

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

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UNITED STATES OF AMERICA,

v.

DYLAN M. WARD,

JOSEPH R. PRICE,

and

VICTOR J. ZABORSKY,

Defendants.

Criminal Nos: 2008-CF1-26996
2008-CF1-27068
2008-CF1-26997

Judge Lynn Leibovitz

**DEFENDANT VICTOR J. ZABORSKY'S MOTION AND INCORPORATED
MEMORANDUM TO SUPPRESS INVOLUNTARY, CUSTODIAL STATEMENTS**

Defendant Victor J. Zaborsky ("Zaborsky"), by and through counsel, respectfully moves for an order suppressing his statements to the police on the night of August 2, 2006 and the early morning of August 3, 2006, on the grounds that his statements were obtained in violation of Zaborsky's Fourth, Fifth and Sixth Amendment rights. Members of the Metropolitan Police Department ("MPD") obtained statements from Zaborsky through custodial interrogation, without advising him of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and in defiance of Zaborsky's request for counsel. Those statements must be suppressed.

I. FACTUAL BACKGROUND.

Zaborsky and co-Defendant Joseph Price are the former owners and residents of 1509 Swann Street, N.W., Washington, D.C., where they lived with their longtime friends and tenants, co-Defendant Dylan Ward and Sarah Morgan.

Robert Wone ("Wone"), Price's friend of more than fifteen years, made arrangements to spend the night of August 2, 2006, at the Swann Street home. Wone, who served as General Counsel for Radio Free Asia, planned to visit with the radio station's night crew and asked to

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spend the night at Price and Zaborsky's home, rather than commute to his home in Oakton, Virginia. Wone arrived at the Swann Street home at approximately 10:30 p.m.

At 11:49 p.m. that evening, Zaborsky called 9-1-1, requested the police and an ambulance, and reported that an intruder had stabbed Wone. Paramedics arrived at the Swann Street home approximately five minutes and forty seconds into the 9-1-1 call. MPD officers arrived on the scene at about the same time. Zaborsky opened the door for the EMS responders and directed them to the room where Wone had been found.

Shortly after MPD's arrival, one of the MPD officers directed Zaborsky, Price, and Ward to sit down in the living room. The same officer directed a uniformed officer to watch the three men. Price suggested to Zaborsky and Ward that they should all get dressed and go to the hospital where Wone was being transported. The same plain-clothed officer instructed the men that they could not go to the hospital, that they were to remain seated in the living room, and that they were not to move. Eventually, after more than a dozen officers had entered the home, an officer directed a uniformed officer to escort Zaborsky, Price, and Ward upstairs, one at a time, to get dressed. Each of the three men was taken upstairs and watched while they dressed, and then taken back downstairs. Zaborsky, Price, and Ward were then told they were being taken to the police station for questioning.

None of the MPD officers asked Zaborsky whether he wanted to go to the police station. Nor was Zaborsky informed of his rights under *Miranda*, including that he had a right not to speak with the MPD and a right to speak with counsel. Instead, Zaborsky was instructed by an MPD officer to get into a patrol car.¹ Once in the car, Zaborsky was questioned by an MPD officer, who again failed to advise Zaborsky of his *Miranda* rights.

¹ Zaborsky, Price, and Ward were all transported in separate police cars to the police station.

Zaborsky arrived at the MPD's Violent Crimes Branch in Anacostia sometime between approximately 12:30 and 1:00 a.m. on August 3, 2006, and was escorted to an interrogation room, where he was left alone with the door locked. The room was small and furnished with three chairs: two office chairs and one metal chair. A length of chain was bolted to the floor. Eventually, two MPD detectives entered the room, informed Zaborsky that Wone had died, and immediately began to interrogate him.² The detectives did not read Zaborsky his *Miranda* rights or indicate at any time that Zaborsky had a right not to make a statement, that anything he said could be used against him, that he had a right to counsel, or that counsel would be appointed for him if he could not afford it.

After some period of time, another detective informed Zaborsky that he wished to record a videotaped statement. This statement was the first interrogation of Zaborsky that the MPD recorded. The detectives, who again failed to advise Zaborsky of his *Miranda* rights, openly challenged Zaborsky's account of what happened. *See* Statement No. 1 of Victor Zaborsky ("POLICE OFFICER: But, I mean, you see why it is kind of hard for us to believe right off the cuff, right?"); *id.* ("POLICE OFFICER: I mean, you got four guys in a house. One guy ends up dead. The other three, you know, are saying, 'I didn't do it and the other persons didn't do it.' But then there is -- we have no evidence of any type of forced entry or anything like that. No motive.").

