Tenth Circuit

Legal Advisor

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"Miranda" is the aim of two of Mike Cusick's three pieces in June Legal Advisor -- all three are concerned with getting as much information as can be found to the prosecutor.

Investigative Procedures

By Mike Cusick

Undercover questioning of an in-custody defendant does not violate Miranda

On June 4, 1990, the United States Supreme Court ruled that an undercover police officer posing as a fellow inmate is not required to give Miranda warnings to an incarcerated suspect before asking questions that may result in incriminating statements.

The decision came in Illinois v. Perkins, 496 U.S. 292, 110 S. Ct. 2394, 110L. Ed. 2d 243 (1990).

A fellow inmate of the defendant Perkins notified law enforcement that Perkins had told him about a murder that Perkins committed.

An undercover officer was placed in the cell with Perkins.

Perkins described in detail how he committed the murder.

Perkins was charged with murder.

His attorney moved to suppress the statement, claiming that the undercover officer should have given Perkins his Miranda rights before questioning, since Perkins was in custody.

The trial court suppressed the confession.

The Illinois appellate courts agreed with the trial court.

In reversing the decisions of the Illinois courts, the Supreme Court reviewed its holding in Miranda.

Miranda prohibits admitting statements given by suspects during *custodial interrogation* without the suspect being advised of his Fifth Amendment privilege against self-incrimination.

Custodial interrogation means questioning started by law

enforcement after a person has been taken into custody.

The concern during custodial interrogation is that the suspect is in a police dominated atmosphere, unable to communicate with outsiders.

That creates an atmosphere which reduces an individual's will to resist and compels him to make statements which he ordinarily might not make.

Statements obtained in violation of Miranda

Officers sometimes do not include in their reports statemetns made by a defendant which they believe were obtained in violation of the defendant's Miranda rights.

It is not up to the officer to determine the admissibility of a statement.

That decision will be made by the court.

All statements made by a defendant should be included in your reports.

It is up to the defendant's attorney to challenge the admissibility of these statements.

Even if the court rules that a statement was obtained in violation of Miranda, we still may be able to use the statement.

Voluntary statements obtained in violation of Miranda may be used to impeach the defendant's testimony at trial.

If the defendant testifies differently at trial than what he told you originally, we may be able to use the suppressed statement to show that the defendant is lying.

If you never put the statement in your report, we will never be able to use it.

In Perkins, the Court found that the essential ingredients of custodial interrogation did not occur.

Since the suspect does not know he is talking to a police officer, the police-dominated atmosphere does not exist.

The Court pointed out that this decision also was not in conflict with prior cases holding that a defendant cannot be questioned about a case once he has been appointed an attorney on this case.

Prior cases have held that an undercover agent may not be used to ask a suspefct questions about a case where he is already represented by an attorney.

In this case, Perkins was being held on other charges and had not been charged with murder.

If Perkins had already been charged with murder, the questioning would have violated his Sixth Amendment right to counsel.

Spouse privilege

There is a spousal privilege which exists that prevents one spouse from testifying about confidential communications made by the other spouse during their marriage.

There are some technical rules with regard to the spousal privilege which are too complicated to go into here in detail. I have occasionally had an officer tell me that he did not question a spouse or he did not include what a spouse said because he thought it could not be used in court.

Just as in Miranda violations, officers should always put in their reports any statements made by one spouse about statements made by the other spouse.

Leave it to the courts later on to determine whether any of the statements made are protected by the spousal privilege.

FROM THE COURTS

Edited by Chip Thullbery

Throwing away drugs is not tampering with evidence

In this Polk County case, the defendant was charged with purchase of cocaine and tampering with evidence.

The evidence at his trial showed that while sitting in his car, the defendant purchased a single rock of cocaine from an undercover police officer.

He was then surrounded by uniformed officers.

At that point he threw the bag of cocaine out of the window of the car where it was retrieved by one of the officers.

The defendant was convicted as charged, but on appeal, the Second District reversed, holding that the defendant's act of throwing the cocaine out of the car did not amount to tampering.

Boice v. State, 15 FLW D1311 (Fla. 2d DCA May 11, 1990).

Portions of witness tampering statute unconstitutional

The defendant was charged with witness tampering by knowingly using or attempting to use intimidation or physical force with intent to influence testimony in an official proceeding in violation of section 914.22(1), Florida Statutes.

He filed a motion to dismiss, asserting that the statute was unconstitutional.

The trial court granted the motion, finding that section 914.22(1)(a) and (3) were unconstitutional.

(See "tampering" next page)

"tampering"

On appeal, the Second District affirmed, holding that section 914.22(1)(a) is unconstitutionally vague and that section 914.22(3) unconstitutionally relieves the State of the burden to prove unlawful activity and intent beyond a reasonable doubt.

State v. Chapman, 15 FLW D1225 (Fla. 2d DCA May 4, 1990).

Abandoned property properly seized

The defendant was charged with carrying a concealed weapon and filed a motion to suppress.

The evidence on the motion showed that an officer saw the defendant and another man satanding in an area of high narcotics activity and passing an object between them.

The officer started to walk towards the defendant and told him to stop.

The defendant fled, dropping something in an alley.

The officer caught the defendant who volunteered that he became nervous and ran because he knew he had a stolen gun.

A revolver was recovered in the alley.

The trial court granted the motion to suppress, but on appeal, the Third District reversed, holding that although the officer did not have a founded suspicion of criminal activity which would justify the stop of the defendant, the seizure of the firearm was valid because the defendant had abandoned it.

State v. Perez, 15 FLW D1355 (Fla. 3d DCA May 15, 1990).

Officer's approach to defendant was proper citizen encounter

The defendant was charged with possession of cocaine and filed a motion to suppress.

The evidence on the motion showed that an officer who was patrolling an apartment complex known for drug activity began to aproach the defendant.

When the defendant saw the officer, he ran in the opposite direction which, unhappily, was towards another officer.

Upon seeing the second officer, the defendant stopped and stood with his fist tightly closed.

The second officer approached him and asked what he had in his hand.

The defendant responded that it was cocaine.

The trial court granted the motion to suppress, finding that the officers had detained the defendant and did not have the requisite founded suspicion necessary to justify the detention.

On appeal, the Third District reversed, holding that the questioning of the defendant by the officer was not a detention, but was a citizen encounter which did not require a founded suspicion of criminal activity.

State v. Scruggs, 15 FLW D1358 (Fla. 3d DCA May 15, 1990).

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