**[Cite as *State v. May*, 2015-Ohio-3062.]**

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

DANNY D. MAY, JR.

Defendant-Appellant

JUDGES:
Hon. William B. Hoffman, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 14 CAA 12 0079

O P I N I O N

CHARACTER OF PROCEEDING: Criminal Appeal from the Court of Common Pleas, Case No. 14 CR I 04 0184

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: July 30, 2015

APPEARANCES:

For Plaintiff-Appellee

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*Wise, J.*

**{¶1}** Defendant-appellant appeals his conviction and sentence entered on September 29, 2014, in the Delaware County Court of Common Pleas following a plea of guilty to one count of Receiving Stolen Property.

**{¶2}** Plaintiff-Appellee is the State of Ohio.

STATEMENT OF THE CASE

**{¶3}** On April 20, 2014, Officer Denman of the Genoa Township Police Department was dispatched to a residence on a report of a stolen boat and trailer. (T. at 7). Officer Denman took the report and suggested to the owner that he check Craigslist to see if the property happened to end up being listed for sale. (T. at 7-8). The owner of the property called Officer Denman later in the day and said he thought he had located a Craigslist ad for the trailer. (T. at 8). Officer Denman reviewed the ad and it seemed to match the description of the trailer that had been provided to him, including some aftermarket modifications that had previously been made by the owner. (T. at 9).

**{¶4}** Officer Denman then set up an undercover operation. (T. at 9). The plan was to set up a meeting with the person selling the trailer at a gas station in Columbus. *Id*. Officer Denman would go in plain clothes and in an unmarked car. *Id*. The Columbus Division of Police would respond with a marked cruiser and uniformed officers in the event that the seller needed to be taken into custody. (T. at 10).

**{¶5}** Appellant Danny D. May, Jr., was the person who showed up with the trailer to sell it. *Id*. He was eventually arrested and placed in the back of the CPD cruiser. (T. at 12). The cruiser was equipped with a video camera. *Id*. At the time of the

arrest, Appellant was read his Miranda rights. (T. at 12). At the scene, Appellant continued to claim the trailer belonged to him. (T. at 14).

**{¶6}** Appellant was transported to the Genoa Township Police Department station by another officer. *Id*. While in the holding area, Appellant asked to speak to the person in charge. (T. at 49). Lieutenant Ciballi, the lieutenant in charge of the patrol division, went to speak with Appellant. (T. at 48-49). Lt. Ciballi spoke to Appellant in the holding area, which is video recorded 24 hours a day, seven days a week. (T. at 49-50). During their conversation, Appellant said "I can talk to an attorney, can't I?" (T. at 51, 61-62). Lt. Ciballi explained to Appellant that he did not have to talk to him. (T. at 52, 62). Lt. Ciballi asked Appellant if he no longer wished to speak to him. (T. at 62). Appellant continued talking. (T. at 52).

**{¶7}** When Officer Denman returned to the police station, he spoke to Appellant again. (T. at 15). At that time, Appellant admitted that he had stolen the boat and the trailer from the Red Bank Harbor. *Id*. However, Appellant claimed that the owner of the boat had paid him to steal it. *Id*.

**{¶8}** On April 30, 2014, an indictment was returned against Appellant, charging him with one count of theft and one count of receiving stolen property. Both charges were felonies of the fifth degree due to the value of the property involved.

**{¶9}** On June 11, 2014, Appellant filed a motion to suppress, seeking to suppress certain statements he made to law enforcement.

**{¶10}** On July 14, 2014, an oral hearing was held on the motion to suppress. A further oral hearing was held on July 23, 2014.

**{¶11}** By Judgment Entry filed August 21, 2014, the trial court denied the motion to suppress.

**{¶12}** On September 29, 2014, Appellant entered a no contest plea to the one count of receiving stolen property on September 29, 2014.

**{¶13}** On November 10, 2014, the trial court sentenced Appellant to a prison term of twelve (12) months.

**{¶14}** Appellant now appeals, assigning the following error for review:

**{¶15}** "I. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT WHEN IT OVERRULED HIS MOTION TO SUPRESS [SIC] HIS STATEMENTS AND THE PHYSICAL EVIDENCE THAT FLOWED THEREFROM."

I.

**{¶16}** In his sole Assignment of Error, Appellant argues that the trial court erred in denying his motion to suppress. We disagree.

**{¶17}** Appellate review of a trial court's decision to deny a motion to suppress involves a mixed question of law and fact. *State v. Long,* 127 Ohio App.3d 328, 332, 713 N.E.2d 1 (4th Dist .1998). During a suppression hearing, the trial court assumes the role of trier of fact and, as such, is in the best position to resolve questions of fact and to evaluate witness credibility. *State v. Brooks,* 75 Ohio St.3d 148, 154, 661 N.E.2d 1030 (1996). A reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Medcalf,* 111 Ohio App.3d 142, 145, 675 N.E.2d 1268 (4th Dist.1996). Accepting these facts as true, the appellate court must independently determine as a matter of law, without deference to the trial court's conclusion, whether the trial court's decision meets the applicable legal standard. *State*

*v. Williams,* 86 Ohio App.3d 37, 42, 619 N.E.2d 1141 (4th Dist.1993), overruled on other grounds.

**{¶18}** There are three methods of challenging a trial court's ruling on a motion to suppress on appeal. First, an appellant may challenge the trial court's finding of fact. In reviewing a challenge of this nature, an appellate court must determine whether the trial court's findings of fact are against the manifest weight of the evidence. *See*, *State v. Fanning,* 1 Ohio St.3d 19, 437 N.E.2d 583 (1982); *State v. Klein,* 73 Ohio App.3d 486, 597 N.E.2d 1141 (4th Dist.1991). Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. *See*, *Williams,* supra. Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final issues raised in a motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry,* 95 Ohio App.3d 93, 96,620 N.E.2d 906 (8th Dist.1994).

