

IN THE DISTRICT COURT OF IOWA IN AND FOR DUBUQUE COUNTY

STATE OF IOWA, Plaintiff, vs. EDDIE HICKS, Defendant.	Case No. 01311 FECR 115453 ORDER
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Hearing was held in this matter on May 23, 2016, on the Defendant's Motion to Suppress. The Defendant was personally present and was represented by Attorneys Christopher Welch and Steven Hodge. The State of Iowa was represented by Assistant County Attorney Brigit Barnes.

FINDINGS OF FACT

On the night of June 17, 2015, Dubuque police were dispatched to a residence on or near Arlington Street in Dubuque, Iowa. Officer Paul Avenarius was near the intersection of Fengler and Garfield when he heard the call over his police radio. He arrived at the scene and found the Defendant ("Hicks") with a lot of blood on him. Avenarius understood that Hicks had fallen off a wall. Hicks was acting in a very erratic and excited manner, and his behavior would cycle between frantic and relatively calm/controlled. When he was calm, his statements were more rational and made sense. When he was erratic, his statements were, at times, nonsensical. At one point, Hicks made the comment that "Kahdyesha did this to me."

Rescue personnel were called to the scene. Kyle Burke, a Dubuque firefighter and medical officer, and Ryan Neuhaus, a Dubuque firefighter and paramedic, arrived together. Neuhaus says Hicks was very agitated, rolling around, making noises, and not answering questions. Neuhaus was advised by police officers that Hicks had been pepper-sprayed, which causes people to become agitated. Hicks would relax for short periods of time, but Neuhaus never found him to be coherent. Police eventually handcuffed Hicks to the emergency cot to help secure him. Neuhaus does not recall asking police to do so, but he says it's not unusual for police to help secure difficult patients. Burke likewise does not recall asking police to secure Hicks. Burke confirmed that Hicks was highly agitated and speaking incomprehensibly. Burke did not sedate Hicks in the ambulance.

Officer Avenarius rode along in the ambulance as Hicks was transported to Finley Hospital in Dubuque. Avenarius acknowledges to having handcuffed Hicks to the medical cot, but says he would not have done so without direction from the rescue personnel, which is department policy. Avenarius says Hicks was not under arrest at any time while at the scene or during transport to the hospital. Avenarius confirmed that Dubuque Police Officer Cory Tuegel spoke with Hicks at Finley before Hicks was sedated. Avenarius did not hear the content of the conversation between Tuegel and Hicks.

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Officer Tuegel's first contact with this incident occurred when he arrived at Finley Hospital and found Hicks handcuffed to a hospital bed. Tuegel had heard something about Hicks having fallen off a wall. Tuegel also knew that a female had been found unconscious and stabbed, and that she may have been the victim of a crime. Tuegel says Hicks was agitated at times, and other times appeared to be sleeping. Tuegel asked Hicks what happened. Their conversation allegedly went as follows:

Tuegel: "What happened?"

Hicks: "I loved her too much."

Tuegel: "Your girlfriend? What's her name?"

Hicks: "Kahdyesha Lemon."

Tuegel: "Was she cheating on you?"

Hicks: "Yeah."

Tuegel: "You just wanted her for yourself?"

Hicks: "Yes."

Tuegel: "Where is your girlfriend now?"

Hicks: "She's at home sleeping."

Tuegel: "No, she's actually at home with stab wounds, unconscious."

Hicks: "Yeah, I know."

Tuegel: "So after you did that, you tried stabbing yourself?"

Hicks: "Yeah."

Tuegel: "Then you fell off a ledge?"

Hicks: "Yes, I don't want to talk anymore."

Tuegel then ended his questioning of Hicks. Tuegel did not record any part of his conversation with Hicks. Tuegel says he didn't have any information about Hicks having used marijuana or PCP at the time he questioned Hicks.

Dr. Keith Shaw was the surgeon who treated Hicks at Finley Hospital that night. Hicks was restrained (cuffed to the bed) when Shaw first encountered him. Shaw agreed with the use of the

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restraints due to the agitated state Hicks was in. Shaw understood Hicks to have fallen approximately ten feet. Hicks was agitated. His speech was sometimes clear, sometimes not. His only apparent injury was several lacerations. Shaw ordered Hicks to be sedated. Shaw also ordered a urinalysis, which he would have ordered regardless of whether Hicks was acting oddly. The urinalysis eventually showed a positive result for THC (marijuana) and benzos. At 11:36 that night, Hicks was given medication for intubation. He remained intubated until approximately 9:45 the next morning.

