[Cite as *State v. Hayes*, 2015-Ohio-1043.]

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

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 25940
	:	
v.	:	T.C. NO. 13CR1133/3
	:	
DENISE R. HAYES	:	(Criminal appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the ___20th___ day of ____March____, 2015.

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DONOVAN, J.

{¶ 1} Defendant-appellant Denise R. Hayes appeals her conviction and sentence for one count of aggravated burglary, in violation of R.C. 2911.11(A)(1), a felony of the first degree, with an accompanying three-year firearm specification; one count of aggravated robbery (deadly weapon), in violation of R.C. 2911.01(A)(1), a felony in the

first degree, with an accompanying three year firearm specification; and one count of kidnapping (felony or flight), in violation of R.C. 2905.01(A)(2), a felony in the first degree. Hayes filed a timely notice of appeal with this Court on October 3, 2013.

{¶ 2} The incident which forms the basis for the instant appeal was a break-in and shooting that occurred during the early morning hours of April 10, 2013, at the apartment of the victim, Zach Malone. Malone's apartment was located at 905 Neal Ave., Unit 19, in Dayton, Ohio. Malone sold snacks, candies, pop, beer and cigarettes out of his apartment. Malone's girlfriend, Rose Durant, and her son, Chad Durant, also spent the night at his apartment occasionally. Rose and Chad were present at the apartment at the time of the incident.

{¶ 3} Between the hours of 6:00 and 7:00 p.m. on April 9, 2013, Hayes knocked on Malone's apartment door and asked to purchase cigarettes. Later that night, Hayes returned to Malone's apartment and attempted to make another purchase. An argument ensued between Malone and Hayes, and no sale was transacted. Hayes returned to Malone's apartment just before 3:00 a.m. in order to make another purchase. Hayes handed Malone money to make her purchase, but she did not enter the apartment. As Malone attempted to close the door, two men forced open the apartment door, knocking Malone down and threatening him with a gun to turn over any money he had. The men searched Malone and took $6.00 from him.

{¶ 4} After searching Malone, the two men kicked open the bedroom door in which Rose Durant was sleeping. This awoke Chad Durant, who was asleep on a recliner elsewhere in the apartment. One of the men ordered Chad to go lay down in a different area, which Chad did. It was at this time that three shots were fired, striking Chad.

Hayes and the two men then fled the scene.

{¶ 5} After the shooting, witnesses identified two males and a female running from Malone's apartment building. Police were dispatched to the scene, and a K-9 tracking unit led by Officer Adam Sharp was brought to the apartment building at approximately 3:00 a.m. The officer-dog team followed a scent to residences located at 951 and 953 Five Oaks Avenue in Dayton, Ohio. 951 and 953 Five Oaks Avenue is located northwest of Malone's apartment.

{¶ 6} At 953 Five Oaks Avenue, Hayes approached Officer Sharp and asked "Coming from 905 Neil Avenue?" Hayes then spoke with Officer Sharp, freely admitting that she had been at 905 Neal Avenue, Malone's apartment, earlier in the evening. Hayes confirmed that she did attempt to purchase items from Malone and that they had an argument. Hayes further stated that after she left Malone's apartment, she heard gun shots and ran to her aunt's house at 953 Five Oaks. Hayes stated that she was not involved in the shooting. More officers eventually arrived at the 953 Five Oaks address and observed two males on the porch who fit the description of the suspects involved in the incident at 905 Neal Avenue.

{¶ 7} Shortly thereafter, the decision was made to transport Hayes and one of the men sitting on the porch to the Dayton Safety Building to be interviewed by detectives. According to the testimony of Officer Melissa Schloss, Hayes was not under arrest at this time but was placed in handcuffs and escorted in the back of a police cruiser. Officer Schloss took Hayes to the Safety Building and escorted her to an interview room. Officer Schloss removed Hayes' handcuffs and left her in the interview room. Officer Schloss testified that she did not advise Hayes of her *Miranda* rights.

