

THE CALIFORNIA SUPREME COURT HAS GRANTED REVIEW OF THIS CASE. IT IS NO LONGER CITABLE AUTHORITY.

People v. Storm

(April 19, 2000) __ Cal.App.4th __ [D030950]

ISSUES

(1) Was a murder suspect "in custody" for *Miranda* purposes when he was questioned by police? (2) After the suspect invoked his *Miranda* right to counsel and was released from custody, could officers seek to question him?

FACTS

Storm was considered a suspect in the murder of his wife whose body was found at a roadside turnout in San Diego County. Sheriff's homicide detectives asked Storm if he would be willing to take a polygraph examination at their office. Storm agreed and, on November 19th, drove himself to the sheriff's office. Before the test began, the polygraph examiner advised Storm of his *Miranda* rights, which he waived.

During the course of the test, the examiner told Storm that "some of the questions seemed to be bothering him and the only explanation was that [Storm] was lying." When the test ended, Storm met with one of the detectives who informed him "the probability of deception was 100 percent concerning [Storm's] denials of involvement in [his wife's] death."

Storm responded, "I wanna help you guys close your case but I better talk to an attorney first." The detective then asked Storm to make a statement "for his own comfort." Storm replied that his wife begged him to kill her because she was suicidal and "he could not stand to watch her suffer." When the detective told Storm "it was best to talk because things kept inside tend to 'eat us,'" Storm said, "Okay. But seriously I think I shouldn't talk about it 'til I've consulted with somebody." The detective continued to discuss the crime and Storm "continued to give details about the killing."

Another detective who was listening to the interview had become "concerned with [Storm's] statements about lawyers and silence," so he paged the detective who was questioning Storm. The two detectives then discussed the matter and decided to permit Storm to leave. This decision was based primarily on their concern that Storm's statements after the apparent invocation were obtained in violation of *Miranda* and were, therefore, inadmissible.

Two days later, on November 21st, detectives went to Storm's apartment and asked to speak with him again. Storm agreed to talk to the detectives and, during the subsequent interview in the apartment, provided more details of the killing.

The next day, the detectives returned to Storm's apartment and arrested him for murdering his wife. He was subsequently convicted to first degree murder.

DISCUSSION

Storm contended his statements to the detectives on November 19th and November 21st were obtained in violation of *Miranda*. As for the interview on the 19th at the sheriff's office, he claimed he was in "custody" for *Miranda* purposes and that the detective violated *Miranda* when he continued to question him after he had invoked. As for the interview in his apartment on the 21st, he contended that although he was not in custody, the detectives' decision to release him on the 19th was merely a pretext to avoid the consequences of his invocation on the 19th and, therefore, his statements on the 21st should be suppressed.

The November 19th statement

A suspect can invoke his *Miranda* rights only during custodial interrogation.⁽¹⁾ Consequently, if Storm was not "in custody" when he asked for a lawyer, his request did not constitute an invocation, in which case the detective's continued questioning was lawful. As a general rule, a suspect is "in custody" for *Miranda* purposes if, as the result of the surrounding circumstances, a reasonable person in the suspect's position would have believed he had been formally arrested or that his freedom of movement had been restrained to the degree associated with a formal arrest.⁽²⁾

Although questioning that occurs at a police station is considered inherently coercive and is therefore usually custodial, it may not be if the circumstances were such that a reasonable person in the suspect's position would have believed he was free to go. For example, questioning at a police station has been deemed noncustodial when, (1) the suspect voluntarily accompanied officers to the station or came in on his own; (2) the suspect was told he was "free to go"; and (3) the questioning was restrained and investigatory, not aggressive and accusatory.⁽³⁾

In applying these principles to the facts of the case, the court ruled Storm was not in custody during the initial phase of the interview. Said the court, "Given that appellant voluntarily came to the station, the lack of direct accusations and the absence of any significant indicia of restraint, a reasonable person would not believe himself initially in custody."

Things changed, however, after the polygraph exam. As the court pointed out, "[W]hen appellant was told he had abysmally failed the polygraph test and therefore was lying when he denied he killed his wife, the only reasonable conclusion appellant could reach was that he was then no longer free to leave. The change in circumstances was not lost on appellant since he almost immediately invoked, unsuccessfully, his right to counsel."

Consequently, the court ruled Storm was "in custody" when he invoked his *Miranda* right to counsel and, therefore, his subsequently statements should have been suppressed.