Dubuque Police Officer Brendan Welsh arrived at Finley Hospital shortly after midnight. He first saw Hicks around 12:15 AM, and Hicks was “primarily unconscious.” With the permission of Dr. Shaw, Welsh photographed Hicks’ injuries.

Dubuque Police Officer Nick Schlosser went to Mercy Hospital in Dubuque, where Kahdyesha Lemon was taken. He knew there was a disturbance involving a stabbing. He was still at Mercy at approximately 3:00 AM when Kahdyesha died as a result of her injuries.

Welsh and Schlosser together went to Finley Hospital at approximately 8:00 AM to interview Hicks. They mistakenly believed that Hicks would be coming out of sedation around that time. They sat in Hicks’ room at the head of his bed waiting for him to wake up. Each officer had a tape recorder with him. Hicks was extubated at approximately 9:45 that morning. By 10:10 AM, he was “resting comfortably, drowsy.” Sometime shortly after noon, the officers felt Hicks was ready and able to speak. Welsh read the *Miranda* rights to Hicks at that time. Hicks needed to use the bathroom and wanted to make some calls, so the officers left his room. The nurse eventually came out and said Hicks wanted to talk to the officers. The officers re-entered his room, and Welsh again read the *Miranda* rights to Hicks. According to the officers, Hicks was very polite. He admitted to smoking PCP three days earlier. He also admitted to having stabbed Kahdyesha. He never told the officers he didn’t want to speak with them. He never asked to speak with an attorney.

At one point, Officer Schlosser’s recorder captured Hicks telling the nurse that he didn’t want anyone in his room other than a lawyer or a doctor. Schlosser says he was not in the room when Hicks made that statement, and he was not aware of that statement until after that day when he listened to the whole recording. (Both officers said they left Hicks’ room various times, including when Hicks needed to use the bathroom and when Hicks’ catheter was removed. The nurse confirmed that she would not permit other people to be present in the room when she removes a patient’s catheter. According to State’s Exhibit 1, said statement by Hicks was made immediately after the nurse removed his catheter and at a time when the officers were not in the room.)

Officer Welsh left his tape recorder in Hicks’ hospital room “periodically” as he waited for Hicks to awaken that morning. He says he did not tell the nurse to record Hicks or to ask any questions of Hicks.

Nurse Sarah Davis was working in the ICU that morning at Finley. When she started her shift, she was informed that Hicks was in soft restraints because he was intubated and the restraints would prevent him from pulling on his tubes. She became aware that the police officers were present, and they informed her that they had recording devices. They said she was free to press record on the recorder(s) if Hicks started to wake up and speak. They did not advise Davis about

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anything she should say to Hicks. In fact, Davis didn't even know about the incident involving Hicks and Kahdyesha Lemon (although she was informed that he had, perhaps, stabbed himself).

When Hicks woke up, he made some phone calls, drank some water, and asked some questions of Nurse Davis. She says he was appropriate, polite, cooperative, and emotional. Davis asked Hicks if he had caused his own injuries. Davis admits that she did press record on the officer's tape recorder a few times, and she confirms that the officers were sometimes out of the room.

Hicks was discharged from the hospital at approximately 5:30 PM on June 18, 2015. At that time, he was placed under arrest and taken into custody.

CONCLUSIONS OF LAW

The State has the burden to show by a preponderance of the evidence that an accused's inculpatory statement was voluntary. State v. Nolan, 390 N.W.2d 137, 142 (Iowa App. 1986). In order to establish the voluntariness of a defendant's inculpatory statements, the State must demonstrate from the totality of circumstances that the statements were the product of an essentially free and unconstrained choice, made by the defendant at a time when his will was not overborne nor his capacity for self-determination critically impaired. State v. Cullison, 227 N.W.2d 121, 127 (Iowa 1975). Under this "totality of the circumstances" test, no one factor is determinative. State v. Hodges, 326 N.W.2d 345, 348 (Iowa 1982). Rather, many factors bear on the issue of voluntariness, such as the defendant's age, experience, prior record, level of education, and intelligence; the length of time the defendant is detained and interrogated; whether physical punishment was used; the defendant's ability to understand the questions; the defendant's physical and emotional condition; whether any deceit or improper promises were used in gaining the admissions. Id.

