[Cite as *State v. Brineger*, 2010-Ohio-1607.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee C.A. CASE NO. 23296

v. T.C. NO. 07 CR 4987

OLAN R. BRINEGAR : (Criminal appeal from Common Pleas Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 9th day of April, 2010.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Olan Ray Brinegar, filed February 27, 2009. On December 13, 2007, Brinegar was indicted on one charge of

endangering children (serious physical harm), in violation of R.C. 2919.22(B)(1), a felony of the second degree. Brinegar pled not guilty, and on January 18, 2008, he filed a motion to suppress. A hearing was held on the motion beginning on July 14, 2008. On July 22, 2008, the trial court ordered that Brinegar undergo an examination to determine his competence to stand trial, and the trial court also issued on its own motion an "Entry Ordering Examination Upon Plea of Not Guilty by Reason of Insanity." On September 9, 2008, the trial court issued an "Order for Second Opinion Examination of Competence at the Time of Reading *Miranda* Rights." The hearing on the motion to suppress was concluded on December 5, 2008, and the trial court overruled the motion on December 23, 2008. On January 26, 2009, Brinegar withdrew his former plea and entered a plea of no contest. On the same date, the trial court issued an "Entry and Order Finding Defendant Competent to Stand Trial," which provided that "[c]ounsel did stipulate to the contents of the psychiatric report as submitted by the Forensic Psychiatry Center for Western Ohio." The trial court sentenced Brinegar to six years in prison.

{¶ 2} At the suppression hearing, Detective Phillip W. Olinger, who had been with the the Dayton Police Department for 21 years and a detective for over nine years, testified. Olinger investigates "the crime of rape, sexual abuse, infant death investigations and child abuse." According to Olinger, he responded to Children's Medical Center on December 1, 2007, on the report of a four-month-old baby girl with head trauma and bleeding on the brain. Olinger' partner, Detective Theresa Lawson, along with some other officers, also responded. Olinger spoke with hospital personnel and on scene crews, and he observed the child. He testified that initially "we were determining if we had a crime." Olinger stated, "we're doing an investigation only and we're talking with everyone that we can and we're telling them it's

an investigation at this point. We don't want to accuse anyone of anything and we're just trying to find out what's going on." Olinger interviewed the child's family, including her mother and grandmother. Olinger stated, "I have got a lot of experience, a lot of interviewing of children and adults. * * * I have been to some special classes, have had special training. I've dealt with Children's Medical Center, had some training there a few times also."

{¶ 3} Brinegar later arrived at the hospital and was also interviewed by Olinger. The detective stated that at this initial interview, Brinegar was not in custody. The interview, as with those of the baby's family, was conducted in a "nice" third floor conference room at the hospital where staff meetings are held. The room contained a large table and several chairs. The doors to the room were not locked, and Olinger stated that Brinegar was free to leave "through[out] that interview." Brinegar was not handcuffed and Olinger advised him that he was not under arrest "and that we weren't going to advise him of his rights." Brinegar was almost 25 years old at the time of the interview.

{¶ 4} Olinger testified, "I interview defendants with a sixth, seventh, eighth, ninth, tenth grade education. So I do ask questions to qualify them if I need any special interpreters or anything like that." Brinegar told Olinger he had a limited education, having completed tenth grade at Meadowdale High School. According to Olinger, Brinegar "did advise that he had an ear problem. I think one of his ears was maybe deformed or had problems. And I made sure that he could understand me and Detective Lawson. He stated he could. And at any time, I advised him if he can't understand that we can explain things. He told us he had a driver's license before. And I asked him how he passed that test. He stated that * * * he's not retarded and he can read, he can write [but not very well]. He stated that things were explained to him. * * * he's held a job for like five years too."

{¶ 5} The initial interview lasted "over an hour, or right at an hour." Brinegar did not exhibit signs of drug or alcohol use and he answered questions appropriately. The detectives took notes during the interview, and "Detective Lawson took a written statement from him 'cause he stated he did not want to write a statement 'cause his writing is not that well. And she read it back to him, verbatim, and then he did sign it acknowledging that is what he stated." Olinger made no promises to Brinegar, Brinegar did not ask to stop the interview, and he did not ask for a lawyer. In reiterating that Brinegar's responses were appropriate, Olinger stated, "he would also demonstrate, too, how the child was in positions till he understood what we were talking about."