The November 21st statement

As noted, Storm was released from custody on the 19th after he invoked his *Miranda* rights. He was then questioned at his apartment on the 21st. Although he was not in custody on the 21st, Storm contended his statements must nevertheless be suppressed because he had invoked his *Miranda* right to counsel on the 19th.

It is settled that when a suspect invokes the *Miranda* right to counsel, officers must immediately terminate questioning and may not later seek to question the suspect. There is, however, an exception to this rule: officers may seek to question the suspect if, (1) the suspect was released from custody after the invocation occurred, and (2) the break in custody was long enough so that the suspect had time to consult with counsel.⁽⁴⁾ It was apparent that both of these requirements were met.

Nevertheless, Storm argued there should be a third requirement: that the officers' decision to release the suspect from custody must have been made in good faith, meaning it must not have been a pretext to avoid the consequences of the *Miranda* invocation. Although there is some indirect authority for such a requirement,⁽⁵⁾ the court rejected it.⁽⁶⁾ It did so because the reason for the "break in custody" exception is that release dissipates the amount of coercion inherent in custodial interrogation. As the court pointed out, "If the basis for the break in custody exception is the impact of release on the suspect's psyche, then the motivation for that release is of no consequence.

The court added that a pretext release for a sufficiently long period of time "is not an abuse of, or an attempt to avoid, any right. As long as the reinitiated contact complies with *Miranda*, i.e., if the renewed contact is a custodial interrogation, there must be an admonition and waiver, and the tactics employed by the police are not badgering or harassing, there is no impropriety in releasing a suspect with the intent to later contact him with the hope of reinitiating interrogation."

Storm's conviction was affirmed.

(1) See *McNeil v. Wisconsin* (1991) 501 US 171, 182, fn3.

(2) See *Berkemer v. McCarty* (1984) 468 US 420, 44; *Stansbury v. California* (1994) 511 US 318, 322-3; *California v. Beheler* (1983) 463 US 1121, 1125; *Oregon v. Mathiason* (1977) 429 US 492, 495.

(3) See *People v. Stansbury* (1995) 9 Cal.4th 824, 831-2; *Oregon v. Mathiason* (1977) 429 US 492, 495; *California v. Beheler* (1983) 463 US 1121.

(4) See *People v. Inman* (1986) 186 Cal.App.3d 1137, 1144; *U.S. v. Hines* (9th Cir. 1992) 963 F.2d 255, 257; *U.S. v. Coleman* (9th Cir. 2000) ___ F.3d ___. **NOTE:** The conclusion that a person who is released from custody on bail or O.R. is not automatically "in custody" is also based on the fundamental principle of *Miranda* that the existence of "custody" depends on whether the objective circumstances surrounding the interview would have caused a reasonable person to believe his freedom had been restrained to the degree associated with a formal arrest. See *Stansbury v. California* (1994) 511 US 318, 324-5; *Minnesota v. Murphy* (1984) 465 US 420, 430; *People v. Stansbury* (1995) 9 Cal.4th 824, 830; *People v. Boyer* (1989) 48 Cal.3d 247, 272; *People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1481; *People v. Bellomo* (1992) 10 Cal.App.4th 195, 198; *People v. Celaya* (1987) 191 Cal.App.3d 665, 671; *People v. Lopez* (1985) 163 Cal.App.3d 602, 606; *People v. Salinas* (1982) 131 Cal.App.3d 925, 935. Obviously, a person who has been released on bail or OR is not subject to any of the restrictions traditionally imposed on arrestees. Furthermore, it is settled that the restrictions imposed by a *Miranda* invocation do not apply if the suspect was released from custody after the invocation-even if the suspect was rearrested. See *People v. Inman* (1986) 186 Cal.App.3d 1137, 1144; *People v. Mack* (1980) 27 Cal.3d 145, 154 ; *In re Bonnie H.* (1997) 56 Cal.App.4th 563; *People v. Scaffidi* (1992) 11 Cal.App.4th 145, 152.

(5) See *Dunkins v. Thigpen* (11th Cir. 1988) 854 F.2d 394, 397, fn. 6; *In re Bonnie H.* (1997) 56 Cal.App.4th 563, 584; *People v. Scaffidi* (1992) 11 Cal.App.4th 145, 154.

(6) **NOTE:** The court also stated, however, that it did not believe the detectives' decision to release of Storm was, in fact, pretextual. This was because the detectives were legitimately concerned that Storm's statements on the 19th were inadmissible and, if so, they had no basis for holding him.