

DISSENTING OPINION BY NAKAMURA, C.J.

I respectfully dissent.

Although the standard of review for whether police conduct constitutes interrogation is not entirely clear, it appears that Hawai'i applies a *de novo* standard of review. State v. Ketchum, 97 Hawai'i 107, 115, 34 P.3d 1006, 1014 (2001) ("The circuit court's determinations that police officers had subjected Ketchum to 'custodial interrogation[]' . . . constitute conclusions of constitutional law, which, consequently, this court reviews *de novo* on appeal, under the 'right/wrong' standard[.]"); State v. Rippe, 119 Hawai'i 15, 22, 193 P.3d 1215, 1222 (App. 2008) (concluding that *de novo* review was applicable to the question of whether a police officer subjected the defendant to interrogation by asking for consent to search).

Under the *de novo* standard, I conclude that Detective Gregory Esteban did not "interrogate" Defendant-Appellee Marwan Timothy Saad Jackson (Jackson) when Detective Esteban responded to Jackson's repeatedly asking, "What am I being charged for?" In my view, Detective Esteban's answer--that "you're not being charged for anything right now but what we're investigating is serious enough that you may spend the rest of your life in prison"--did not constitute interrogation. I therefore would reverse the trial court's suppression of the statements made by Jackson in response to Detective Esteban's answer.

I.

In Rhode Island v. Innis, 446 U.S. 291 (1980), the United States Supreme Court defined "interrogation" for purposes of the protection provided by the Miranda opinion.^{1/} The Court noted that its concern in Miranda "was that the 'interrogation environment' created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination." Id. at 299 (citation omitted). "The police practices that evoked this concern included several that did not

^{1/} Miranda v. Arizona, 384 U.S. 436 (1966).

involve express questioning[,] " such as the use of coached witnesses to identify the defendant as the perpetrator of the alleged or a fictitious crime and other psychological ploys designed to compel the defendant to make incriminating statements. Id.

To ensure that such police practices would fall within Miranda's protections, the Court defined "interrogation" to include not only express questioning, but its functional equivalent.

We conclude that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to 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.

Id. at 300-01 (footnotes omitted).

The Court made clear, however, that not all statements made by a person in police custody should be considered the product of interrogation, and that volunteered statements were fully admissible. Id. at 299-300. The Court quoted the following passage from its Miranda opinion:

Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. *The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. . . .* Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

Id. (internal quotation marks omitted; ellipsis points and emphasis in original). The Court explained that "[i]nterrogation," as conceptualized in the Miranda opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself." Id. at 300.

The Hawai'i Supreme Court has basically adopted the definition of interrogation set forth in Innis. Thus, the Hawai'i Supreme Court has stated that "interrogation," as used

in a *Miranda* context, [means] 'express questioning or its functional equivalent.'" Ketchum, 97 Hawai'i at 119, 34 P.3d at 1018 (some internal quotation marks and citation omitted) (brackets in original). "[W]hether a police officer has subjected a person to 'interrogation' is determined by objectively assessing the 'totality of the circumstances.'" Id. Focusing upon the conduct of the police, the nature of the questions asked, and any other relevant circumstance, "the ultimate question becomes 'whether the police officer should have known that his or her words or actions were reasonably likely to elicit an incriminating response' from the person in custody." Id. (brackets and citation omitted). In addition, "volunteered confessions or admissions, obtained independent of express police questioning or its functional equivalent, are admissible." State v. Ikaika, 67 Haw. 563, 566, 689 P.2d 281, 284 (1985).

II.

Jackson was charged in this case with second degree murder, first degree sexual assault, kidnapping, and violation of a protective order. The alleged victim of these offenses was Sarah Fay, who was alternatively referred to in trial court proceedings as Jackson's "girlfriend" or his "wife."

Jackson was initially arrested on outstanding warrants unrelated to the charges in this case, but was told that he was a suspect in an investigation involving his girlfriend. Detective Tom Poy advised Jackson of his Miranda rights after which Jackson indicated he wanted an attorney and did not wish to make a statement. After Jackson invoked his rights, Detectives Poy and Esteban executed a search warrant for evidence on Jackson's body (body warrant), which consisted of photographing various parts of Jackson's body to document injuries, taking swabs from Jackson's mouth, and obtaining fingernail clippings. The process of executing the body warrant took over one hour.