{¶ 8} At the Safety Building, Hayes was placed in an interview room where she was asked to wait for a detective to interview her. Detective Roderick Jones entered the Safety Building around 5:00 a.m. on April 10, 2013. Det. Jones testified that he was called to the Safety Building because there had been a shooting at 905 Neil Avenue, and he was asked to interview witnesses of the incident. Upon going up to the second floor of the Safety Building, Det. Jones heard Hayes screaming in the interview room, stating that she had information to provide regarding the shooting and wanted to help the police. Det. Jones proceeded into the room and then advised Hayes to "Tell me what you know." Before addressing Hayes, Det. Jones was not involved in the investigation of the shooting in any way. Det. Jones did not read Hayes her *Miranda* rights. Hayes then proceeded to tell Detective Jones the events of the previous night. Hayes told Det. Jones the same version of events she had given to Officer Sharp before she was taken into custody.

{¶ 9} Shortly after Det. Jones finished interviewing Hayes and left the interview room, Detective Douglas Baker arrived and proceeded to read Hayes her *Miranda* rights before he interviewed her. Hayes then shouted, "I want a lawyer, lawyer lawyer!" After Hayes invoked her right to counsel, Det. Baker stopped the interview and no further attempts to question her were made.[1]

{¶ 10} On April 18, 2013, Hayes was indicted for one count of aggravated burglary, one count of aggravated robbery, and one count of kidnapping. All of the counts were accompanied by a firearm specification. At her arraignment on May 21, 2013, Hayes stood mute, and the trial court entered a plea of not guilty to the charged offenses.

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[1] Although not at issue in the instant appeal, we note that later on the morning of April 10, 2013, Malone was shown a photo spread wherein he immediately identified Hayes as the woman who persuaded him to open the door to his apartment just before the two men forced their way inside.

{¶ 11} Hayes subsequently filed a motion to suppress on June 3, 2013. In her motion, Hayes argued that any statements she made to police without having been first advised of her *Miranda* rights should be suppressed. Hayes also challenged the photo-spread created by police and used to identify her as being "unnecessarily suggestive." The trial court held a hearing on Hayes' motion to suppress on June 25, 2013, and July 12, 2013. On July 25, 2013, the trial court issued a decision and entry overruling Hayes' motion to suppress.

{¶ 12} After a jury trial held on September 3 through September 6, 2013, Hayes was found guilty on all of the charged offenses. The trial court subsequently sentenced Hayes to an aggregate prison term of six years.

{¶ 13} Hayes' appeal was originally filed on October 3, 2013. Pursuant to *Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.E.2d 493 (1967), original appellate counsel for Hayes asserted that there were no meritorious issues for review. By magistrate's order of February 19, 2014, we informed Hayes that her counsel had filed an *Anders* brief and invited her to file a pro se brief assigning any error for our review within sixty days of our order. Hayes did not file anything with this Court. In a decision and entry filed on June 13, 2014, we found that a potentially meritorious issue existed for appeal regarding whether Hayes was subject to custodial interrogation in violation of her *Miranda* rights. Accordingly, we appointed new appellate counsel to represent Hayes, and her merit brief was filed on October 14, 2014.

{¶ 14} Hayes' appeal is now properly before this Court.

{¶ 15} Hayes' sole assignment of error is as follows:

{¶ 16} "MS. HAYES WAS SUBJECT TO A CUSTODIAL INTERROGATION IN

VIOLATION OF HER *MIRANDA* RIGHTS."

{¶ 17} In her sole assignment, Hayes contends that the trial court erred when it overruled her motion to suppress. Specifically, Hayes argues that the trial court erred when it found that although she was in custody when she spoke with Det. Jones at the Safety Building, she was not being interrogated, and thus, she was not entitled to *Miranda* warnings.

