1999

The State of Utah v. Brian Swink : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
BRIAN SWINK,	:	Case No. 990501-CA Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from a judgment of conviction for Attempted Theft, a third degree felony, in violation of Utah Code Ann. §§ 76-6-404 (1999) (Theft) and 76-4-101 (1999) (Attempt), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Tyrone E. Medley, Judge, presiding.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES, RULE AND CONSTITUTIONAL PROVISION

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THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
BRIAN SWINK,	:	Case No. 990501-CA Priority No. 2
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JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction for Attempted Theft, a third degree felony, in violation of Utah Code Ann. §§ 76-6-404 (1999) (Theft) & 76-4-101 (1999) (Attempt), in the Third Judicial District Court, State of Utah, the Honorable Tyrone E. Medley, Judge, presiding. Jurisdiction is conferred on this court pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1996). See Addendum A (judgment and conviction).

STATEMENT OF THE ISSUE AND THE STANDARD OF REVIEW

ISSUE: Whether the trial court erred in failing to suppress a confession made by Appellant without benefit of warnings set forth in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966), in violation of his Fifth Amendment right against self-incrimination.

Standard of Review: "In reviewing the trial court's denial of defendant's motion to suppress the incriminating statements, we examine the trial court's 'underlying factual findings for clear error,' and ''review the trial court's conclusions of law based [on those findings] for correctness.''" State v. Yoder, 935 P.2d 534, 545 (Utah App. 1997) (quotations omitted). "When, [as

in the present case,] a trial court bases its 'ultimate conclusions concerning . . . defendant's Miranda rights ... upon essentially undisputed facts . . .' its conclusions present questions of law . . . review[ed] under a correction of error standard." State v. Gutierrez, 864 P.2d 894, 898 (Utah App.1993) (quoting State v. Sampson, 808 P.2d 1100, 1103 (Utah App.1990), cert. denied, 817 P.2d 327 (Utah 1991), cert. denied, 503 U.S. 914, 112 S.Ct. 1282, 117 L.Ed.2d 507 (1992)).

PRESERVATION OF THE ARGUMENT

Appellant Brian Swink's ("Swink") motion to suppress his illegally obtained confession is preserved on the record for appeal ("R.") at 23-26,70.

CONSTITUTIONAL PROVISION

The following constitutional provision is determinative of the issues on appeal:

Amendment V, United States Constitution:

> No person shall . . . be compelled in any criminal case to be a witness against himself.

STATEMENT OF THE CASE

Nature of the Case, Course of the Proceedings and Disposition in the Court Below.

Swink was charged by information with one count of theft of a vehicle, a second degree felony, in violation of Utah Code Ann. § 76-6-404. R.6-7. Swink moved to suppress statements that formed the basis of the charge and which were taken from him without benefit of warnings set forth in Miranda v. Arizona, 384

U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1976), in violation of his Fifth Amendment right against self-incrimination. R.23-26;70.

The trial court denied Swink's motion, finding that there was neither custody nor an interrogation for purposes of Miranda. R.39;71[3-5]. Consequently, Swink entered a conditional guilty plea to attempted theft, a third degree felony, in violation of Utah Code Ann. §§ 76-6-404 (theft) & 76-4-101 (attempt). R.41-43,71[6-14]. See Utah R. Crim. P. 11(i) (1999); State v. Sery, 758 P.2d 935 (Utah App. 1988). Swink appeals from the denial of his motion to suppress his illegally obtained confession.

STATEMENT OF THE FACTS

The undisputed facts are as follows:

Appellant Swink was a participant in the Genesis Youth Center ("Genesis"). Genesis is an unsecured facility that provides a work program designed for youth offenders to work off restitution, community service hours, and fines. R.69[12]. Swink was originally sentenced to the Decker Lake Youth Corrections facility ("Decker Lake"), but was transferred to Genesis on a ninety-day trial placement basis in anticipation of his parole from Decker Lake. Id.

On January 5, 1999, Swink and another Genesis participant ran away from the program. R.69[15-17]. At approximately 5:00 p.m. on the same day, Swink called Decker Lake to turn himself in. R.69[18]. A Decker Lake employee contacted Officer Corbett Ford ("Ford") of the Salt Lake City Police Department to retrieve

Swink. R.69[28]. Ford called Swink to obtain his address. Id. Ford told Swink that it would be one-and-one-half hours before he could pick him up. Id. Swink waited for Ford until he arrived to escort him back to Decker Lake. R.69[33].

Ford returned Swink to Decker Lake by 7:00 p.m. R.69 [18,29]. Swink was stripped of his street clothes, placed in Decker Lake issue clothing, searched for contraband, and placed into state custody on the basis of a fugitive warrant that was issued when he fled from Genesis. R.69[21-22]. Swink was not hand-cuffed. R.69[22]. According to Chris Pacheco ("Pacheco"), a counselor at Decker Lake and a youth corrections officer, Swink was not at liberty to leave when he was returned to Decker Lake, having been detained on the fugitive warrant. R.69[21]. Pacheco further testified that he detained Swink on the warrant by his own authority as a youth corrections officer. R.69[21].

Pacheco received Swink at Decker Lake and initiated an intake interview. R.69[12,20,21]. Pacheco testified at Swink's preliminary hearing that the purpose of the intake interview was to determine whether Swink was under the influence of drugs or alcohol, and whether he was suicidal or otherwise in need of medical attention. R.69[13]. He also testified that the purpose of the interview was to secure the safety of both Swink and Decker Lake. Id.

To this end, Pacheco asked Swink where he had been and what he had been up to while on the run. R.69[14]. Initially, Swink responded that he and one other person had run away from Genesis

and ended up at South Towne Mall in the afternoon. R.69[14]. Pacheco testified that Swink's story had gaps, leading Pacheco to believe that Swink was lying and prompting him to press Swink for more information. R.69[15,24].

Pacheco testified that, upon questioning, Swink stated, "F it, I'll probably get in trouble anyway." R.69[15,24]. Swink told how he and the second person, named Azar, went to a convenience store and made a phone call. R.69[16]. They were picked up and taken to Azar's home, then to a grocery store where Swink stole a screwdriver. R.69[16]. Swink proceeded to Trolley Square, then walked along 700 East until he came upon a Toyota minivan. Id. He started the van by inserting the screwdriver into the ignition. Id. Swink told Pacheco that he drove away in the van. R.69[16-17].