According to Detective Poy's police report, which was admitted in evidence, and his testimony at the voluntariness hearing, about forty-five minutes into the execution of the body

warrant, Jackson made several spontaneous statements, including that he and his "wife" had gotten into a fight over a fifteen-year-old girl; that he loves his wife; and that he made a "mistake." Jackson was reminded by Detective Esteban that Jackson had chosen not to make a statements and that Jackson should not be talking. Jackson asked if his wife was okay. He then asked, "What am I being charged for?" Detective Esteban replied, "You're not being charged for anything right now but what we're investigating is serious enough that you may spend the rest of your life in prison." Detective Esteban's tone of voice was "matter of fact," and he did not yell at or scold Jackson.

In response, Jackson became upset and stated:

The rest of my life! I'm only 24! I'm a young man! How can I spend the rest of my life in jail just for fighting with my wife? . . . We were just fighting. She hit me two times. The second time that she hit me in the head, I just lost it.

Detective Poy testified that several times before Jackson's response, Detective Esteban had reminded Jackson that he had invoked his rights and should remain silent, and that Jackson was also given the same reminder after his response.

Detective Esteban's police report, which was admitted in evidence, and his voluntariness hearing testimony were basically consistent with the police report and testimony of Detective Poe. According to Detective Esteban, during the course of the execution of the body warrant, Jackson made spontaneous references to a fight he had with his "wife." Jackson also repeatedly asked, "What am I being charged for?" In response to one of Jackson's later inquiries, Detective Esteban informed Jackson that "you're not being charged for anything right now but what we're investigating is serious enough that you may spend the rest of your life in prison." Detective Esteban testified that he used a conversational, matter-of-fact tone in responding to Jackson's question, and that his intent in responding was to answer Jackson's question. Jackson then made the statements at issue in this appeal, and Detective Esteban reminded Jackson that

he had previously invoked his Miranda rights. Detective Esteban testified that he did not ask Jackson any questions during the execution of the body warrant.

III.

The trial court made the following findings of fact (FOF) and conclusions of law (COL) relevant to this appeal:

FINDINGS OF FACT

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19. [Jackson] repeatedly asked "what am I being charged for?".

20. At one point, Det. Esteban answered that [Jackson] was not being charged with anything right now but what they're investigating "is serious enough that you may spend the rest of your life in prison".

21. [Jackson] responded by stating "the rest of my life. I'm only 24! I'm a young man! How can I spend the rest of my life in jail just for fighting with my wife?".

22. [Jackson] continued by stating "we were just fighting. She hit me two times. The second time that she hit me in the head, I just lost it".

23. Det. Esteban reminded [Jackson] of his choice not to make a statement and his request for an attorney.

CONCLUSIONS OF LAW

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9. [Det.] Esteban's statement to [Jackson] as noted in FOF No. 20 was custodial interrogation in that it was reasonably likely to evoke an incriminating response.

10. [Jackson's] statements to Det. Esteban and Det. Poy as noted in FOF Nos. 21 and 22, were the product of custodial interrogation.

IV.

I accept the trial court's FOF Nos. 19-23 as not clearly erroneous. I disagree, however, with the trial court's conclusion that Detective Esteban's response to Jackson's repeatedly asking, "What am I being charged for?" constituted interrogation. Based on an objective assessment of the totality of the circumstances, Detective Esteban's answer in response to Jackson's repeated question was not reasonably likely to elicit an incriminating response.

Detective Esteban did not question Jackson, but simply answered Jackson's repeated demand to know what Jackson was being charged with by stating, "You're not being charged for anything right now but what we're investigating is serious enough that you may spend the rest of your life in prison." Jackson's inquiry can reasonably be viewed as a request for information about his status with the police, and Detective Esteban's answer addressed this subject. Detective Esteban responded to Jackson's repeated inquiry by, in essence, informing Jackson that although there were no existing charges, the police were conducting an investigation that could lead to very serious charges against Jackson. Detective Esteban did not confront Jackson with any evidence, much less any incriminating evidence, gathered by the police during the investigation. He did not use a threatening or coercive tone of voice. Nor is there any indication that Detective Esteban exerted any pressure or used psychological ploys to "subjugate [Jackson] to the will of [Detective Esteban] and thereby undermine the privilege against compulsory self-incrimination." See Innis, 446 U.S. at 299. Indeed, the record indicates that both before and after Jackson made the statements at issue in this appeal, Detective Esteban reminded Jackson that he had previously invoked his Miranda rights and should remain silent. The element of compulsion necessary to transform Detective Esteban's answer into the functional equivalent of interrogation is missing.

The United States Supreme Court has made clear that the purposes of Miranda, to safeguard against coerced confessions, must be kept in mind in evaluating whether police conduct is the functional equivalent of interrogation. In Innis, the Court stated that "[i]nterrogation," as conceptualized in the Miranda opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself." Id. at 300. In Arizona v. Mauro, 481 U.S. 520 (1987), the Court stated:

In deciding whether particular police conduct is interrogation, we must remember the purpose behind our decisions in Miranda and Edwards: preventing government

officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment.