{¶ 18} As this Court has previously noted:

> In regard to a motion to suppress, " 'the trial court assumes the role of the trier of facts and is in the best position to resolve questions of fact and evaluate the credibility of witnesses.' " *State v. Hopfer* (1996), 112 Ohio App.3d 521, 548, 679 N.E.2d 321, quoting *State v. Venham* (1994), 96 Ohio App.3d 649, 653, 645 N.E.2d 831. The court of appeals must accept the trial court's findings of fact if they are supported by competent, credible evidence in the record. *State v. Isaac,* Montgomery App. No. 20662, 2005-Ohio-3733, 2005 WL 1707019, citing *State v. Retherford* (1994), 93 Ohio App.3d 586, 639 N.E.2d 498. Accepting those facts as true, the appellate court must then determine, as a matter of law and without deference to the trial court's legal conclusion, whether the applicable legal standard is satisfied. *Id.*

State v. Hoskins, 197 Ohio App.3d 635, 2012-Ohio-25, 968 N.E.2d 544, ¶ 11 (2d Dist.).

{¶ 19} The Fifth Amendment to the United States Constitution provides that "[n]o person *** shall be compelled in any criminal case to be a witness against himself." "The Fifth Amendment privilege against compulsory self-incrimination 'protects against any

disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.' " *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt Cty.*, 542 U.S. 177, 190, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004), quoting *Kastigar v. United States*, 406 U.S. 441, 445, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972); *Ohio v. Reiner*, 532 U.S. 17, 20, 121 S.Ct. 1252, 149 L.Ed.2d 158 (2001). "The right to *Miranda* warnings is grounded in the Fifth Amendment's prohibition against compelled self-incrimination." *State v. Strozier*, 172 Ohio App. 3d 780, 2007-Ohio-4575, 876 N.E.2d 1304, ¶16 (2d Dist.), citing *Moran v. Burbine*, 475 U.S. 412, 420, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986).

{¶ 20} Police are not required to give *Miranda* warnings to every person they question, even if the person being questioned is a suspect. *State v. Biros,* 78 Ohio St.3d 426, 440, 678 N.E.2d 891 (1997)*; State v. Hatten*, 186 Ohio App.3d 286, 2010-Ohio-499, 927 N.E.2d 632, ¶ 49 (2d Dist.). *Miranda* warnings are required only for custodial interrogations. *Biros* at 440. *Miranda* defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). "The ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Oregon v. Mathiason,* 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977). The inquiry whether a person is subject to custodial interrogation focuses upon how a reasonable person in the suspect's position would have understood the situation. *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). The subjective views of the interviewing officer and the suspect are immaterial to

the determination of whether a custodial interrogation was conducted. *Stansbury v. California*, 511 U.S. 318, 323, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994); *Hatten* at ¶ 50.

{¶ 21} A suspect who volunteers information, and who is not even asked any questions, is not subject to a custodial interrogation and is not entitled to *Miranda* warnings. *State v. McGuire*, 80 Ohio St.3d 390, 401, 686 N.E.2d 1112 (1997), citing *State v. Roe*, 41 Ohio St.3d 18, 22, 535 N.E.2d 1351 (1989). In other words, "*Miranda* does not affect the admissibility of '[v]olunteered statements of any kind.'" *Id*., citing *Miranda*, at 478; *State v. Montgomery*, 2d Dist. Montgomery No. 23870, 2010-Ohio-5047, ¶15.

{¶ 22} " 'Interrogation' includes express questioning as well as 'any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.' " *Strozier* at ¶20, quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). "Interrogation" must reflect "a measure of compulsion above and beyond that inherent in custody itself." *Innis,* 446 U.S. at 300. "Police officers are not responsible for unforeseeable incriminating responses." *State v. Waggoner*, 2d Dist. Montgomery No. 21245, 2006-Ohio-844, ¶14; *Strozier* at ¶20.

{¶ 23} In its decision overruling Hayes' motion to suppress, the trial court stated the following:

> *** Arguably one could find that Defendant Hayes was in custody. One cannot find that there was an interrogation. There must be an interrogation before *Miranda* Warnings are required. Thus, *Miranda* Warnings were not required here and Defendant's statements should not be suppressed because of a violation of *Miranda v. Arizona*.