Law enforcement are required to give *Miranda* warnings before conducting a custodial interrogation. To determine whether a person is in custody, we examine the totality of the circumstances surrounding the interrogation. State v. Countryman, 572 N.W.2d 553, 557-58 (Iowa 1997). The custody determination does not depend on the subjective views of the officer or the person being questioned. Stansbury v. California, 511 U.S. 318, 323 (1994). Rather, we view the objective circumstances of the interrogation and ask whether a reasonable person in the defendant's position would have believed himself to be in custody. Countryman, at 558. Historically, we have used various factors which, along with the totality of the circumstances, help to determine whether the person was in custody when questioned. Those factors include (1) the language used to summon the person; (2) the purpose, place, and manner of interrogation; (3) the extent to which the person is confronted with evidence of his guilt; and (4) whether the person is free to leave the place of questioning. State v. Deases, 518 N.W.2d 784, 789 (Iowa 1994).

Law enforcement, when questioning a defendant who is not in custody, do not have an absolute duty to inform that defendant that he is free to leave. State v. Underwood, 845 N.W.2d 719 (Table)(Iowa App. 2014).

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Until a defendant is taken into custody, any attempt to invoke *Miranda* rights is merely an “empty gesture.” State v. Bradshaw, 457 S.E.2d 456, 530 (W.Va. 1995). A police officer may continue to question a suspect in a noncustodial situation, even if the suspect has clearly made a request for counsel, so long as the officer’s persistence in questioning does not render the suspect’s statements involuntary. State v. Fry, 573 N.E.2d 1108 (Ohio App. 1988).

ORDER

In the Defendant’s original *Motion to Suppress Statements* (filed herein on 12-7-15), the Defendant seems to attack (1) the statements made by the Defendant to Officer Tuegel, and (2) the statements made by the Defendant to Officers Welsh and Schlosser. Later, in the *Notice of Additional Grounds on Motion to Suppress* (filed herein on 5-19-16), the Defendant attacks any statements made to Nurse Davis and/or any recordings made by Nurse Davis.

I. Statements made by the Defendant to Officer Tuegel

The Defendant’s first argument with respect to the questioning by Officer Tuegel is that that Defendant was in custody, and thus the *Miranda* warnings were required. In support of that argument, the Defendant cites to the New Mexico case of State v. Ybarra, 804 P.2d 1053 (NM 1990). There, Mr. Ybarra was involved in an altercation with another man, Mr. Garcia. Garcia struck Ybarra in the face, knocking him down. Garcia then kicked Ybarra in the chest while Ybarra was on the ground. After threatening to get even, Ybarra went to the local police station to file a complaint. He was told that a complaint could not be filed until the morning because a judge was not available. Ybarra became angry and said the police would find Garcia in pieces. Ybarra went back to the residence and another scuffle ensued. Garcia kicked Ybarra in the knee. Ybarra then stabbed Garcia. Police arrived shortly thereafter. Garcia was taken to the hospital where he died. Ybarra was taken to the police station. Despite being taken into custody and arrested, Ybarra was not read his *Miranda* rights. The police then took him to the hospital for treatment to his knee. While handcuffed and guarded by a police officer, Ybarra was questioned by a nurse about his injuries. She eventually asked if he was the person who had stabbed Garcia. Ybarra admitted he had, and he said Garcia deserved it. He said he would have shot Garcia if he had had a gun. The New Mexico Supreme Court held that Ybarra was in custody, that he should have been read his *Miranda* rights, and that his statements to the nurse were inadmissible.

The *Ybarra* decision seems to hinge entirely on whether the defendant is “in custody” at the time of the questioning. The State of New Mexico has, since *Ybarra*, held that a hospital patient who was not in custody and who was at the hospital merely for treatment purposes was not entitled to the *Miranda* warnings prior to questioning by police. State v. LaCouture, 213 P.3d 799 (NM Ct of Appeals 2009). Mr. LaCouture was severely injured when his pick-up truck collided with a semi. He was transported to the hospital for treatment. Officer Diaz investigated at the scene, and then went to the hospital to continue his investigation. At the hospital, Diaz recorded his questioning of LaCouture, who could be heard moaning and mumbling from the pain. Nevertheless, his answers were voluntary and coherent, and he admitted to having consumed amphetamine and Lortab earlier that day. Finding that LaCouture was not “in custody” at the time of the questioning, the court held

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that the officer was not required to read the *Miranda* rights, and thus LaCouture's statements were admissible.