{¶ 6} On cross-examination, Olinger stated that he told Brinegar that he was not under arrest, and when asked if he specifically told Brinegar that he was free to leave, Olinger responded, "I don't believe that ever came up." Olinger described Brinegar as "very cooperative." According to Olinger, however, Brinegar "would make a statement and then he would make another statement changing from the first statement. And we were a little confused on what he was saying. And he changed his statement several times. We didn't care what his statement was. We wanted him to tell us the truth and what he knew of the injuries at this point. We did not know all the injuries at this point. We just knew that the child had had some head trauma and we were waiting for the experts at the hospital to tell us if this was inflicted or not." Olinger stated he "did not believe all the stuff [Brinegar] was telling me." Olinger did not know that someone had Brinegar's power of attorney. Olinger indicated that he knew that Brinegar had a work-related hand injury.

{¶ 7} Olinger's next contact with Brinegar occurred on December 5, 2007. Olinger had learned from the hospital that the child's injuries were the result of inflicted trauma.

Olinger sent officers to Brinegar's workplace and had him brought to the police department where he was placed in an interview room. Detective Lawson was also present. Olinger advised Brinegar of his rights, using a pre-interview form. Olinger went over each individual right with Brinegar and asked him if he understood each right. Brinegar indicated he did, and Olinger had him place his initials next to each right to indicate his understanding thereof.

{¶ 8} After going through Brinigar's individual rights, Olinger went over the waiver of rights paragraph with him. Olinger asked Brinegar if he understood the waiver and asked "him how many years of schooling he has, even though I already knew. He stated ten. And then he writes ten - that's his ten - and then he initials that because he wrote something there. * * * And then he signed the waiver of rights stating that he understood and he was willing to talk to me without an attorney present." Olinger testified that at this point, Brinegar was in custody and not free to leave. During the interview, Olinger testified that Brinegar never asked for an attorney, and he never asked to stop the interview. The interview lasted about an hour and 20 minutes, during which a 10 minute break was taken. Olinger offered Brinegar refreshments and the opportunity to use the bathroom at that time. Brinegar told Olinger "he had a history with the police department and he had his rights read to him before and he's been arrested before." As with the interview on December 1, 2007, Olinger stated that Brinegar responded appropriately to the questions Olinger asked. According to Olinger, Brinegar declined to make a video statement. Olinger stated that no threats or promises were made in the course of the interview, and Brinegar "always stated he did understand."

{¶ 9} On cross-examination, Olinger indicated that Brinegar told him that he "actually doesn't sleep that much at night, maybe two hours at a time. * * * and then he'll be up and then go back for two hours at a time." At the time of the interveiw, Brinegar indicted

he was not tired.

{¶ 10} On re-direct, Olinger stated he believed he learned of Brinegar's hand injury at the first interview and that Brinegar was on some prescription pain medication for the injury.

{¶ 11} Olinger described the injury as "nothing severe, not bandaged or nothing * * * very minor stuff." Olinger stated that Brinegar never indicated to him that being on the prescription medication altered his mind or affected his ability to think clearly.

{¶ 12} Carlos Walker testified that he was formerly employed at the Montgomery County Adult Probation as an intensive probation officer specializing in domestic violence. Walker was Brinegar's probation officer while he was on probation for a domestic violence offense. Pursuant to his probation, Brinegar was required, among other things, to obtain and maintain verifiable employment, attend the Alternatives to Violence Program, and receive a Crisis Care Assessment and follow the recommended treatment, attend the STOP Violence Program, and attend the SWOP Program. Walker testified that Brinegar successfully completed his probation under his supervision. Walker testified that the Alternatives to Violence Program is a one-time class, and that the STOP Program is 16 weeks long. In the STOP program, the probationers "have homework every week on different topics." During the program, Walker had weekly contact with Brinegar. He testified that Brinegar demonstrated an ability to read and write by means of his homework and in class paperwork. Walker also testified that Brinegar followed directions and could carry on meaningful conversations with him. Walker described Brinegar's performance while on probation as "above average." Walker was aware that Brinegar had a "hearing disability" but stated that it never posed a problem during his probation.

{¶ 13} On cross-examination Walker indicated that he took over supervision of

Brinegar from Patrick Kennedy, and that Kennedy completed all of the intake paperwork with Brinegar.

{¶ 14} Karen M. Chancellor testified for the defense. Chancellor is employed at Meadowdale High School as a records clerk/secretary. She testified that Brinegar left school after 10th grade, and that school records indicated that he had a learning disability. On cross-examination she indicated that Brinegar earned Bs and Cs and one F in middle school, and that he did not earn all Fs in high school.