Pacheco continued questioning Swink. Id. Swink described how he drove to South Towne Mall. Id. Swink was chased from the mall by mall security. Id. He got back into the van and left. Id. He abandoned the van and called Decker Lake to turn himself in. R.69[18]. Pacheco never administered Miranda warnings at any point during his interview with Swink, testifying that he is not required to administer such warnings. R.69[25].

Officer Ford, who was present throughout Pacheco's interview with Swink, testified that it became apparent that Swink was involved in an auto theft. R.69[33-34]. Ford also testified that Swink was in custody and was not free to leave during the questioning. R.69[34]. However, Ford likewise failed to give

Swink Miranda warnings. Id. At the end of the interview, Ford asked Swink where the stolen van was located because Swink had earlier indicated that the van was still running. R.69[30]. Swink revealed the van's location and Ford accordingly called the SLCPD. R.69[31]. Ford verified that the van was stolen and called for recovery. Id. The SLCPD recovered the van and returned it to it's owner. R.69[32].

SUMMARY OF THE ARGUMENT

The trial court erred as a matter of law in concluding that the undisputed facts presented at the preliminary hearing did not amount to a custodial interrogation for purposes of Miranda and, consequently, in denying Swink's motion to suppress his non-Mirandized statement obtained in violation of his Fifth Amendment privilege against self-incrimination.

ARGUMENT

ISSUE: THE TRIAL COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT SWINK'S STATEMENT WAS ADMISSIBLE ALTHOUGH IT WAS TAKEN AS THE RESULT OF A CUSTODIAL INTERROGATION WITHOUT BENEFIT OF **MIRANDA** WARNINGS.

The Fifth Amendment to the United States Constitution provides that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself."

In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1976), the United States Supreme Court held:

> 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. . . . As for the procedural safeguards to be employed, . . . the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive the effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently.

Id. at 444.

"The warning mandated by Miranda was meant to preserve the privilege [against compulsory self-incrimination] during 'incommunicado interrogation of individuals in a police-dominated atmosphere.'" Illinois v. Perkins, 496 U.S. 292, 296, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990) (quoting Miranda, 384 U.S. at 445). "That atmosphere is said to generate 'inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.'" Id. (quoting Miranda, 384 U.S. at 467).

In the present case, the trial court erred as a matter of law in denying Swink's motion to suppress his statement because the undisputed facts establish the "salient features" of a custodial interrogation necessitating the Miranda warnings[1]: a compelled confession, "incommunicado interrogation," and a

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[1] "When a trial court bases its 'ultimate conclusions concerning . . . defendant's Miranda rights ... upon essentially undisputed facts . . .' its conclusions present questions of law which we review under a correction of error standard." State v. Gutierrez, 864 P.2d 894, 898 (Utah App.1993) (quoting State v. Sampson, 808 P.2d 1100, 1103 (Utah App.1990), cert. denied, 817 P.2d 327 (Utah 1991), cert. denied, 503 U.S. 914, 112 S.Ct. 1282, 117 L.Ed.2d 507 (1992)).

"police-dominated atmosphere." Miranda, 384 U.S. at 445.

A. Custody

The trial court concluded that the facts of Swink's case did not amount to "custody" for purposes of Miranda, 384 U.S. at 444. R.71[3-4]. In so holding, the court adopted the "added imposition" test, a test used by a number of jurisdictions to determine whether an individual, already detained in a correctional facility, is in "custody." R.71[3]; see also Cervantes v. Walker, 589 F.2d 424, 427 (9th Cir. 1978) (applying added imposition test in prison context); Garcia v. Singletary, 13 F.3d 1487, 1491 (11th Cir. 1994) (same); United States v. Conely, 779 F.2d 970, 973 (4th Cir. 1985) (same), cert denied, 479 U.S. 830, 107 S.Ct. 114, 93 L.Ed.2d 61 (1986); Leviston v. Black, 843 F.2d 302, 304 (8th Cir.) (same), cert denied, 488 U.S. 865, 109 S.Ct. 168, 102 L.Ed.2d 138 (1988); United States v. Cooper, 800 F.2d 412, 414 (4th Cir. 1986) (same); United States v. Willoughby 860 F.2d 15, 23 (2d Cir. 1988) (same), cert denied, 488 U.S. 1033, 109 S.Ct. 846, 102 L.Ed.2d 978 (1989); United States v. Menzer 29 F.3d 1223, 1232-33 (7th Cir 1994) (same). Without discussion of the facts, the court stated, "based upon this court's determination of the facts and circumstances of this case, this court is of the opinion that there . . . was no added imposition imposed in this particular case warranting the administration of the Miranda warnings." R.71[3-4]. The court's conclusion is in error.

The Miranda Court defined "custodial interrogation" as

"questioning initiated by law enforcement officers *after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.*" 384 U.S. at 444 (emphasis added) (footnote omitted). "'[A] court must examine all of the circumstances surrounding the interrogation, but 'the ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest.'" Stansbury v. California, 511 U.S. 318, 322, 114 S.Ct. 1526, 1529, 128 L.Ed.2d 293 (1994) (quoting California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983) (per curiam), quoting Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977) (per curiam));

Swink was in "custody" under Miranda because he was under arrest when questioned. 384 U.S. at 444. Both Pacheco and Officer Ford testified that Swink was in state custody when he was interrogated at Decker Lake, having been arrested on the fugitive warrant that issued when he absconded from Genesis. R.69[21,34]. Pacheco testified, moreover, that Swink was not free to leave because of the warrant, and that he had the authority as a youth corrections officer to detain Swink. R.69[21]. Hence, the trial court erred as a matter of law when it concluded that Swink was not in custody; the uncontroverted evidence establishes that Swink was under arrest and therefore "ha[d] been taken into custody" for purposes of Miranda. 384 U.S. at 444; see also Stansbury, 511 U.S. at 322.