Police interrogation of an injured defendant, conducted at the hospital, does not require *Miranda* warnings when the defendant is not in custody. State v. Kyseth, 240 N.W.2d 671 (Iowa 1976); State v. Cain, 400 N.W.2d 582 (Iowa 1987). When Officer Tuegel talked with Hicks, Hicks had not been arrested, nor had he been taken to the police station. The police were still investigating the incident, and it wasn't entirely clear yet what had happened. It was possible that both Hicks and Kahdyesha Lemon had been the victims of a robbery. It was possible that Kahdyesha Lemon had attacked Hicks, and he had defended himself. (Hicks has, in fact, filed a notice of self-defense in this matter.) And it was possible that Hicks had attacked Lemon. Hicks was restrained at the time of the questioning, but he wasn't restrained because he was in the custody of the Dubuque police department or because he was under arrest. He was restrained because of his erratic behavior and the need to control him and keep him safe while his injuries were being assessed and treated. The emergency medical responders supported his restraint, as did the emergency room physician. Based upon the totality of the circumstances, Hicks was not "in custody" at the time he was questioned by Tuegel.

Hicks next argues that he couldn't reliably answer Tuegel's questions, claiming he was "in and out of consciousness" while questioned, "likely high on PCP," and had possibly received sedatives from the medical personnel. It does not appear that Hicks was given any sedatives prior to the questioning by Tuegel. And although multiple witnesses described Hicks' behavior as "cycling" between calm and erratic, none of the medical personnel ever mentioned any loss of consciousness. Regarding his use of PCP, Hicks himself said he had used the substance three days prior. A defendant's voluntary consumption of substances does not automatically render his inculpatory statements inadmissible. State v. Wilson, 264 N.W.2d 614 (Iowa 1978). Rather, the defendant's insobriety is merely one factor to consider in the totality of circumstances surrounding an admission. The determination of voluntariness hinges on whether the defendant's will was overborne. State v. Cullison, 227 N.W.2d 121, 127 (Iowa 1975). Here, it cannot be said that Hicks' will was overborne. The questioning was very short. And when Hicks said he didn't want to talk any further, Tuegel's questioning ended.

For all of the above reasons, and based on the totality of circumstances, the questions by Officer Tuegel and the answers provided by Hicks are admissible.

II. Statements made by the Defendant to Officers Welsh and Schlosser

For the reasons already provided herein, the Defendant was not in custody when he was questioned by Officers Welsh and Schlosser. Nevertheless, Welsh read the *Miranda* rights to Hicks twice before any questioning began. Hicks separately acknowledged the individual rights and said he understood them. The questioning by Officers Welsh and Schlosser was not improper, and Hicks' answers to those questions are admissible.

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III. Statements made by the Defendant to the nurse

For the reasons already provided herein, the Defendant was not in custody when he was being treated at the hospital. The nurse asked Hicks if he caused his own injuries. She was not instructed or directed by any law enforcement personnel to ask that, or any other, question. Although she had been made aware of the belief that Hicks may have caused his own injuries, she wasn't aware that another person had been injured. Her questioning of the Defendant was not improper.

The Defendant's argument that the nurse impermissibly pressed the record button on the police officer's audio recorder is dependent upon the argument that the recording itself was somehow improper. The nurse confirmed that the ICU rooms have since been equipped with continuous cameras and recording equipment. Clearly the State would be permitted to subpoena those recordings as part of a criminal investigation. The recording itself is not an "interrogation."

Any questioning by the nurse was not improper. Any recordings obtained by the nurse having pressed the record button were not improper.

The Defendant's Motion to Suppress is **DENIED**.



State of Iowa Courts

Type: OTHER ORDER

Case Number **Case Title**
FECR115453 EMC STATE OF IOWA VS EDDIE HICKS

So Ordered

A handwritten signature in black ink, appearing to read "Thomas A. Bitter", is written over a horizontal line.

**Thomas A. Bitter, District Court Judge,
First Judicial District of Iowa**