Id. at 529-30. In Mauro, the Court also cited Oregon v. Elstad, 470 U.S. 298, 305 (1985), and included the parenthetical quotation, "Far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable." Id. at 529 (internal quotation marks and brackets omitted).

In both Innis and Mauro, the Court held that police conduct that involved greater compulsion than present in this case did not constitute the functional equivalent of interrogation. In Innis, 446 U.S. at 293-94, the defendant, who was arrested on suspicion of armed robbery, was found standing in the street without a weapon. While en route to the police station, two police officers engaged in conversation between themselves and, in the defendant's presence, discussed the existence of a school for handicapped children in the area and expressed concern that one of the children may find the gun and hurt themselves. Id. at 294-95. In response, the defendant told the officers to turn the car around so he could show them where the gun was located. Id. at 295. The defendant explained that he "wanted to get the gun out of the way because of the kids in the area in the school," and he led the police to the gun. Id. (internal quotation marks omitted). The Innis Court held that the police officers' conversation in the defendant's presence did not constitute interrogation in that the officers' conduct was not reasonably likely to elicit an incriminating response from the defendant. Id. at 303.

In Mauro, 481 U.S. at 521-22, the defendant was arrested and in custody for killing his son. After the defendant invoked his Miranda rights, the police allowed the defendant's wife to speak to him in the presence of a police officer, who tape recorded their conversation. Id. at 522. The Court held that the conduct of the police did not constitute interrogation

and that defendant's statements to his wife were therefore admissible. Id. at 529-30. The Court stated, "[The defendant] was not subjected to compelling influences, psychological ploys, or direct questioning. Thus, his volunteered statements cannot properly be considered the result of police interrogation." Id. at 529.

When evaluated in the context of the purposes of Miranda, Detective Esteban's answer to Jackson's repeated question was not reasonably likely to elicit an incriminating response from Jackson. As in Mauro, Detective Esteban did not subject Jackson to "compelling influences, psychological ploys, or direct questioning." In addition, Jackson's statements were not the product of any compulsion exerted by Detective Esteban, but were the result of Jackson's exercise of his own free will in making volunteered statements.

The conclusion that Detective Esteban's statement to Jackson did not constitute interrogation is supported by decisions of the Hawai'i Supreme Court and other jurisdictions. See e.g., Ikaika, 67 Haw. at 565-68, 698 P.2d at 283-85 (holding that statement to defendant by desk officer at processing room, "What's happening? Must be heavy stuff for two detectives to bring you down here?", in response to which the defendant confessed, did not constitute interrogation); United States v. Moreno-Flores, 33 F.3d 1164, 1168-69 (9th Cir. 1994) (holding that statement by federal agent to the defendant that agents had seized 600 pounds of cocaine, that the defendant was in serious trouble, and that the defendant was facing a lengthy prison sentence did not constitute interrogation); United States v. Morton, 391 F.3d 274, 275-76 (D.C. Cir. 2004) (concluding that officer's statement to the defendant that she had been arrested for a serious charge and might not be getting out as quickly as she thought did not constitute interrogation); Wright v. State, 916 N.E.2d 269, 274, 278 (Ind. Ct. App. 2009) (holding that the defendant was not subject to interrogation when the police informed him that he was under arrest for triple homicide, in

that "[m]erely informing a suspect of the charges against him is not unduly influential, nor does it overcome his will"); United States v. Simmons, 526 F. Supp. 2d 557, 564 (E.D.N.C. 2007) (concluding that officer's matter-of-fact explanation of the nature of the charges facing the defendant did not constitute interrogation); Oliver v. State, 554 S.E.2d 474, 476 (Ga. 2001) (concluding that police officer's statement, in response to the defendant's question about the charges the defendant faced, that the defendant was facing armed robbery and murder charges and that witnesses had seen the defendant demand money and shoot the victim did not constitute interrogation); United States v. Hendrix, 509 F.3d 362, 374 (7th Cir. 2007) (concluding that police officer's statement, in response to defendant's repeated demands for more information about the charges against him, that there would be more charges against the defendant due to the items found at his apartment did not constitute interrogation).

V.

Based on the foregoing, I would reverse the trial court's conclusion that Jackson's statements at issue in this appeal were the product of interrogation by Detective Esteban, and I would reverse the trial court's decision to suppress those statements by Jackson. I therefore respectfully dissent.

Craig H. Nakamura