{¶ 15} When the hearing on the motion to suppress resumed on December 5, 2008, Barbra Ann Bergman, a forensic psychologist, testified regarding her assessment of Brinegar's competency to waive his constitutional rights. Bergman evaluated Brinegar on August 1, 2, 3, 6, 9, and 10, 2008, for a total period of time of ten hours, administering an IQ screening test called the Wechsler Abbreviated Scale of Intelligence ("WASI"), a test of functional abilities called the Street Survival Skills Questionnaire, ("SSSQ"), which is a test of adaptive behavior, and a test called Assessing Understanding and Appreciation of *Miranda* Rights.

{¶ 16} Regarding the *Miranda* test, Bergman stated the test contains four separate subtests: "One of them gets at whether or not the person comprehends the words that are used in the *Miranda* warning.

{¶ 17} "One of them gets at the person's ability to comprehend the words by getting them to recognize whether the word that's used is the same as or different than different choices that they have to make. It's called recognition.

{¶ 18} " * * * one has to do with the person's comprehension of the essence of the rights. Just what the rights are, if they understand that.

{¶ 19} "And the last one gets at whether or not they understand how those rights function in an interrogation situation."

{¶ 20} Bergman testified that Brinegar was often confused and upset because he couldn't understand the questions she was asking him. She stated that he accused her of trying to trick him, and that she had to spend a lot of time calming him down.

{¶ 21} Bergman also testified that she examined Brinegar "in regard to the actual pre-interview form that's used by the Dayton Police Department, which is worded a little bit differently from [the *Miranda* test]. Obviously, it's the same concepts but the wording is a little bit different. And he made the same errors there, too. * * * So, in my opinion, he did not understand. He truly didn't understand. * * *"

{¶ 22} Bergman testified regarding the meaning of the term "practice effect," pursuant to which a person taking a test for the second or third time may score better "just because they have practice." When asked if "practice effect" would apply to the *Miranda* test, she replied, "* * * it doesn't specifically apply to [that] test, if it's administered the way it describes in the manual. If you just ask the questions and record the person's response and then score it and don't correct it or give them any information, then you could administer it every day if you wanted and, theoretically, you should get very much the same results each time.

{¶ 23} "But in this case, I don't administer that test that way. * * * I always do teaching and coaching and prompting and queuing [sic]. Again, because I want to see how much it's going to take for the person to be able to understand what they don't understand to begin with, if they're even capable of understanding it. Sometimes I will have the person - - I will say this is the right answer, repeat after me. * * *

{¶ 24} "* * *

{¶ 25} "I spent double the time that it would take to administer this instrument to anybody because I was doing that. I was teaching, prompting, seeing if I could get him to understand this and then apply it to something else later on. * * * ."

{¶ 26} At the conclusion of her testing, Bergman concluded, to a reasonable degree of psychological certainty, that Brinegar "did not make a knowing and intelligent and voluntary waiver of his *Miranda* rights."

{¶ 27} Thomas Martin, a clinical psychologist, also evaluated Brinegar, and his results conflicted with Bergman's. Martin administered the Wechsler Adult Intelligence Scale, Third Edition ("WAIS-III"), explaining that the WASI that Bergman administered is an abbreviated version of the WAIS-III, which is more comprehensive. Martin met with Brinegar twice. Martin did not administer the SSSQ test, but he did administer the *Miranda* test administered by Bergman.

{¶ 28} According to Martin, he "administered the WAIS-III to Mr. Brinegar on October 1st in the Montgomery Cuonty Jail. * * * the WAIS-III generates three IQ scores that were intelligence quotient scores and it generates a verbal IQ score, performance IQ score - - which is a nonverbal estimate - - and it also provides a full-scale IQ score.

{¶ 29} "On the WAIS-III, Mr. Brinegar obtained an IQ verbal score of 71. He obtained a performance IQ score of 77 and he obtained a full-scale IQ score of 72. All of these scores fall within what is defined as the borderline range of intelligence which is above what was formally known as the mental retardation ranges."

{¶ 30} Martin further stated that he "read Dr. Bergman's report before I saw the defendant and given her descriptions of him, I was expecting that I was going to have some

difficulty with him because her report suggested that.

{¶ 31} "In contrast to my expectation, Mr. Brinegar was very cooperative each time I saw him. He corrected some things that I mentioned from Dr. Bergman's report in terms of sequence of when things occurred or where he was employed and so forth or what kind of work he did when he was employed. So he provided corrections."

{¶ 32} Martin described his administration of the *Miranda* test, and concluded that Brinegar was able to knowingly and intelligently waive his constitutional rights.

{¶ 33} In overruling the motion to suppress, the trial court from the bench noted the qualifications of both expert witnesses and their conflicting opinions, which the court described as "coming pretty much to a draw." It was significant to the court that the *Miranda* test contained language "far different than the language that was used when the defendant was interrogated according to the rights form that was gone over by Detective Olinger. The language [in the rights form used by Olinger] was simpler and * * * much easier to understand."