Yet, even if Pacheco and Ford had not testified that Swink was in custody, R.69[21,34], the balance of the evidence would still establish that Swink was "otherwise deprived of his freedom of action in [a] significant way," Miranda, 384 U.S. at 444, and that a reasonable person in his situation would not feel at liberty to leave. See Stansbury, 511 U.S. at 324. In order to determine "custody" in circumstances outside of formal arrest, Utah courts have looked to four factors, including: "'(1) the site of the interrogation; (2) whether the investigation focused on the accused; (3) whether the objective indicia of arrest were present; and (4) the length and form of interrogation.'" State v. Mirquet, 914 P.2d 1144, 1147 (Utah 1996) (quoting Salt Lake City v. Carner, 664 P.2d 1168, 1171 (Utah 1983)); see also State v. Worthington, 970 P.2d 714, 715-16 (Utah App. 1998) (noting that the U.S. Supreme Court in Stansbury, 511 U.S. at 321, set forth the same factors and determined that no single factor was "dispositive")[2]. "'[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood

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[2] The trial court did not apply this test in its custody analysis, using instead a test to determine custody in the prison context. See infra. Discussion of the Mirquet factors is nonetheless appropriate on appeal because the record evidence concerning the content of the interview and the attendant circumstances is both ample and undisputed. See Mirquet, 914 P.2d at 1147, 1149; State v. Snyder, 860 P.2d 351, 355 n.4 (Utah App. 1993). "When credibility is not an issue as to underlying facts or a trial judge has already made necessary credibility assessments, the material facts are not disputed, and there is no additional evidence relevant to the dispositive issues that can or should be adduced, an appellate court is in as good a position as the trial court to apply the governing rules of law to the facts." Id. at 1149; see also Snyder, 860 P.2d at 355 n.4.

his situation.'" Stansbury, 511 U.S. at 324 (quoting Berkemer v. McCarty, 468 U.S. 420, 442, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317 (1984)).

The record establishes that Swink was in custody under these factors. As to the first and third Mirquet factors (the "site of the interrogation" and the presence of "objective indicia of arrest"), 914 P.2d at 1147, the record shows that the questioning of Swink occurred at the Decker Lake youth detention center, R.69[12,29], an inherently "police-dominated atmosphere." Miranda, 384 U.S. at 445.[3] As noted by this Court in State v. Sampson, 808 P.2d 1100 (Utah App. 1990), "[s]tation-house questioning lends itself to a finding of custody." Id. at 1105 (citing Oregon v. Matthiason, 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977) (per curiam)) (holding defendant in "custody" where questioning occurred at police station); see State v. Brandley, 972 P.2d 78, 82 (Utah App. 1998) (defendant not in "custody" where questioning occurred in school office); Worthington, 970 P.2d at 716 (defendant not in "custody" who was questioned in his home).

In addition, the questioning was conducted by Pacheco, a counselor and a youth corrections officer, R.69[10,21], as well as Officer Ford, a police officer and special functions agent for the Division of Youth Corrections. R.69[26-27,29]. Such a police/authority presence underscores the custodial nature of

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[3] The record is silent as to where the interview occurred inside Decker Lake, i.e. in an office, interrogation room, hallway, or in an otherwise isolated or secured area.

Swink's situation, and presents the sort of psychological pressures that undermine an individual's right against self-incrimination. See Illinois v. Perkins, 496 U.S. 292, 297, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990) ("[q]uestioning by captors, who appear to control the suspect's fate, may create mutually reinforcing pressures that the Court has assumed will weaken the suspect's will"); see Miranda, 384 U.S. at 448 (noting the psychological pressures that "in-custody interrogation" brings to bear upon suspects).

Moreover, Swink was escorted to Decker Lake by a police officer. R.69[27]; see State v. Snyder, 860 P.2d 351, 356 (Utah App. 1993) (finding "custody" where defendant was driven to "government facility" in police squad car and "site [of questioning] was unilaterally chosen by the officers"). Prior to that, Swink had been free, and was even left under his own recognizance for an hour and a half until Ford picked him up. R.69[33]. At Decker Lake, Swink was stripped of his street clothing, put into a Decker Lake uniform, and searched for contraband. R.69[22]. At no point was Swink informed that he was free to leave. R.69[10-34]; see Sampson, 808 P.2d at 1105 ("it is pertinent to note that [defendant] was not specifically informed of his freedom to leave") (footnote omitted). Such "objective indicia of arrest," Mirquet, 914 P.2d at 1147, would lead the reasonable person in Swink's position to believe that he was in custody. See Stansbury, 511 U.S. at 324.

The second and fourth Mirquet factors ("whether the

investigation focused on the accused" and the "length and form of the interrogation") also compel the conclusion that Swink was in "custody." 914 P.2d at 1147; see Miranda, 384 U.S. at 444. First, the interview was lengthy, lasting forty-five minutes. See Brandley, 972 P.2d at 82 (questioning was non-custodial because it lasted only ten or fifteen minutes); State v. Mincy, 838 P.2d 648, 653 (Utah App. 1992) (questioning non-custodial because it lasted only five minutes).

As to the content of the interview,[4] Pacheco testified that the questioning was intended as an "intake interview" to determine where Swink had been; whether he was under the influence of drugs or alcohol; whether he needed medical attention; whether he was suicidal; and to secure the safety of Decker Lake and Swink. R.69[12-14].

Pacheco did not testify that he asked any questions directly relating to drugs or alcohol. R.69[10-25]. Instead, Pacheco asked general, open-ended questions about Swink's activity. Pacheco started out by asking "where have you been? What have you been doing?" R.69[14]. Swink responded that he and another Genesis participant ran away from the program. Id. Pacheco asked him a few more times for his story, and each time Swink would give Pacheco more details. Id. Pacheco testified that Swink's story still had "inconsistencies and holes [and] didn't make sense." R.69[15]. He told Swink, "Brian, there's holes in

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[4] There was no transcript of the interview available to the court below.

the story. You know, fill me in more of what's been going on." Id. At that point, Pacheco testified that Swink "hesita[ted]" then,

> finally said, yeah. He said F it. He said, I'm going to get in trouble anyway, and so he then -- I said, I want to know the story from the time you left Genesis to the time you were picked up, and [Swink] started from that point.

Id. After this exchange, Swink told Pacheco that he stole a screwdriver from a grocery store. R.69[16]. Pacheco then testified that Swink admitted he used the screwdriver to start, and then steal, a minivan. R.69[16-17].

