom of movement to the degree associated with a formal arrest. *State v. Isaac*, Greene App. No. 2003-CA-91, 2004-Ohio-4683, citing *California v. Beheler* (1983), 463 U.S. 1121, 1125, 103 S.Ct. 3517, quoting *Oregon v. Mathiason* (1977), 429 U.S. 492, 495, 97 S.Ct. 711.

{¶ 120} In determining whether a person is in custody, courts have considered certain factors to be relevant. These include the length of the detention, the perception and expectation of the detainee as to his freedom to leave at the conclusion of the interrogation, the atmosphere of the interrogation, and whether the interview is in a public or private place. See *Berkemer v. McCarty* (1984), 468 U.S. 420; *State v. Warrell* (1987), 41 Ohio App.3d 286, 534 N.E.2d 1237. This court has considered factors such as the location of the questioning (at home versus in the more restrictive

environment of a police station), was the defendant a suspect at the time the interview began, was the defendant's freedom to leave restricted in any way, was the defendant handcuffed or told he was under arrest, were threats made during the interrogation, was the defendant physically intimidated during the interrogation, did the police verbally dominate the interrogation, the defendant's purpose for being at the place where questioning took place, and whether police took any action to overpower, trick or coerce the defendant into making a statement. *State v. Estepp* (Nov. 26, 1997), Montgomery App. No. 16279.

{¶ 121} A person may voluntarily go to the police station for questioning and still be found to be in custody. See *State v. Robinson* (1994), 98 Ohio App.3d 560, 649 N.E.2d 18; (holding defendant found to be in custody where he drove himself to the station house after receiving telephone message from police that he was wanted for questioning, where defendant was taken directly to detective bureau and questioned, *Mirandized* and advised he might be charged with a crime, where the crime which he was told he could be charged with was different than the crime about which he was interrogated).

{¶ 122} The following facts lead me to the conclusion Knight was in custody:

{¶ 123} (1) The interview took place in the restrictive environment of a police station with three members of law enforcement in a small room;

{¶ 124} (2) Knight was a suspect, in fact, the only suspect according to Detective Eggers at the time the interview began;

{¶ 125} (3) Threats of the electric chair were made more than once;

{¶ 126} (4) The tenor of the interview changed when one officer left the

room and a Detective Eggers entered. Thereafter, Detective Eggers clearly dominates the interview;

{¶ 127} (5)When Knight asked "May I find an attorney?" rather than respond "yes" which is the correct legal response, the detective answers "Do what?" . . . "By Whom?" These responses were calculated to avoid the intervention of counsel, post *Miranda*.

{¶ 128} (6) An initial request for a break was ignored, the interview continued. The request for counsel was ignored, the interview continued. Thus, law enforcement communicated to Knight that his requests would be ignored, and he was subject to their decision-making, including his freedom of movement.

{¶ 129} Having determined that Knight was in custody, I would also find that his statement was involuntary. I would hold that Knight's confession was taken in violation of his Fifth Amendment rights under the Ohio and U.S. Constitutions.

{¶ 130} The Fifth Amendment right against self-incrimination can be waived, but the waiver must be voluntary. *State v. Petitjean* (2000), 140 Ohio App.3d 517, 748 N.E.2d 133. The decision to waive is voluntary absent a showing that his will was overborne because of coercive police conduct. *State v. Otte*, 74 Ohio St.3d 555, 562, 660 N.E.2d 711, 1998-Ohio-108, citing *Colorado v. Connelly* (1986), 479 U.S. 157, 107 S.Ct. 515. The due process inquiry of voluntariness is a separate inquiry from that required for *Miranda* custody and takes into consideration all of the circumstances surrounding the confession, including the characteristics of the accused and the details of the interrogation. *Dickerson v. United States* (2000), 530 U.S. 428, 434, 120 S.Ct. 2326. Ohio courts consider circumstances such as the age, mentality and prior criminal

experience of the accused, the length, intensity and frequency of the interrogation, the existence of physical deprivation or mistreatment, and the existence of threat of inducement. *State v. Bays* (Jan. 30, 1998), Greene Co. App. No. 95-CA-118, citing *State v. Edwards* (1976), 49 Ohio St.2d 31, 358 N.E.2d 1051. A confession may be involuntary whether or not *Miranda* warnings are required. *State v. Petitjean* (2000), 140 Ohio App.3d 517, 748 N.E.2d 133, citing *Dickerson* at 434. The State has the burden of proving the voluntariness of the confession by a preponderance of the evidence. *State v. Gumm*, 73 Ohio St.3d 413, 429, 653 N.E.2d 253, 1995-Ohio-24.

{¶ 131} While law enforcement may lie to a suspect to a certain extent during questioning, they may not misstate the law. *State v. Arrington* (1984), 14 Ohio App.3d 111, 470 N.E.2d 211. Repeated references, (three times), to the electric chair were a misstatement of the law; this is just the kind of reference to the "torture of fear" that courts condemn. Although Knight may have faced the death penalty by lethal injection, the chair certainly conjures up other images of death that the State of Ohio did not have the legal ability to implement. It was a complete mischaracterization of the method of punishment available to the State,

{¶ 132} and the clear implication communicated to Knight was that a "confession" may result in avoidance of the electric chair.

