STATE OF MISSOURI)
) SS.
COUNTY OF ST. LOUIS)

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS

STATE OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Cause No. 08SL-CR08431-01
	)	
OUNDRE T. AKINS,	)	Division No. 18
	)	
Defendant.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER, JUDGMENT, AND DECREE OF COURT ON DEFENDANT'S MOTION TO SUPPRESS STATEMENTS

This matter comes before the Court on Motion by defendant to suppress statements given to law enforcement which may be introduced at trial. Defendant appears by his attorneys, Assistant Public Defenders Donald Catlett and Janice Zembles. State appears by Assistant Prosecuting Attorney, Dean P. Waldemer. Upon the Court's own motion, the Court takes judicial notice of its file and transcripts in this matter. The cause was taken as submitted after an evidentiary hearing was conducted on July 22, 2011.

Any finding of fact herein equally applicable as a conclusion of law is adopted as such; and any conclusion of law equally applicable as a finding of fact is adopted as such.

APPLICABLE LAW

1. In a motion to suppress hearing, the State has the burden of showing, by a preponderance of the evidence that a defendant knowingly, intelligently, and voluntarily waived his Miranda rights. State v. Dixon, 332 S.W. 2d 214, 217 (Mo. App. 2010); State v. Bucklew, 973 S.W. 2d 83, 87 (Mo. banc 1998).

2. Under the 5th and 6th amendments to the United States Constitution, an accused has the right to remain silent and the right to have an attorney present during custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); State v. Mateo, 335 S.W. 3d 529, 535 (Mo. App. 2011). Once an accused has invoked either of those rights, police interrogation must stop until counsel has been made available or the accused himself initiates a dialogue with police. Edwards v. Arizona, 451 U.S. 477, 484-85, 1010 S. Ct. 1880, 1885, 68 L. Ed. 2d 378 (1981); Mateo, at 535.

3. However, a person in custody must clearly, unambiguously and unequivocally invoke his right to counsel before interrogation must cease. Davis v. United States, 512 U.S. 452, 458-62, 114 S. Ct. 2350, 2354-2357, 129 L. Ed. 2d 362 (1994). Not every mention of a lawyer will invoke the right to presence of counsel during questioning. An ambiguous or equivocal statement regarding counsel does not require officers to halt the interrogation or even to seek clarification. Davis, 512 U.S. at 461-62, 114 S. Ct. at 2356. "If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him. Id. at pp. 461-462.

4. Whether the particular mention of an attorney constitutes a clear

invocation of the right to counsel depends on the statement itself and the totality of the surrounding circumstances. The question of whether a defendant has invoked his right to counsel is objective. The test is "whether a reasonable police officer, under similar circumstances, would have understood the statement to be a request for an attorney" not merely that he *might* be invoking the right to counsel. Davis, 512 U.S. at 459, 114 S. Ct. at 2355; Mateo at 536. "The suspect' must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." Id.

5. A defendant does not unambiguously invoke his or her right to counsel when he or she makes that request contingent on an event that has not occurred. People v. Martinez, 47 Cal. 4th 911, 952; 224 P.3d 877, 907; 105 Cal. Rptr. 3d 131, 166 (Cal. 2010). Here the California Supreme Court found defendant's statement in a death penalty case, "I think I should talk to a lawyer before I decide to take a polygraph," was conditional. Since no polygraph had been or was administered, defendant did not need the assistance of counsel and the detectives under Davis were not obligated to inquire further at that point. Id. A request for a lawyer which is conditional is ambiguous and does not invoke the 5th Amendment's right to remain silent nor the 6th Amendment right to counsel. In People v. Gonzalez, 34 Cal. 4th 1111, 23 Cal. Rptr. 3d 295, 104 P.3d 98, 106 (Cal. 2005), the California Supreme Court held that a request for a lawyer conditioned on being charged was not an unambiguous request sufficient to invoke the defendant's 5th and 6th Amendment rights under Davis.[1] Conditional requests for counsel

[1]When asked if he would submit to a polygraph test, Gonzalez replied, "if for anything you guys are going to charge me I want to talk to a public defender too, for any little thing." Gonzalez, 104 P.3d. at 102. The court found that the conditional nature of the statement rendered it, at best, ambiguous and equivocal because a reasonable police

are ambiguous and do not require cessation of questioning. Id., Arizona v. Newell, 212 Ariz. 389, 132 P.3d 833, 834 (Ariz. 2006)[2] ; Louisiana v. Genter, 872 So. 2d 552, 571 (La. Ct. App. 2004)[3].