Still unsatisfied with the story, Pacheco pressed further with the questions "to determine where [Swink] had been." R.69[17]. Swink clarified that he drove the van to South Towne mall, where he was chased by a security guard because he had "taken something." R.69[17-18]. Swink then told Pacheco that he drove away in the van and later "dropped it off." R.69[18-19]. Pacheco asked Swink whether he "hot-wired" the van. R.69[17]. Swink "said no. . . . I started it and left." Id.

Although characterized as an "intake interview" to determine whether Swink was under the influence of drugs or alcohol, R.69[12-13], Pacheco's open-ended and persistent questioning style elicited obviously incriminating information from Swink. Rather than asking direct questions about drug and alcohol use, Pacheco asked Swink, "where have you been? What have you been doing?" R.69[14]. Moreover, Pacheco expressly told Swink that he did not believe him because there were "holes in [his] story,"

R.69[15], changing the complexion of the interview from one of merely information gathering to an accusatorial questioning. See Sampson, 808 P.2d at 1105 (accusatorial questioning "weighs heavily in favor of a determination of custody"); Brandley, 972 P.2d at 82 n.5 (holding questioning accusatory in part because officer told defendant that witnesses accused him of lewdness and his file contained incriminating information). A reasonable person under these circumstances would feel that he was the "focus of [an] investigation." Id. at 82. Indeed, Swink, at this point, responded to Pacheco's line of questioning with, "F it. . . . I'm going to get in trouble anyway" and then proceeded to admit that he stole the minivan. R.69[15].

The accusatory nature of the questioning is further underscored by the fact that it persisted long after Swink clearly admitted to numerous instances of criminal conduct, including absconding from the Genesis program, stealing a screwdriver from a grocery store, stealing the minivan and taking "something" from South Towne Mall. R.69[16-18]. "'The change from investigatory to accusatory questioning occurs when the 'police have reasonable grounds to believe that a crime has been committed and also reasonable grounds to believe that defendant committed it.'" Snyder, 860 P.2d at 357 (quoting Sampson, 808 P.2d at 1105-06; quoting Carner, 664 P.2d at 1171).

Indeed, both Pacheco and Ford testified that they understood that Swink had stolen a car. R.69[17,29-30,33-34]. Both men conducted questioning in light of that realization. Pacheco

asked Swink how he started the van and whether he "hot-wired" it. R.69[16-17]. Ford testified that he asked for the van's location once Swink "mentioned . . . that he'd taken a vehicle from downtown and had left it running." R.69[29,33-34].

This Court in Snyder addressed a similar situation, wherein the police discovered during the course of a non-accusatorial interview that the defendant was the man responsible for the crime under investigation. 860 P.2d at 357. This Court stated:

> [e]ven assuming that the initial questioning in this case was merely investigatory, the questioning became inarguably accusatory when defendant admitted that he was the man involved in the incident and that he had been masturbating immediately prior to the allegedly lewd display.

Id. Pacheco and Ford's questioning likewise "became inarguably accusatory" when Swink admitted to stealing the van, as well as when he admitted to absconding from the Genesis program, stealing the screwdriver, and taking "something-[else]" from South Towne Mall. Id.; R.69[16-19]. Hence, the questioning was custodial in nature, compelling the conclusion that Miranda warning were necessary in this case. See Sampson, 808 P.2d at 1105.

As noted supra, rather than the Mirquet analysis, the trial court adopted the "added imposition" test, R.71[3], an analysis used in other jurisdictions to determine "custody" in situations where the individual is already incarcerated at the time of the interrogation. See Cervantes, 589 F.2d at 427; Garcia, 13 F.3d at 1491; Conely, 779 F.2d at 973; Leviston, 843 F.2d at 303; Cooper, 800 F.2d at 414; Willoughby 860 F.2d at 23; Menzer 29 F.3d at 1232-33.

The trial court's application of this test assumes that Swink was incarcerated prior to the custodial interrogation. As noted by defense counsel below, R.70[12], the evidence actually suggests that Swink was not incarcerated prior to being taken into custody to the extent that he had absconded from the Genesis program and was not under any supervision in the several hours prior to the time when he turned himself in. R.69[15-18].

Assuming for the sake of argument, however, that Swink was incarcerated prior to the interview, the circumstances of this case still amount to "custody" under the "added imposition" test. In Mathis v. United States, 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381 (1968), the U.S. Supreme Court held that prisoners subjected to custodial interrogations were protected by the Fifth Amendment and, therefore, entitled to Miranda warnings. Id. at 4-5 (citing Miranda, 384 U.S. at 478) (reversing and remanding conviction for filing false tax returns based on statements taken from prisoner defendant by IRS agent without Miranda warnings). The Supreme Court has not defined "custody" in the prison setting however. See Bradley v. Ohio, 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 768 (1990) (denying certiorari review on issue of "custody" in prison setting for purposes of Miranda).[5]

Other jurisdictions have developed the "added imposition" test to determine custody in the prison context. The Ninth

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[5] Utah case law likewise does not address "custody" in the prison context for purposes of Miranda and therefore has not specifically set forth the "added imposition" test adopted by the lower court in this case.

Circuit Court of Appeals was among the first to articulate the test in Cervantes, 589 F.2d at 428. That Court stated,

> The concept of "restriction" is significant in the prison setting, for it implies the need for a showing that the officers have in some way acted upon the defendant so as to have "deprived (him) of his freedom of action in any significant way," Miranda v. Arizona, [] 384 U.S. at 444, 86 S.Ct. at 1612 (footnote omitted). In the prison situation, this necessarily implies a change in the surroundings of the prisoner which results in an added imposition on his freedom of movement. Thus, restriction is a relative concept, one not determined exclusively by lack of freedom to leave. Rather, we look to some act which places further limitations on the prisoner.
>
> In defining this concept we adhere to the objective, reasonable person standard.

Id.; see also Garcia, 13 F.3d at 1491; Conely, 779 F.2d at 973; Leviston, 843 F.2d at 303; Cooper, 800 F.2d at 414; Willoughby 860 F.2d at 23; Menzer 29 F.3d at 1232-33.