**{¶19}** In the case *sub judice*, Appellant claims that all questioning should have stopped when he invoked his right to counsel, and therefore his confession was obtained in violation of his Fifth Amendment rights and should have been suppressed.

**{¶20}** “The Fifth Amendment to the United States Constitution provides that no person ‘shall be compelled in any criminal case to be a witness against himself.’ ” *State v. Leach,* 102 Ohio St.3d 135, 2004–Ohio–2147, ¶ 11. The Fifth Amendment applies to the states through the Fourteenth Amendment. *State v. Graham,* 136 Ohio St.3d 125, 2013–Ohio–2114, ¶ 19. During a custodial interrogation, a suspect has the right to

remain silent and to be represented by an attorney. *Miranda v. Arizona,* 384 U.S. 436, 469 (1966). “A suspect's right to an attorney during questioning * * * is derivative of his [or her] right to remain silent * * * [,]” under the Fifth Amendment. *Leach* at ¶ 13, quoting *Wainwright v. Greenfield,* 474 U.S. 284, 298–299 (1986) (Rehnquist, J., concurring). When a person is subject to a custodial interrogation, he must be informed of his rights to remain silent and to an attorney. *Miranda* at 469.

**{¶21}** When a suspect in police custody invokes his Fifth Amendment right to counsel, police interviewers must cease the interrogation and may not further initiate the interview until the suspect's lawyer is present. *Edwards v. Arizona,* 451 U.S. 477, 484–485, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Any statement, question or remark (other than those normally attendant to arrest and custody) that the police should know are reasonably “likely to elicit an incriminating response” is an interrogation. *Rhode Island v. Innis,* 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). “The latter portion of this definition [of interrogation] focuses primarily upon the perceptions of the suspect, rather than the intent of the police.” *Id.*

**{¶22}** We review the totality of the circumstances in determining whether a suspect has voluntarily waived his *Miranda* rights. *In re Taylor* at *2. “[T]he totality of the circumstances include[s] 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; the existence of threat or inducement.” *State v. Shepherd,* 9th Dist. Summit No. 15777, 1993 WL 36093, (Feb. 17, 1993), quoting *State v. Edwards,* 49 Ohio St.2d 31 (1976), paragraph two of the syllabus, vacated in part on other grounds 438 U.S. 911 (1978).

**{¶23}** "The State bears the burden of proving a waiver of *Miranda* rights by a preponderance of the evidence." *State v. Barr,* 9th Dist. Summit No. 16822, 1995 WL 244156, (Apr. 26, 1995), citing *State v. Bobo,* 65 Ohio App.3d 685, 689 (8th Dist.1989).

**{¶24}** In the instant case, the trial court found the relevant portions of the conversation between Appellant and Lt. Ciballi were as follows:

**{¶25}** "The Defendant asked officers if he could speak to the "boss." Lieutenant Ciballi spoke to the Defendant and asked what he wanted. He was the "boss." A long conversation ensued about the stolen boat and trailer at around 20:13.10. During the conversation at 20:24:11, the Defendant said, "you know what, I can talk to an attorney, can't I?" The lieutenant said "sure, you don't have to talk to me." The Defendant again continued to complain about the form of the questioning. The lieutenant said "let me clarify, do you want an attorney or continue talking to me? Do you want to continue talking or not?" The Defendant asked if the attorney would come there and the officer indicated it would be difficult to find an attorney on Easter Sunday. The lieutenant again told the Defendant that if he wanted an attorney, he would quit talking to him. The questioning ceased shortly thereafter when the lieutenant told Defendant to quit lying. He had no more time to speak with him."

**{¶26}** The trial court went on to find that approximately one hour and five minutes elapsed between the time Appellant was given the Miranda warnings and the interrogation at the station. The trial court also found that Appellant initiated the interrogation, asking to speak with the officer in charge. Finally, the trial court found that Appellant's inquiries concerning his right to speak with an attorney were equivocal and that when "[t]he lieutenant sought to clarify if he wanted one and he never said he did."

**{¶27}** When a suspect in custody expresses "his desire to deal with the police only through counsel," the suspect "is not subject to further interrogation by the authorities until counsel has been made available to him." *State v. Voss,* 12th Dist. Warren No. CA2006–11–132, 2008–Ohio–3889, ¶ 65, citing *Edwards v.. Arizona,* 451 U.S. 477, 485–485, 101 S.Ct. 1880 (1981). To invoke the right to have an attorney present during interrogation, a suspect must unambiguously request counsel such that a reasonable officer in the circumstances could understand the statement to be a request for an attorney. *Voss* at ¶ 66, quoting *Davis v. United States,* 512 U.S. 452, 459, 101 S.Ct. 2350 (1994). However, if the statement is not clear that the person is requesting an attorney, then the officers are not required to stop questioning the suspect. *Id.* Statements such as "I think I need a lawyer" have been found not to be an unambiguous and unequivocal request for an attorney. *See, e.g., Voss* at ¶ 69; *State v. Henness,* 79 Ohio St.3d 53, 63 (1997)

**{¶28}** Based upon the above, we do not find Appellant's statements were made in violation of *Miranda* or in violation of his constitutional rights. The trial court properly

found Appellant waived his right to counsel and confessed to his actions. We find the trial court did not err in denying to suppress his confession.

**{¶29}** For the foregoing reasons, the decision of the Court of Common Pleas of Delaware County, Ohio, is affirmed.

By: Wise, J.

Hoffman, P. J., and

Delaney, J., concur.

JWW/d 0620