{¶ 133} We have previously addressed the use of threats by police in eliciting confessions. *State v. Petitjean* (2000), 140 Ohio App.3d 517, 748 N.E.2d 133; *State v. Kerby*, Clark App. No. 03-CA-55, 2007-Ohio-187. In *Petitjean*, the defendant was found not to be in custody and was not given *Miranda* warnings. During questioning regarding a murder, the police officers made statements that he could receive the

electric chair, that he needed to explain his involvement or he would "go bye-bye for a big long * * * time-for life, or you lose your life." *Id*. at 529. They also implied he might be able to successfully argue self-defense or involuntary manslaughter and be out of jail in six months, or "* * *if you want to work with us and work with yourself * * * you'd probably get two years of probation." *Id*. at 530. This court reversed the trial court's ruling and held that the confession was involuntary. In doing so, we focused on the threats and promises of leniency made to Petitjean. Though the outcomes advanced by the police were technically possible (anything from probation to the death penalty, depending on Petitjean's statement) and were presented in the form of possibilities or probabilities rather than certainties, the false hope created by the possibility of probation together with the fear created by the threats of death or life-imprisonment were coercive in nature and overbore Petitjean's will. His subsequent waiver of his Fifth Amendment rights was involuntary. *Id*. at 533. We went on to state that "* * * the more aggressive police become in questioning suspects, the greater the risk that a resulting confession is involuntary. Thus, it is the sworn obligation of the courts to prevent the use of the confession in the defendant's prosecution by suppressing the confession and any other evidence derived from it." *Id*. at 534. Although there was no explicit promise of leniency portrayed by the record herein, it is certainly implied, and the threats of the chair and disregard of Knight's second request for counsel, in my view, render any subsequent statements inadmissible.

{¶ 134} Similarly, in *Kerby,* a 17-year-old suspect was taken to the police station for interrogation by the Springfield Police Dept. at approximately 2:30 a.m. regarding a fatal shooting which occurred in the course of a robbery. During the course

of the interview, the police made several statements to Kerby that he would receive the death penalty for his involvement in the shooting, and at one point implied that he would receive leniency if they could show the prosecutor he was sorry for what happened. This court found the confession to be involuntary, citing the promises of leniency and the fact that the suggestion that Kerby could face the death penalty for his involvement in the shooting was "deceptively misleading and a misstatement of the law" since the death penalty was not available because of his age. *Kerby* at 12. Thus, in Knight's case, I would find the threat of the electric chair "deceptively misleading and a misstatement of the law."

{¶ 135} At least one court has found a confession to be involuntary when a suspect's request for an attorney was ignored following *Miranda* warnings, despite findings that the suspect was not in custody and his right to an attorney had not yet attached. *State v. Arnold* (March 30, 2000), Athens App. No. 99CA37. In *Arnold*, the trial court found that in addition to the suspect's low intellect and lack of prior experience with the law, the police officer employed deceit, threats and inducement in eliciting a confession. Specifically, the police read Arnold his *Miranda* rights prior to questioning, even though he was not in custody at the time, which caused Arnold to believe he had a right to an attorney. In upholding the trial court's ruling, the appellate court stated the following:

{¶ 136} "[The police officer] erroneously informed appellee that he had the right to an attorney present during questioning. When appellee requested an attorney, [the police officer] reiterated that appellee had 'every right to have a lawyer present * * * while * * *being questioned' yet continued talking with appellee. Such action by a police

officer is not only coercive but indicates to a suspect that his rights will not be respected by the police and the only way to terminate the interrogation is to cooperate with police." *Id*. at 4.

{¶ 137} In addition to incorrectly advising Arnold that he had a right to an attorney, the police officer also made statements that tended to imply that Arnold would receive leniency if he confessed and that implied the police had the authority to ensure Arnold was incarcerated for a long period of time. *Id*.

{¶ 138} Given the similarity to the above-mentioned cases, I'd find the tactics utilized by law enforcement herein to be coercive in nature, misleading and violative of Knight's constitutional rights. I cannot say that the "totality of circumstances" render Knight's statements voluntary. Knight was denied his right to counsel when he "politely" asked "may I find representation?" This was the second time Knight brought up his desire for counsel after initially indicating he was "nervous" about signing the *Miranda* form. I concede Knight's first request for a lawyer was equivocal, but the second request cannot be morphed by law enforcement into equivocation by further questions to Knight. There is nothing unclear about "may I find representation"? This request is not ambiguous nor is it equivocal. This request is not susceptible to more than one interpretation. A defendant should not be required to forcefully demand the assistance of counsel before an effective invocation of the right to counsel is established. Knight's request was sufficiently clear that a reasonable officer would have understood the statement to be a request for counsel requiring termination of the interrogation. No clarification of this request was required and law enforcement should not be permitted to play stupid and answer snidely with "do what?" and "by whom?"

Knight's request for representation can "reasonably be construed as an expression of a desire for an attorney's assistance." See *Davis v. United States* (1994), 512 U.S. 452, 114 S.Ct. 2350. As Justice Souter noted in *Smith v. Illinois* (1984), 469 U.S. 91, 105 S.Ct. 490, a suspect need not "speak with the discrimination of an Oxford don," nor would I add, should he be penalized by asking politely for representation. Knight's decision to deal with the officers through counsel should have been scrupulously honored. The follow-up questions by Detective Eggers herein were not for clarification, but rather designed to frustrate Knight's subjectively held desire for counsel, as well as his right to the assistance of counsel.

{¶ 139} Unlike the majority, I would find that Knight's capacity for self-determination was critically impaired because of police coercive conduct, and that his statements were obtained in violation of his constitutional rights. Any suggestion that he had a moral compulsion to confess can only be gleaned from this record after Knight was three times threatened with the electric chair and deprived of his right to speak with a lawyer. The trial court's admission of statements Knight made, while in custody, after an unequivocal request for counsel, cannot be characterized as harmless error on this record. Thus, his conviction must be reversed and he must be given a new trial absent the constitutionally tainted evidence.

{¶ 140} Accordingly, I would sustain the sole assignment of error and reverse for further proceedings.

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