In applying this test, courts have looked at various factors, including the language used to summon the individual; the physical surroundings; the extent to which the individual is confronted with evidence of his guilt; additional pressure used to detain him; whether he was incarcerated prior to questioning; whether he initiated questioning; whether he was informed that he was free to leave or to not answer questions; whether he was under arrest; whether he had unrestrained freedom of movement during questioning; and whether he was placed under arrest at the termination of questioning. See Cervantes, 589 F.2d at 428; United States v. Chamberlain, 163 F.3d 499, 503 (8th Cir. 1998) (citing Perkins, 496 U.S. at 297); United States v. Griffin, 922 F.2d 1343, 1349 (8th Cir. 1990)). As noted in Chamberlain, the

"custody issue ultimately 'focuses upon the totality of the circumstances.'" 163 F.3d at 503 (quotation omitted). Accordingly, the aforementioned factors need not all be present to find "custody," nor is the list exhaustive. Id. (citation omitted).

In light of the foregoing, Swink was in "custody" under the added imposition test employed by the trial court. R.71[3]. In addition to the factors discussed supra, which establish that Swink underwent an "added imposition on his freedom of movement," Cervantes, 589 F.2d at 428, it is significant that Swink was originally housed at Genesis. R.69[15]. Pacheco described Genesis as an unsecured facility and work program in which participants go out in to the community under the supervision of Genesis staff. R.69[12]. Decker Lake, by contrast, is a more secured facility where the inmates have less freedom of movement.[6] See Chamberlain, 163 F.3d at 501-02, 504 (prisoner defendant in "custody" because he was moved to a "higher-level security facility" when questioned).

Accordingly, Swink's placement in Decker Lake, where he was put in Decker Lake issue clothing and searched for contraband, under arrest on the fugitive warrant, under the supervision of Pacheco, a Decker Lake youth corrections officer, and Officer

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[6] Although the record does not provide information as to the level of security at Decker Lake, it can be inferred from the facts presented that it is a more secured facility than Genesis to the extent that Decker Lake inmates are transferred to Genesis when they are placed on parole. R.69[12].

Ford, represents an "added imposition on [Swink's] freedom of movement." Cervantes, 589 F.2d at 428; R.69[10-12,21-22]. A reasonable inmate in Swink's position would not feel at liberty to do anything other than answer the questions asked of him by the authorities present. See Stansbury, 511 U.S. at 324; Cervantes, 589 F.2d at 428.

In sum, Swink was in "custody" for purposes of Miranda, 384 U.S. at 444. He was under arrest on the fugitive warrant when questioned by Pacheco and Ford. Moreover, under the factors set forth in Mirquet, 914 P.2d at 1147, as well as the "added imposition" test adopted by the trial court, Swink was under restraint amounting to formal arrest. A reasonable person in his situation would not feel at liberty to leave or do anything other than answer the questions asked by Pacheco and Ford. The trial court erred, therefore, in concluding that Swink's circumstances did not amount to "custody" for purposes of Miranda, 384 U.S. at 444; R.71[3].

B. Interrogation.

The trial court erred as a matter of law in concluding that the uncontroverted evidence established that Swink was not "interrogated" for purposes of Miranda. 384 U.S. at 444. The court noted the following in this regard:

> Furthermore, in this court's view, this court is of the opinion that the counselor, and there was a counselor involved in this discussion with Mr. Swink, consistent with his testimony in this court's view, first of all, . . . he didn't have prior knowledge of the specific criminal activity when he had this conversation with Mr. Swink. He also testified, in this court's view, and it seems to be reasonable and consistent that his

> primary purpose was that of the safety of Mr. Swink, the safety of other individuals in the facility and the facility itself. That in essence, this was an intake interview. It lasted approximately 45 minutes in duration. Based upon the conversation, it appears that there was no coercion or compulsion of any nature in this court's view in any way. And for all those reasons, . . . this court does not believe that the facts and circumstances necessitated the admonition, the Miranda admonition.

R.71[4].

Miranda proscribes "*questioning* initiated by law enforcement officers" that occurs when an individual is in "custody." 384 U.S. at 444 (emphasis added).[7] The U.S. Supreme Court in Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), expanded the definition of "interrogation" to include "express questioning or its functional equivalent." Id. at 300-01.

> 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 301 (footnotes omitted). "[T]he definition of interrogation can extend only to words or actions on the part of

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[7] Under Miranda, "questioning" does not include

> [g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. . . . In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.

Id. at 477-78 (footnote omitted). Moreover, "[v]olunteered statements of any kind are not barred by the Fifth Amendment." Id. at 478.

police officers that they *should have known* were reasonably likely to elicit an incriminating response." Id. at 302 (emphasis original). "Although the question of whether a statement or comment is reasonably likely to evoke an incriminating answer is an inquiry resolved from the perspective of the defendant, [] it must be resolved in light of the officer's knowledge of the suspect's characteristics." State v. Singer, 815 P.2d 1303, 1311 (Utah App. 1991) (citing Innis, 446 U.S. at 301-03).

Implicit in the definition of "interrogation" is the recognition 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." Innis, 446 U.S. at 299 (quoting Miranda, 384 U.S. at 457-58); see also Perkins, 496 U.S. at 297 ("[i]t is the premise of Miranda that the danger of coercion results from the interaction of custody and official interrogation"). "Questioning by captors, who appear to control the suspect's fate, may create mutually reinforcing pressures that the Court has assumed will weaken the suspect's will." Perkins, 496 U.S. at 297.[8]

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[8] The Miranda rule does not apply where there is no State action. See Colorado v. Connely, 479 U.S. 157 (1986). Although not disputed by the trial court or the State, it bears mentioning that Pacheco and Officer Ford are both government agents for purposes of Miranda, 384 U.S. at 444. Pacheco testified that he is employed as a counselor at the Decker Lake juvenile correctional facility and is classified as a youth corrections officer with authority to detain juvenile inmates. R.69[10,21]. Likewise, Ford testified

In light of the foregoing, the questioning initiated by Pacheco and participated in by Ford constitutes "interrogation" under Miranda. 384 U.S. at 444. The colloquies with Pacheco and Ford establish the interrogatory nature of the questioning of Swink. Pacheco testified to the following on direct and cross-examination regarding the interview:

> State: **[R.69[13]]** Okay. You had this conversation [with Swink.] What did you talk about initially?
>
> Pacheco: *Initially I just asked Brian where he'd been, you know, what he was doing.*[9] The point of my conversation was, A, to find out where Brian had been. But not only that, but I needed to know his demeanor. I also needed to know if he'd taken any drugs or alcohol. . . . If there's need for medical attention and/or his demeanor could be for suicide. . . .
>
> State: Okay, so your conversation focused on what he was doing, to find out if he was consuming any alcohol **[R.96[14]]** or drugs for the safety of Decker Lake and his own safety; is that right?
>
> Pacheco: Correct.
>
> State: Okay. So what happened after you had this conversation? What did you talk about then?
>
> Pacheco: The conversation was, you know, *Brian, where have you been? What have you been doing?* He started out with, I ran from Genesis with a kid.
>
> State: Does he say who?
>
> Pacheco: At that point he did not say who. Through the conversation, though, I did determine the individual's name.

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that he is a police officer and a special functions agent with the Department of Youth Corrections. R.69[26-27].

[9] The italicized portions of Pacheco and Ford's testimony indicate general questioning of Swink as to his whereabouts and activity and/or questioning as to the stolen car in particular.

State: Okay. After he's telling you about how he fled from Genesis, did you ask him any questions about what was going on once he was on AWOL status?

Pacheco: *I'd asked him where he'd been. . . .* At that point he said he and the other kid had ran. They went somewhere, and didn't specify where. From there he ended up at South Towne Mall.

State: Did you question him about that?

Pacheco: I did. *I asked him, you know, Where have you been?* He said, The individual and I ran. We made a phone call at Maverick. We talked to somebody - again, not naming any names. He said he went up to Trolley **[R.69[15]** Square Mall and then down to South Towne Mall. So each time I had asked him, a little bit more of the story had come out.

State: And his story is progressively changing. What does that mean to you?

Pacheco: Well, the inconsistencies and the holes, it didn't make sense. The whole story was not there.

State: So what was your response to these holes and inconsistencies (inaudible)?

Pacheco: *Once again I said, Brian there's holes in the story. You know, fill me in more of what's been going on.*

State: And did he?

Pacheco: At one point, he did. He was hesitant. Then he finally said, yeah. He said F it. He said, I'm going to get in trouble anyway, and so he then - *I said, I want to know the story from the time you left Genesis to the time you were picked up, and he started from that point.*

State: And he freely gave you that information?

Pacheco: Correct. . . . He said that he and - the other juvenile's name was Azar, [] ran from Genesis. . . **[R.69[16]** [They] were picked up and taken to Azar's home and from Azar's home they had gone to a Smith's. . . . From Smith's, he said he stole a screwdriver and was dropped off at Trolley Square Mall. . . .

State: So he stole a screwdriver at Smith's and then what did he tell you?

Pacheco: Said that he walked south on 7th East and he found a vehicle.

State: What kind of vehicle, did he say?

Pacheco: *At the time, he did not say. He said the easiest ones to steal, and I said okay. You know, I named a few different vehicle brands. He said no, it was a mini-van.* I says okay. He said that he jumped in - he says all you have to do is push the screwdriver into the ignition and it will start. He said he left with the **[R.69[17]** minivan.

State: So Mr. Swink admits to you that he stole a mini-van?

Pacheco: Correct.

State: What was your response to that?

Pacheco: *To continue with the story, to determine where he had been.* . . . He said at that point that . . . he ended up in South Towne Mall. . . . [H]e said that at South Towne Mall he'd been chased by the security in the mall and . . . he had stated that he'd jumped into a van, started it and left. I'd asked him did he hot-wire it. He said no. I said, Did you have the keys? He said, No; I started it and left.

So that was kind of why *I said there's more to this story and that's why I'd gone back to him and said, Let's hear the whole story.*

State: Did he eventually tell you that whole story?

Pacheco: Yeah. . . . **[R.69[18]]** He said that he had taken something - . . . it was never determined what exactly - from [South Towne M]all. He did not say which store. At which point he said, I jumped into the van. He said, I was followed out by some undercover security. . . . He said at that point he drove away. . . .

State: **[R.69[19]]** Did the Defendant, in reference to this mini-van that he stole, did he ever indicate what he did with that?

Pacheco: He said he'd dropped it off. *We asked him where*. He said it was about two blocks or a block away from where [Officer Ford] picked him up. At that point he said - he goes, In the pursuit when the security was following me, the screwdriver fell out, he said, so he just left it running and walked away.

At that point, [Officer Ford] tried to get a closer location of where it was left so he could, A, determine if it was still there and notify a police officer to come and recover the vehicle. . . .

[Cross-Examination]

Defense Counsel: **[R.69[21]]** You said that one of the purposes for this intake is to determine if he is suicidal or needs medical attention because of the use of drugs. Did you make **[R.69[22]]** that determination?

Pacheco: Through his demeanor and through his conversation, at that point, no, I didn't see that it was needed.

Ford, present throughout Pacheco's questioning of Swink, likewise testified during direct examination that he questioned Swink about the stolen vehicle.

Ford: I didn't really ask anything as far as details what Brian had been involved in until he had mentioned to Chris and I that he'd taken a vehicle from downtown Salt Lake and that he had left it running.

State: So you were present and you overheard the Defendant's admission that he stole a mini-van and that he dumped it somewhere and left it running?

Ford: Yes, I was.

State: And what was your response once you overheard that?

Ford: When I heard that, I was concerned that - because he had stated that he left the vehicle running and the doors unlocked and there was no key, I was concerned that there could be some public safety issues . . . or that the car may be stolen again, so *I asked him to describe to me the exact location of the vehicle so that I could go and secure the vehicle*.

R.69[29-30]. Ford then testified that Swink gave him the location of the stolen van; that he located the van at that place; that he verified with the Salt Lake County Sheriff's Office that the van, in fact, had been reported stolen; and that he notified the Salt Lake City Police Department to recover the stolen van. R.69[31]. Ford reiterated upon cross-examination that it became apparent that Pacheco and Swink were talking about a crime, and that he asked Swink specific information about a vehicle that Swink indicated he stole. R.69[33-34].