Zaborsky's first taped interview officially ended at 4:30 a.m. MPD then continued to interrogate Zaborsky, again without recording the interrogation, until approximately 6:30 a.m.

² Zaborsky's complete interrogation was not recorded. Instead, the MPD interrogated Zaborsky for a considerable period of time before beginning to videotape the interrogation. At one point during Zaborsky's videotaped interrogation, the interrogating officer acknowledged that he had spoken with Zaborsky prior to the videotaped statement. Statement No. 1 of Victor Zaborsky ("Sorry it took me awhile to come back in.").

After repeated questioning by MPD officers, Zaborsky asked to speak to an attorney. Rather than ending the interview, the interrogating officers continued to question Zaborsky for several minutes before stopping.

After the detectives interrogating Zaborsky permitted him to leave, Zaborsky found Price waiting outside the police station. Zaborsky and Price then waited for Ward's interrogation to end. Later that morning, Detective Brian Waid approached Zaborsky and Price, stated that he was the detective in charge of the case, and told them that he personally needed to question them about Wone's murder. Detective Waid then escorted Zaborsky and Price into separate interrogation rooms. Detective Waid did not advise Zaborsky of his *Miranda* rights, even though he acknowledged that he was aware that Zaborsky had requested to speak with an attorney. Detective Waid interrogated Zaborsky for approximately 90 minutes, on video, without advising him at any time of his *Miranda* rights.

II. ARGUMENT.

A. ZABORSKY'S STATEMENTS TO POLICE WERE OBTAINED IN VIOLATION OF *MIRANDA* AND MUST BE SUPPRESSED.

Among the oldest and most sacrosanct rights of every American citizen are those "basic rights that are enshrined in our Constitution – that 'No person...shall be compelled in any criminal case to be a witness against himself,' and that 'the accused shall...have the Assistance of Counsel.'" *Miranda v. Arizona*, 384 U.S. 436, 442 (1966). In *Miranda*, the Supreme Court held that, in order "to use statements obtained during custodial interrogation of the accused, the State must warn the accused prior to such questioning of his right to remain silent and of his right to have counsel, retained or appointed, present during interrogation." *Fare v. Michael C.*, 442 U.S. 707, 717 (1979) (citing *Miranda*, 384 U.S. at 473). "[S]pecifically, the Court held that 'the prosecution may not use statements, whether exculpatory or inculpatory, stemming from

custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.” *Rhode Island v. Innis*, 446 U.S. 291, 297 (1980) (citing *Miranda*, 384 U.S. at 444). Moreover, warnings of an individual’s rights are the only effective procedural safeguard: they are “an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.” *Miranda*, 384 U.S. at 471-72. Absent such safeguards, statements made during a custodial interrogation offend both the Fifth Amendment’s guarantee that no person “shall be compelled in any criminal case to be a witness against himself,” and the Sixth Amendment’s guarantee to assistance of counsel. *See id.* at 461-62, 472; U.S. CONST. amends. V & VI. Here, the defendant was subjected to custodial interrogation but was never advised of his *Miranda* rights. The statements he made to the police are therefore inadmissible and must be suppressed.

i. Zaborsky was in Custody for Purposes of *Miranda*.

The procedural safeguards mandated by *Miranda* are triggered “when the individual is first subjected to police interrogation while in custody *at the station or otherwise deprived of his freedom of action in any significant way.*” *Miranda*, 384 U.S. at 477 (emphasis added). The Supreme Court has articulated a two-part custody test: first, the court must consider the circumstances surrounding the interrogation; second, in light of those circumstances, the court must consider whether “a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.” *Yarborough v. Alvarado*, 541 U.S. 652, 663 (2004) (citing *Thompson v. Keohane*, 516 U.S. 99, 112 (1995)). “The test is whether under all of the circumstances a ‘reasonable man’ innocent of any crime would have thought he was not free to

leave.” *Griffin v. United States*, 878 A.2d 1195, 1198 (D.C. 2005) (quoting *United States v. Gayden*, 492 A.2d 868, 872 (D.C. 1985)).

The courts have identified various factors which affect an inquiry into the circumstances of an interrogation, including police domination of the scene; the location of the interrogation; separation of the subject from others; and knowledge by the subject that he is a primary target of the investigation. Moreover, the Supreme Court has identified station house interrogations as “the standard against which all potentially custodial situations are to be measured... Police questioning of a suspect in . . . any police facility . . . raises significant concerns for which *Miranda* warnings are an appropriate prophylactic against compelled self-incrimination.” *United States v. Turner*, 761 A.2d 845, 852 (D.C. 2000).