6. A defendant's comment about getting a lawyer and telling officers to "go for it" was not an unambiguous invocation of his rights, but was a challenge to his questioners. People v. Davis, 46 Cal. 4th 539, 587, 208 P. 3d 78, 118, 94 Cal. Rptr. 3d 322, 369-370 (Cal. 2009). The California Supreme Court upheld the conclusion that the defendant was employing his own "technique" by standing up and issuing "a challenge" to his questioners: "[I]f you can prove it, go for it." Id. at 588, 119. Similarly, a defendant's statement "I want to see my attorney cause you're all bullshitting now" was found to be an expression of frustration and game playing, and was not an unambiguous invocation of the right to counsel. People v. Williams, 49 Cal. 4th 405, 432-433; 233 P.3d 1000, 1022; 111 Cal. Rptr. 3d 589, 615 (Cal. 2010). The Court concluded in each case that the comments were not an unequivocal invocation but merely a "challenge," and that "defendant was using 'as much technique as the people who were questioning him.'" Id.

FINDINGS OF FACT

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officer in these circumstances would not necessarily have known whether the condition would be fulfilled since, as these officers explained, the decision to charge is not made by police. Confronted with this statement, a reasonable police officer would have understood on that "the suspect *might* be invoking the right to counsel," which is insufficient under Davis to require questioning to end.

[2] The Supreme Court of Arizona determined the statement, "If I'm going to jail, I want to talk to my lawyer," was ambiguous and equivocal.

[3]The Louisiana Court of Appeals held that the statement, "I already told you everything and if this is gonna continue I'll just wait for a lawyer" was not an unequivocal invocation of the suspect's right to counsel.

1. At the hearing on the motion to suppress the State called one witness, Detective John Bradley and introduced three (3) exhibits: Exhibit #1, a search warrant issued in St. Clair County, IL, on the morning of defendant's arrest; Exhibit # 2, an unedited DVD of defendant's interview on November 13, 2008; and Exhibit #3, a transcript prepared of the interview. The Court has reviewed the testimony and all exhibits and the transcript of the hearing. Based upon the evidence produced at the hearing on the motion to suppress, as well as the information provided in State's motion exhibit #1, probable cause existed for his lawful arrest on November 13, 2008.

2. On November 13, 2008, after being arrested at his home in Cahokia, IL, the defendant was interviewed by St. Louis County Police Detective John Bradley and Erich Von Almen at the Illinois State Police Headquarters in Collinsville, IL. The interview began at approximately 7:50 a.m. and lasted until approximately 9:15 a.m. for a total of eighty-five (85) minutes. The entire interview was recorded on DVD and the Court has reviewed the DVD and transcript.

3. Throughout the interview, other than one occasion when he stood to demonstrate, the defendant was seated at a metal desk with his left side to the video camera facing the detectives. Defendant wore no handcuffs during the interview and was not restrained.

4. At the start of the interview, the defendant was asked if he knew his Miranda rights and indicated yes. Detective Bradley advised defendant of his

constitutional rights by reading to him from a single page written form. Defendant was seated next to Detective Bradley as he read from the form. Those rights read aloud to him from the form provided the following advisements: That defendant did not have to make a statement at this time and had the right to remain silent; defendant was informed that anything he said can and would be used against him in a court of law; that he had the right to consult with an attorney and have an attorney present; and that an attorney would be appointed for him in the event he could not afford one.

5. At the end of reading defendant his rights Detective Bradley asked if he understood his rights and defendant responded "yes". Defendant then inquired if defendant understood "every line" and defendant indicated yes. Detective Bradley informed him he wanted to talk to him about something that happened over in St. Louis County, "okay". Defendant indicated in the affirmative. During the time in which the form was read aloud, the defendant was not threatened or intimidated in any way by either of the detectives. Defendant appeared on the video to be calm at the time his rights were given to him and did not appear to be confused regarding what was transpiring. During the time he was given his rights, Detective Bradley who read from the form did not raise his voice or use a firm tone. Defendant did not appear to be under any effects of alcohol or narcotics at the time his rights were given to him. During the time in which the form was read aloud to Defendant he appeared to understand what was being read to him and provided oral and coherent responses to the questions at the times when the questions were posed and an answer was expected. During this time, defendant did not appear to have any mental or physical disability, nor did not appear to have any physical

pain or discomfort. Defendant did not demonstrate any reluctance to speak with the detectives nor did he ask the officers not to speak with him.