The trial court erred in concluding that Pacheco's "intake interview" did not amount to "interrogation." R.71[4]. In fact, Pacheco's line of questioning amounts to "interrogation" because Pacheco and Ford should have known that it was "reasonably likely to elicit an incriminating response" from Swink. Innis, 446 U.S. at 301.

As an initial matter, the questioning was not specifically aimed at Swink's possible drug and alcohol use while on the lam, nor his mental state. Pacheco does not testify to any questions such as, "did you use any drugs?", "did you consume alcohol?", "are you feeling suicidal?". R.69[10-25]. Moreover, the State did not establish that Pacheco's questions were prescribed by statute or Decker Lake policy, or that they were otherwise "normally attendant" to intake at Decker Lake. Innis, 446 U.S. at 301; see also State v. Hayes, 860 P.2d 968, 971-72 (Utah App. 1993) (holding that defendant was not interrogated where officer asked questions prescribed by statute) (citing State v. Wilson,

701 P.2d 1058, 1059 (Utah 1985) (same)); see also State v. Dutchie, 969 P.2d 422, 426-27 (Utah 1988) (holding defendant was not interrogated where one officer asked questions off department questionnaire and where second officer asked name and age because such questions were "normally attendant to arrest and custody and were not likely to elicit an incriminating response").

Indeed, Pacheco's questions were uncharacteristic of an intake interview to the extent that they focused on Swink's general activity rather than his possible drug and alcohol use in particular. Pacheco testified that he generally "asked [Swink] where he'd been, . . . what he was doing." R.69[13]. Moreover, Pacheco's questioning in this regard was not "off-hand[ed]" nor isolated. Innis, 446 U.S. at 303 (holding that "few off-hand remarks" made by police during "brief conversation" with defendant were not likely to elicit incriminating response); see also Singer, 815 P.2d at 1312 (few off-handed remarks regarding officers' family sentiment did not amount to interrogation).

Rather, Pacheco's line of questioning continued for forty-five minutes without a break, during which time he asked Swink at least ten times about his activity in a calculated effort to get the "whole story." R.69[15]. Pacheco testified that he intentionally persisted with this line of questioning because he felt there were "inconsistencies and holes" in the story. Id. Pacheco and Ford should have known that such a calculated and "lengthy harangue" as to Swink's activity was "likely to elicit an incriminating response." Innis, 446 U.S. at 303. Hence, the

trial court erred in concluding that the intake interview did not amount to an "interrogation." Miranda, 384 U.S. at 444; R.71[4].

The trial court's error is underscored given that both Pacheco and Ford should have known that Swink was particularly susceptible to Pacheco's questioning style. See Innis, 446 U.S. at 302 n.8. Police knowledge of a suspect's "unusual susceptibility . . . to a particular form of persuasion might be an important factor in determining whether [they] should have known that their words or actions were reasonably likely to elicit an incriminating response." Id.

Pacheco's testimony indicates that he asked Swink at least six times a general question about his whereabouts and activity. R.69[13 ("[i]nitially I just asked Brian where he'd been, you know, what he was doing"); 14 ("[t]he conversation was, you know, Brian, where have you been? What have you been doing?"; "I'd asked him where he'd been."; "I asked him, you know, Where have you been?"); 15 ("each time I had asked him, a little bit more of the story had come out"; "[o]nce again I said, Brian, there's holes in the story. You know, fill me in more of what's been going on.")]. At the end of this series of questions, Swink stated, "F it, . . . I'm going to get in trouble anyway." R.69[15]. Swink immediately proceeded to inform Pacheco and Ford about the stolen van. R.69[15-17].

Swink's statement was a verbalized indication to Pacheco and Ford that he was about to divulge incriminating information as a result of Pacheco's persistent and generalized questioning. It

is plain from Swink's choice of words (i.e., "I'm going to get in trouble anyway"), R.69[15], that the next statement from Swink would concern his criminal activity. Given this clear, verbalized indication that Swink was about to give incriminating information, Pacheco and Ford were obliged to administer the Miranda warnings. See Innis, 446 U.S. at 301-02. Their failure to do so, R.69[25,34], renders Swink's statements inadmissible and, consequently, the trial court's ruling as to interrogation clearly erroneous. R.71[4]; see Miranda, 384 U.S. at 444.

To this end, the trial court's finding that Pacheco "didn't have prior knowledge of the specific criminal activity" is an unsound justification for its conclusion that Swink was not "interrogated." R.71[4]. Even if Pacheco did not have prior knowledge of Swink's criminal, Pacheco was on alert at the point that Swink stated, "F it. . . . I'm going to get in trouble anyway." R.69[15]. Such a statement is strongly suggestive of guilt of something, if not the specific offense itself. Accordingly, Pacheco and Ford were aware at that point that Swink had been involved in some sort of criminal activity and was willing to confess, necessitating Miranda warnings. 384 U.S. at 444.

Moreover, the trial court's finding is irrelevant to the interrogation analysis. It is the fact of the custodial interrogation that necessitates Miranda warnings in the present case. As noted by the U.S. Supreme Court, "[i]t is the compulsive aspect of custodial interrogation, and not the

strength or content of the government's suspicions at the time the questioning was conducted, which led the Court to impose the Miranda requirements with regard to custodial questioning." Beckwith v. United States, 425 U.S. 341, 346-47, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976).

In addition to Swink's verbalized intent to divulge his criminal conduct, Pacheco and Ford should have known that the questioning would have "elicit[ed] an incriminating response" on account of Swink's youth and the fact that he turned himself in after absconding from Genesis. Innis, 446 U.S. at 302. At the time of the questioning, Swink was 17 years old. R.8 (booking sheet indicating Swink's age); see, e.g., Fare v. Michael C., 442 U.S. 707, 725, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979) (considering age of juvenile defendant in assessing voluntariness of waiver of Miranda rights). Swink's youth likely made him even more susceptible to give incriminating answers in the face of questioning by authority figures like Pacheco and Ford, a counselor/youth corrections officer and police officer respectively. R.69[10,21,26-27]. Moreover, although not indicated in the record, Pacheco and Ford were undoubtedly older than Swink, thus underscoring Swink's vulnerability to questioning by adults.