All of the circumstances here point to the fact that Zaborsky was in custody – both while in his home and while being interrogated at the police station. The exercise of physical control by police over a suspect by ordering him to dress, telling him where to sit, and escorting him on any occasion he is permitted to move, weighs heavily towards a finding of custody. *See United States v. Mittel-Carey*, 493 F.3d 36, 40 (1st Cir. 2007); *see also United States v. Longbehn*, 850 F.2d 450, 452 (8th Cir. 1988) (finding custody where the defendant was transported under supervision in a police vehicle, and was continuously chaperoned while police searched his home). Moreover, removal of a suspect from the presence of family, friends, or colleagues during the interrogation is a strong indicator of police domination. *See Miranda*, 384 U.S. at 450-51.

Here, Zaborsky was in a police-dominated, custodial atmosphere from the moment the MPD arrived on the scene at 1509 Swann Street. Zaborsky was “deprived of his freedom of action in [] significant way[s].” *Miranda*, 384 U.S. at 477. He was not permitted, as he wished

and requested, to go with Wone and his housemates to the hospital; instead, he was told to sit in a specific area in his home and not to move. He was then escorted upstairs individually by a uniformed MPD officer, who watched him as he dressed. He was subsequently taken from his home, separated from his partner and his roommate, and placed in a police car³ for transport to the police station.

Zaborsky was unquestionably in custody once he arrived at the police station. Under *Miranda* itself, the “protection which must be given to the privilege against self-incrimination [attaches] when the individual is first subjected to police interrogation *while in custody at the station* or otherwise deprived of his freedom of action in any significant way.” *Miranda*, 384 U.S. at 477. Zaborsky was locked in a room at the police station, where he was interrogated by officers and detectives for hours. He was aware that he was a primary target of the police investigation, and he was not permitted to see Ward or Price until after he was interrogated. Under these circumstances, no reasonable person would have thought he was free to leave. Zaborsky was therefore in custody for purposes of *Miranda*.

ii. Zaborsky was Interrogated Within the Meaning of *Miranda*.

The Supreme Court explained in *Innis* that “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. The latter portion of this definition focuses primarily upon the perceptions of the subject, rather than the intent of the police.” *Innis*, 446 U.S. at 301. “In determining whether a query on the part of the investigating officer rises to

³ As the Supreme Court made clear in *Innis*, a defendant can be “in custody” for *Miranda* purposes in a variety of circumstances, including when placed in a police vehicle for transport to a police station. *See Innis*, 446 U.S. at 298 (“It is also uncontested that the respondent was ‘in custody’ while being transported to the police station.”).

the level of interrogation, the focus is not merely on the language employed by the officer, but the factual context in which it was spoken.” *In re I.J.*, 906 A.2d 249, 264 (D.C. 2005) (citing *In re E.G.*, 482 A.2d 1243, 1247-48 (D.C. 1984)).

Here, there is no question that Zaborsky was interrogated by the MPD. Zaborsky was asked whether he killed Wone. He was also asked whether either of his housemates had killed Wone, and was accused of fabricating the claim that there was an intruder in the home. The questioning went on through the night, for almost eight hours in total. This situation is precisely that against which the procedural safeguards of *Miranda* were designed to protect.

Notwithstanding the extreme duration of the custodial interrogation to which Zaborsky was subjected, he was never advised of his *Miranda* rights. These warnings are “an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead.” *Miranda*, 384 U.S. at 471-72; *see also Longbehn*, 850 F.2d at 453 (“The requirement of *Miranda* warnings is not contingent either upon a defendant’s actual or presumed knowledge of his rights or on his status but, rather, must be honored in *all* instances of custodial interrogation.”). Because the detectives chose to interrogate Zaborsky without advising him of his *Miranda* rights at any time, all of his statements to the MPD were procured in violation of the Fifth Amendment and must be suppressed.

B. ZABORSKY’S STATEMENTS TO POLICE WERE OBTAINED IN VIOLATION OF EDWARDS AND MUST BE SUPPRESSED.

Zaborsky’s statement to Detective Waid must also be suppressed because it was obtained through interrogation initiated by the police after Zaborsky asked to speak with an attorney. Zaborsky’s second interview concluded when he stated that he wanted to leave and he wanted a lawyer. Approximately two and a half hours later, Detective Waid arrived at the station and told Zaborsky that he needed to personally question him. That police-initiated interrogation,

following an unambiguous request to speak with counsel, violated the rule set forth in *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981); see *Tindle v. United States*, 778 A.2d 1077, 1083 (D.C. 2001) (“[W]hen counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney.”) (quoting *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990)).