6. At no point during the interview did either detective raise their voices to defendant nor did either officer use profane language with defendant. Nor was the tone of questioning as evidenced in the recording harsh or accusatory as Detective Bradley repeatedly told defendant he only wanted the truth. The recording reveals that the defendant, an apparently mature man, was throughout the interview perfectly capable of calculating his own self-interest in choosing whether to disclose or withhold information. During the course of the interview, defendant's demeanor included points where he was calm, quiet, loud, assertive and challenging. There were moments in the interview where defendant mumbles or mutters something to himself or the detectives. Of the many instances of inaudible sounds attributed to defendant, this Court is unable to discern the meaning of those noises. The defendant exhibited the ability to make himself heard and understood on many occasions when he both denied and admitted details about the crimes. The inaudible portions of the records were directly caused by defendant not making himself clear, not by the detectives questioning him.

7. The initial part of the interview consisted of some general background questions about defendant, his family and previous employment. Defendant immediately engaged the officers in a casual conversation, and he never indicated a desire to cease the interrogation or remain silent. Rather, defendant seemed to enjoy the interaction with Bradley and Von Almen. At no time did he clearly suggest a desire to end all questioning or to remain silent.

8. On three separate occasions defendant mentioned the word lawyer while simultaneously expressing his desire to speak to police.

A. The first occasion occurred approximately twenty-seven (27) minutes into the interview when defendant stated, "To get a lawyer (inaudible) you're going to have to put me in that position." [Interview transcript p. 35, hereinafter It.]. Prior to this statement, defendant had challenged the detectives on multiple occasions to "put me there".[4] Without being asked a question by either detective, defendant continued, "I'm saying you ain't come at me with no facts. You got to show me some facts I was there. Anybody can say something, he say, she say. Like I said, I can't be like oh, he was with me. You know what I'm saying, you got to put me there with him, though."{It. p. 35-36]. Defendant's statements do not suggest a desire to end all questioning or to remain silent or demand to speak with an attorney. The clear context of the interview indicates that the defendant mentioned the word lawyer only to challenge the detective to show him proof of his guilt. He did not indicate he wanted an attorney and no longer wanted to answer questions. His request for a lawyer was conditional upon the police officer being able to place him with his brother, at the scene of the crime, or in the vehicle used at the time of the crime or to challenge the police to

[4]

Transcript Page	Line	Statement
28	L9	You ain't got no photos to that
28	L13	**[you are not]** Proving my case
30	L10	Can't put me in there [Anthony's car]
30	L16	Show me the camera you know the surveillance
30	L22	I said show me the pictures
34	L4	I'm saying, where can you put me in there though
34	L13	You still got to put me in there
34	L15	But I'm saying you got to put me in there

get a lawyer (prosecutor) to prove it. Such a conditional and ambiguous response would not have been interpreted by a reasonable police officer as a clear desire to invoke his right to an attorney and halt the proceedings as required by Davis, 512 U.S. at 462.

B. The next mention of the term lawyer occurred approximately four minutes after the first reference when the defendant stated, "Get a lawyer, you have to put me there." [It. p. 38]. Again, this statement simultaneously expresses a desire to speak to police while mentioning a lawyer. He did not indicate he wanted an attorney and no longer wanted to answer questions. His request for a lawyer remained conditional upon the police officer being able to place him at the scene of the crime.[5] or a challenge to the police to get a lawyer to prove it. This was an ambiguous request that did not require the police to stop their interview. See Davis, 512 U.S. at 462.

C. The final reference to a lawyer occurs approximately thirty-four (34) minutes into the interview when defendant states, "Get me a lawyer, man." [It p. 42]. While this comment was audible on the recording, it was seemingly inaudible to Detective Bradley in the room with defendant sitting a one or two feet away as he responded, "huh?" The defendant replied, "Need me a lawyer, man." In response, Detective Von Almen began to speak but was interrupted by defendant's statement, "Just put me in the car then, the restaurant then." [It p.

[5] Defendant repeated his challenges three additional times prior to this second comment:

Transcript Page	Line	Statement
36	L1	You got to show me some facts I was there
36	L4	you got to put me there with him though
37	L15	You better put me there, that's the thing

42]. Von Almen did not ask any questions of defendant prior to being interrupted. The clear context of defendant's conditional request for counsel did not suggest a desire to end all questioning or to remain silent. His request for a lawyer was conditional upon the detectives being able to place him at the scene or the crime or in the vehicle used at the time of the crime or was a challenge to the police to get a lawyer to prove it. Such a conditional and ambiguous response would not have been interpreted by a reasonable police officer as a clear desire to invoke his right to an attorney and halt the proceedings.