{¶ 34} The court then indicated that it reviewed Olinger's testimony and concluded that Brinegar understood the rights he waived on December 5th. According to the trial court, "[a]t the time that Detective Olinger examined Mr. Brinegar, Mr. Brinegar appeared to understand everything although he mentioned that he did have a hearing problem, he appeared to be able to hear everything. He appeared to be able to understand everything. He certainly indicated so by initialing each individual right and signing the form. * * * he also had * * * reading and writing deficiencies as well.

{¶ 35} "Detective Olinger testified that he has been trained specifically in those areas, though I don't grant him an expertise * * * I believe him when he says he's done this kind of

thing and that he's very careful when he interviews someone who has certain impediments and he was in this case.

{¶ 36} "Further, the defendant indicated to Detective Olinger that he does have a criminal history and he's had his rights read to him before. All of his responses to the detective were appropriate. The detective even asked him if he wanted the interview videotaped and the defendant declined. He also declined to make a written statement on December 5th. Those declinations indicate that he understood those things and that he decided that those weren't in his best interest and he, therefore, declined."

{¶ 37} Regarding the interview that took place on December 1st at the hospital, the trial court determined "at that point in time * * * they were just trying to get some information to determine whether a crime had even been committed. [Brinegar] was not in custody at that time and * * * those statements can be admitted as well."

{¶ 38} Brinegar asserts two assignments of error. His first assignment of error is as follows:

{¶ 39} "THE DETECTIVES' INTERVIEW OF APPELLANT ON DECEMBER 1, 2007 CONSTITUTED A CUSTODIAL INTERROGATION, AND THE DETECTIVES VIOLATED APPELLANT'S RIGHTS BY NOT MIRANDIZING HIM PRIOR TO THAT INTERVIEW."

{¶ 40} "Appellate courts give great deference to the factual findings of the trier of facts. (Internal citations omitted). At a suppression hearing, the trial court serves as the trier of fact, and must judge the credibility of witnesses and the weight of the evidence. (Internal citations omitted). The trial court is in the best position to resolve questions of fact and evaluate witness credibility. (Internal citations omitted). In reviewing a trial court's

decision on a motion to suppress, an appellate court accepts the trial court's factual findings, relies on the trial court's ability to assess the credibility of witnesses, and independently determines whether the trial court applied the proper legal standard to the facts as found. (Internal citations omitted). An appellate court is bound to accept the trial court's factual findings as long as they are supported by competent, credible evidence. (Internal citations omitted)." *State v. Purser,* Greene App. No. 2006 CA 14, 2007-Ohio-192, ¶ 11.

{¶ 41} "It is well established that the police are not required to administer *Miranda* warnings to every individual they question. (Internal citations omitted). The United States Supreme Court has held that police officers have a duty to advise a suspect of his rights pursuant to *Miranda v. Arizona* (1966), 384 U.S. 436, 369-73, 86 S.Ct. 1602, 16 L.Ed.2d 694, when their questioning of the suspect rises to the level of custodial interrogation. (Internal citations omitted). A person is 'in custody' only if, under the totality of the circumstances, a reasonable person in the same situation would feel that he was not free to leave." *State v.Wood*, Greene App. No. 2006 CA 1, 2007-Ohio-1027.

{¶ 42} "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, 104 S.Ct. 3138, 82 L.Ed.2d 317; *State v. Warrell* (1987), 41 Ohio App.3d 286 * * *. 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." *State v. Knight*, Clark App. No. 04-CA-35, 2008-Ohio-4926, ¶ 120.

{¶ 43} The following facts lead us to conclude that Brinegar was not in custody during his interview on December 1st. Olinger testified that the interviews that occurred on that date were investigatory in nature to determine if in fact a crime had even been committed and the detectives' purpose was not to develop a suspect. Brinegar's interview was of reasonable length, approximately an hour. Brinegar arrived at the hospital not for the purpose of being questioned but to check on the victim and her mother, who was his girlfriend at the time. He was told that he was not under arrest and that the officers were not going to advise him of his rights. Olinger stated that Brinegar was free to leave at any time. He was not handcuffed. The interview took place in a "nice," large hospital conference room with several chairs and a large table, as opposed to the more restrictive environment of the police station. The doors to the conference room were not locked. There is nothing in the record to suggest that Brinegar was threatened or intimidated during the interview. Olinger advised Brinegar that the detectives would explain anything he did not understand, and nothing suggests that they dominated the interrogation but instead

allowed Brinegar to ask any questions he had. Olinger made no promises to Brinegar. Brinegar did not ask to stop the interview or ask for a lawyer. When Brinegar made inconsistent statements, Olinger testified that the detectives wanted him to tell the truth, and the record does not suggest that they tried to trick or coerce him into making a statement. See *State v. Lewis* (Dec. 22, 2000), Montgomery App. No. 18098 (holding that "a reasonable person in Lewis' position would not have felt that his freedom was being restrained to the extent associated with a formal arrest [while being interviewed in a room located within a hospital and that] Lewis was not in custody and *Miranda* warnings were not required before police questioned him.")