Although Zaborsky’s final interview was initiated at the request of Detective Waid, rather than at Zaborsky’s initiative, Detective Waid attempted to recharacterize the interview as voluntary. Detective Waid stated that although another police officer had informed him of Zaborsky’s request to speak with counsel, he “just wanted to make it clear that, you know, you guys came back, I guess because I came back and spoke to you that, you know ... I just wanted to make sure ... that you’re here voluntarily.” See Statement No. 2 of Victor Zaborsky. That statement is insufficient to avoid the rule of *Edwards*. Here, as in *Tindle*, Zaborsky “indicated that he did not want to make a statement without the presence of counsel,” and “[t]he next words came ‘at the instance of the authorities.’” *Tindle*, 778 A.2d at 1084 (quoting *Edwards*, 451 U.S. at 487). Because Detective Waid, by his own admission, was fully aware that Zaborsky had unambiguously requested to speak with an attorney, his decision to “[come] back and [speak]” to Zaborsky violated *Edwards*. Zaborsky’s subsequent statements must therefore be suppressed.

C. ZABORSKY’S STATEMENTS TO THE POLICE WERE OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT AND MUST BE SUPPRESSED.

Zaborsky’s statements to the police must also be suppressed because they were obtained after Zaborsky was unlawfully seized in violation of the Fourth Amendment. The MPD officers who seized Zaborsky in his Swann Street home did not have probable cause to do so. Any statements subsequent to the seizure must therefore be suppressed.

Here, for all of the reasons discussed in Section II.A above, Zaborsky was seized in violation of the Fourth Amendment from the moment MPD officers ordered him to sit and not to move. He was physically constrained by the MPD at his home, not permitted to dress himself without a police escort, separated from his roommates, escorted by the MPD to the police station, and locked in an interrogation room at the police station for hours. Any reasonable person in Zaborsky's position would have believed he was not free to leave; and, in fact, Zaborsky submitted to the MPD's show of authority and cooperated with the orders he was given. That is all that is required to establish a seizure for Fourth Amendment purposes. *See, e.g., Brendlin v. California*, 551 U.S. 249, 254 (2007); *California v. Hodari D.*, 499 U.S. 621, 624-27 (1991).

Because MPD did not obtain a warrant before seizing Zaborsky, the burden is on the government to show that the MPD officers who responded to Zaborsky's 9-1-1 call had probable cause to arrest him. It cannot meet that burden here. "Probable cause exists where 'the facts and circumstances within the [police officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man [or woman] of reasonable caution in the belief that an offense has been or is being committed.'" *Spinner v. United States*, 618 A.2d 176, 178 (D.C. 1992) (internal citation omitted). "The Supreme Court has stressed the importance of 'individualized suspicion' as an essential prerequisite to a valid search or seizure under the Fourth Amendment." *Carr v. United States*, 758 A.2d 944, 947 (D.C. 2000) (citing *Chandler v. Miller*, 520 U.S. 305, 308 (1997) (emphasis added)). Here, the government cannot point to any specific, "individualized" reason why an objective, reasonable officer would have suspected that Zaborsky (as opposed to an intruder or the other Defendants) killed Wone, or that Zaborsky had committed any other offense. To the contrary, at the time MPD officers seized Zaborsky, the only facts known to them were that Zaborsky had called 9-1-

I to report that an intruder had assaulted Wone in Zaborsky's home, and that Wone had been murdered. Those facts were insufficient to give an objective, reasonable officer an individualized basis to suspect Zaborsky had committed an offense. *Cf. Funchess v. United States*, 677 A.2d 1019, 1021 (D.C. 1996) (“[C]ompanionship with an offender at the very time of the latter’s criminal conduct is not inevitably sufficient to establish probable cause for arrest of the companion” (citing, *inter alia*, *United States v. Di Re*, 332 U.S. 581 (1948))).

Because no reasonable officer would have had an individualized suspicion that Zaborsky had committed an offense at the time he was arrested, all of Zaborsky’s statements should be suppressed pursuant to the Fourth Amendment. *Wong Sun v. United States*, 371 U.S. 471, 485-86 (1963).

III. CONCLUSION

For the foregoing reasons, defendant Victor J. Zaborsky respectfully moves the Court to suppress all statements made to the police because they occurred in violation of the Fourth, Fifth, and Sixth Amendments.

Respectfully submitted,



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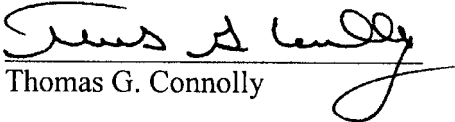
Counsel for Defendant Victor J. Zaborsky

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant Victor J. Zaborsky's Motion And Incorporated Memorandum To Suppress Involuntary, Custodial Statements was served by first-class mail, postage prepaid, this 26th day of February, 2010, upon:

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