9. The defendant's references to a lawyer were ambiguous, equivocal and unclear when taken in context of the interview. His statements were sandwiched between mundane conversations with the detectives, their occasional accusations of his criminality, and his assertion that they needed to "put him there." Defendant's statements had no sense of urgency. Detective Bradley testified he never directly answered defendant's statement because he did not understand it to be a genuine request for counsel. There is no indication of dishonesty or bad faith on the part of the detectives questioning defendant. The best that can be said is defendant knew he had the right to counsel but failed to unambiguously declare the present intent to exercise his right to counsel.

10. An equally valid explanation for the Defendant's ambiguous use of the word lawyer in the context of "putting him there" (at the crime scene or in the car) is that he was telling the police they better get a lawyer (prosecutor) that could prove that he was there. Objectively the police could interpret these statements as just that. In fact Detective Bradley testified at the hearing of the Defendants suppression motion "He was

using the word (lawyer) as a game to connect it to what I have to prove to him before he's done" (Tr pg. 55, line 9)" "But what also is important is he was referencing a lawyer with part of the game he was playing, that we have to prove that we have evidence that connects him to the crime (tr. P 56 line 23) Further Detective Bradley stated "Oundre did not stop trying to convey to us that we have to prove that he was there" (Tr pg 66 line 22)

11. The inherent ambiguity in defendant's comments are clear when considered in the context of the entire statement. Many times he challenges the detectives to "put him there." Every mention of a lawyer is connected to that challenge. There could be reasonably interpreted by the police officers as his requesting a lawyer only if the police could put him at the scene of the crime or just as reasonably that the police will have to get a lawyer (prosecutor) to do so.

If the former, his condition to put him there clearly had not been met in his mind sufficiently to indicate he wanted a lawyer at that moment, as the condition of putting him there has not be fulfilled. If the latter then of course he was not asserting a right to appointed counsel, but was telling the police they better get a lawyer to prove he was at the crime scene.

Therefore the conditional nature of his request for a lawyer rendered it ambiguous. A reasonable police officer, under these circumstances would have understood only that the Defendant might be invoking his right to counsel or challenging the police to get a lawyer to "put him there." As the Defendant's references to "a lawyer" did not meet the standard of clarity set for in Davis, he did not invoke his 5th Amendment right to remain silent nor his 6th Amendment right to counsel. Davis 512 U.S. at 459, 114 S. et. 129 L. ED. 2d at 371

CONCLUSIONS OF LAW

1. The Court finds that probable cause existed to arrest defendant on November 13, 2008 and that his arrest in his home was lawful.

2. The Court finds that prior to being questioned by detectives he was properly advised of his rights pursuant Miranda and after acknowledging he understood those rights, he voluntarily answered questions posed by the detectives.

3. The Court finds statements made after defendant was properly "Mirandized" were made after a voluntary, knowing and intelligent waiver of his constitutional rights as set forth in Miranda v. Arizona.

4. The Court specifically finds that all of defendant's statements which are the subject of this motion were voluntarily made to detectives.

5. The Court finds that defendant did not at any time during the interview express his intention to remain silent.

6. The Court finds that defendant was not subjected to any threats or intimidation of any kind during the interview.

7. The Court finds that neither the length of the eight-five (85) minute interview or the physical circumstances of defendant's interview were coercive in any way.

8. The Court finds that the defendant never clearly, unambiguously and unequivocally invoked his right to remain silent nor his right to counsel during this interview as required by Davis v. United States, 512 U.S. 452, 458-62, 114 S. Ct. 2350, 2354-2357, 129 L. Ed. 2d 362 (1994); Miranda v Arizona 384 U.S. 436, 86 S. Ct. 1062, 16 L. Ed. 2d 694 (1966); State v Mateo 335 SW3d 529, 535 (Mo App2011) and Edwards

vs Arizona 451 U.S. 477, 484-485, 1010 S. Ct 1880,1885 68 L. E 2d 378 (1981)

ORDER, JUDGMENT, AND DECREE OF COURT

WHEREFORE, it is hereby ordered, adjudged, and decreed that defendant's Motion to Suppress Statements is denied.

SO ORDERED:

Honorable Richard C. Bresnahan
Circuit Court Division 18