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{¶ 24} Officer Schloss handcuffed Hayes and transported her to the Safety Building. Officer Schloss testified that she decided to take Hayes to the Safety Building because she believed that the appellant was somehow involved in the shooting and robbery at Malone's apartment. After arriving at the Safety Building, Hayes' handcuffs were removed, and she was placed in an interview room on the second floor where she waited to be questioned by police detectives regarding the incident. It is apparent from the record that Hayes was in custody for the purposes of *Miranda*. However, that is not the end of our discussion.

{¶ 25} For the second prong of *Miranda* to be satisfied, we must find that an interrogation occurred when Det. Jones spoke with Hayes in the interview room. In support of her contention that an interrogation occurred, Hayes cites *Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004). The Ohio Supreme Court followed and applied *Seibert* in *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985. The situation surrounding Hayes' statements, however, is factually distinguishable from the circumstances present in *Seibert*.

{¶ 26} In *Seibert*, during one nearly continuous interrogation, police deliberately employed a "question first, warn later" strategy, effectively dividing the interrogation into two parts. *Seibert*, at syllabus. First, police questioned Defendant until they obtained a confession, intentionally failing to give *Miranda* warnings. *Id*. After a brief break, the same officer then advised defendant of her *Miranda* rights, obtained a signed waiver, and then continued questioning defendant, confronting her with her pre-warning statements until defendant repeated her earlier confession. *Id*. The Supreme Court upheld the

suppression of the second confession, finding that giving *Miranda* warnings midway through the interrogation session, after a confession, was ineffective to fulfill their purpose. *Id*. That is not the situation here.

{¶ 27} In the instant case, Det. Jones testified that when he came into contact with Hayes, he did not know why she was in the interview room and had no interactions with Officer Schloss or any of the officers who were involved with the investigation of the shooting and robbery at Malone's apartment. Det. Jones testified that he was only informed that there had been a shooting a 905 Neil Avenue, and he was asked to interview witnesses of the incident. Furthermore, Hayes was not prompted in any way by Det. Jones to speak with her. Hayes initiated the conversation with Det. Jones by saying that she had information regarding the incident and "wanted to help the police." Det. Jones did not know what information Hayes was going to offer.

{¶ 28} Additionally, there is no evidence in the record to suggest that Det. Jones made any effort, calculated or otherwise, to elicit incriminating statements from Hayes. When Hayes informed Det. Jones that she wanted to offer information to aid the police, Det. Jones merely stated "Tell me what you know." Thereafter, Hayes made several exculpatory statements, telling Det. Jones essentially the same version of events that she had provided Officer Sharp when he encountered her at 953 Five Oaks Avenue. Without any prior information regarding the offenses committed at Malone's apartment, and in light of the initial statements made by Hayes regarding her willingness to help the police, it is unreasonable to conclude that Det. Jones knew or should have known that his words were reasonably likely to elicit an incriminating response from the appellant. Accordingly, we find that the trial court did not err when it overruled Hayes' motion to

suppress, finding that no interrogation occurred when she spoke with Det. Jones at the Safety Building.

{¶ 29} Hayes' sole assignment of error is overruled.

{¶ 30} Hayes' sole assignment of error having been overruled, the judgment of the trial court is affirmed.

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HALL, J., concurs.

FAIN, J., concurring:

{¶ 31} I concur fully in Judge Donovan's opinion for the court. I write separately merely to indicate that under many other circumstances, a police officer's statement to one in custody, "tell me what you know," could be deemed to be words that the officer should know are reasonably likely to elicit an incriminating statement, in violation of *Miranda*. From the circumstances in the case before us, however, it is evident that Hayes had expressed a desire to speak to a police officer about information she had relating to the shooting. Therefore, the trial court could reasonably construe the officer's saying, "tell me what you know," as merely acquiescing to Hayes's expressed desire to do so, which she expressed before any questioning took place at the Safety Building.

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