{¶ 44} Since Brinegar's December 1st interview did not constitute custodial interrogation, *Miranda* warnings were not required, and his first assignment of error is overruled.

{¶ 45} Brinegar's second assignment of error is as follows:

{¶ 46} "APPELLANT DID NOT MAKE A KNOWING, INTELLIGENT, AND VOLUNTARY WAIVER OF HIS RIGHTS PURSUANT TO MIRANDA."

{¶ 47} According to Brinegar, he "was not competent to make a knowing, intelligent and voluntary waiver of his Miranda rights," in reliance upon the expert testimony of Bergman.

{¶ 48} In *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, the United States Supreme Court held:

{¶ 49} "'[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege

against self-incrimination.

{¶ 50} "* * *

{¶ 51} "'Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently.' *Id.*, at 444.

{¶ 52} "In order to be effective, a waiver of *Miranda* rights must have been made with a full awareness of both the nature of the rights being abandoned and the consequences of the decision to abandon those rights and the protections against self-incrimination they afford. Only if the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." (Citation omitted). *State v. Jiminez*, Montgomery App. No. 22082, 2008-Ohio-1601, ¶ 10-14.

{¶ 53} "The burden is on the prosecution to prove by a preponderance of the evidence that a defendant waived his *Miranda* rights voluntarily, knowingly, and intelligently. (Citation omitted) * * *

{¶ 54} "* * * The test is whether the actions are voluntary under 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.'" (Citations omitted). *State v. Phillips* (Aug. 11, 2000), Montgomery App. No. 18049.

{¶ 55} Finally, "[t]he weight to be given the expert opinions proffered at [a] suppression hearing [is] a matter for the trier of fact." (Citations omitted). *State v. Amann* (Sept. 7, 1990), Montgomery App. No. 11446.

{¶ 56} The trial court, having determined that the expert testimony was "pretty much a draw," was free to look at all the evidence in deciding the issue of waiver. Brinegar was 25 years old at the time of the interview, and he informed Olinger that he had prior criminal experience, which included previously being advised of his rights. It was significant to Olinger that Brinegar had obtained a driver's license in the past and maintained employment for five years. The interview on December 5th was of reasonable duration, lasting approximately one hour and 20 minutes, with a ten minute break, during which time Olinger offered Brinegar refreshments and the opportunity to use the bathroom. There is no evidence of threats or inducements for Brinegar's statements. While Brinegar indicated that he has trouble sleeping, he stated he was not tired at the interview. Although Brinegar's hand bore a minor injury, he did not indicate to Olinger that his medication affected his ability to think clearly. While Brinegar had a problem with his ear, there is no indication that he did not hear Olinger or Lawson in the course of the interview.

{¶ 57} Olinger, who has substantial interviewing experience and training, and who was aware of Brinegar's limited education, testified that he carefully went over every right individually with Brinegar, and that Brinegar indicated his understanding thereof by placing his initials by each right. Brinegar's responses to Olinger's questions were appropriate. Brinegar signed the waiver, indicating his willingness to talk to Olinger without an attorney present. The trial court could reasonably

conclude that the fact that Brinegar declined to make a statement via videotape and/or a written statement as well indicate that "he understood those things and that he decided that those weren't in his best interest."

{¶ 58} Walker's testimony also supports Olinger's regarding Brinegar's comprehension abilities. Brinegar maintained employment during the course of his probation and also completed his homework in the 16 week STOP program, thereby demonstrating an ability to read and write. Walker also testified that Brinegar's "hearing disability" never posed a problem in the course of his probation.

{¶ 59} Since the totality of the circumstances reveal both "an uncoerced choice and the requisite level of comprehension," the trial court properly concluded that Brinegar made a voluntary, knowing and intelligent waiver of his *Miranda* rights. Since the trial court's findings are supported by competent, reliable evidence, Brinegar's second assignment of error is overruled, and the judgment of the trial court is affirmed.

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BROGAN, J. and FROELICH, J., concur.

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