The fact that Swink turned himself in to the authorities also indicates a state-of-mind that should have led Pacheco and Ford to understand that Swink would likely incriminate himself during questioning. See Innis, 446 U.S. at 302 n.8. As opposed

to being arrested on the fugitive warrant against his will, Swink turned himself in. R.69[28]. Such an act is indicative of Swink's remorse for running away and willingness to accept responsibility for his behavior. Under this guilty state-of-mind, Pacheco and Ford should have understood that Swink would be particularly susceptible to confessing his criminal behavior while on the lam. See Innis, 446 U.S. at 302 n.8.

Other undisputed facts underscore the compulsion inherent in the questioning of Swink and, therefore, render the trial court's conclusion against interrogation clearly erroneous. R.71[4]. For example, as noted supra Point I.A., the interview occurred in a custodial setting. Swink was under arrest when the questioning occurred. R.69[21, 34]. Moreover, "other objective indicia of arrest" pervaded the atmosphere. Swink was questioned at Decker Lake, a secured correctional facility, by Pacheco, a counselor and youth corrections officer, and in the presence of Ford, a police officer. Swink was also placed in Decker Lake issue clothing and searched for weapons just prior to the interview. Such circumstances constitute the sort of inherently "incommunicado police-dominated atmosphere" that weakens a suspect's will and subverts his right against self-incrimination. Miranda, 384 U.S. at 456.

In addition, Pacheco's questions were permeated with his articulated and unequivocal disbelief that Swink was not telling the truth. In fact, Pacheco used this doubt tactic as a tool to get the "whole story." R.69 [15]. The following colloquy

evidences Pacheco's intent to employ this tactic in an effort to elicit details from Swink, as well as his success in deriving the desired information:

> State: And his story is progressively changing. What does that mean to you?
>
> Pacheco: Well, the inconsistencies and the holes, it didn't make sense. The whole story was not there.
>
> State: So what was your response to these holes and inconsistencies (inaudible)?
>
> Pacheco: Once again I said, Brian, there's holes in the story. You know, fill me in more of what's been going on.
>
> State: And did he?
>
> Pacheco: At one point, he did. He said F it. He said, I'm going to get in trouble anyway. . . . I said, I want to know the story from the time you left Genesis to the time you were picked up, and he started from that point.

R.69[15].

Pacheco got the hoped-for response because Swink, at this point, admitted that he stole a vehicle and proceeded to give details of the crime. R.69[15-18]. Pacheco continued to express doubt as to Swink's story in an effort to elicit more information when he listed several vehicle brands in order to identify the make and model of the vehicle that Swink stole. R.69[16]. After he ascertained that it was a mini-van, Pacheco once again told Swink, "there's more to this story. . . . Let's hear the whole story." R.69[17]. Again, Swink responded with more information, explaining that he took "something" from South Towne Mall and then fled in the van. R.69[18].

In the face of such doubt and suspicion, especially when

that doubt and suspicion are used as a tool to elicit more information, a reasonable person in Swink's position would feel compelled to answer the questions. See Innis, 446 U.S. at 301 (focusing on "perceptions of the suspect"). In fact, as evinced by the aforementioned testimony, Swink in fact gave incriminating information. Hence, the trial court erred as a matter of law where the undisputed facts establish that Pacheco successfully engaged in questioning deliberately designed to "elicit an incriminating response." Innis, 446 U.S. at 302; R.71[4].

As a final matter, the trial court erred in ruling that Swink was not interrogated where the questions posed to Swink directly related to the stolen vehicle and were, therefore, the sort of "express questioning" mandating Miranda warnings. Innis, 446 U.S. at 300-01; see also Miranda, 384 U.S. at 444. Once Swink admitted to stealing a vehicle, Pacheco asked direct questions about the details of the crime. For example, he asked about the vehicle's make, R.69[16]; whether he "hot-wired it . . . [or] ha[d] the keys," R.69[17]; where he drove the stolen vehicle, R.69[17-18]; and where he abandoned it, R.69[19]. Ford likewise asked direct questions about the stolen vehicle. Ford testified that it became clear that Swink stole a vehicle and that he had left it running someplace. R.69[30]. Accordingly, Ford "asked [Swink] to describe . . . the exact location of the vehicle so I could go and secure the vehicle." Id.

As noted by the Innis Court, "Miranda safeguards come into play whenever a person in custody is subjected to [] express

questioning." 446 U.S. at 300-01. As evidenced by the facts marshalled above, Swink was subjected to express questioning about the stolen van while in custody. Accordingly, the trial court erred in concluding that Swink was not subjected to the sort of questioning necessitating the Miranda warnings. R.71[4].

In sum, the trial court erred as a matter of law in concluding that the undisputed facts do not establish "interrogation" for purposes of Miranda, 384 U.S. at 444. R.71[3-4]. The lengthy interview did not consist of simple questions regarding Swink's possible drug or alcohol use. Rather, Pacheco engaged in a persistent line of open-ended questions calculated to elicit information as to Swink's activity in general. Moreover, although Pacheco and Ford were aware that Swink was about to divulge incriminating information in response to Pacheco's questions when he stated, "F it. . . . I'm going to get in trouble anyway," they nonetheless failed to Mirandize Swink. Instead, Pacheco continued with the same line of questioning, resulting in the sought-after information. Moreover, both Pacheco and Ford asked direct questions about the stolen vehicle once Swink admitted to that crime.

Hence, under the circumstances, Pacheco and Ford engaged in "express questioning," as well as a line of questioning that they should have known would "likely result in an incriminating response." Innis, 446 U.S. at 301-02. In so doing, they "undermine[d] [Swink's] privilege against self-incrimination" since they failed to Mirandize him. Innis, 446 U.S. at 299

(citing Miranda, 384 U.S. at 457-58); R.69[25,34].

CONCLUSION

In light of the foregoing, Swink respectfully requests this Court to reverse the trial court's order denying his motion to suppress statements taken in violation of his Fifth Amendment right against self-incrimination. The undisputed facts establish that Swink was subjected to a custodial interrogation. The undisputed facts likewise establish that he was not Mirandized at any point during the custodial interrogation. R.69[25,34]. Accordingly, the trial court erred as a matter of law in concluding that his statement was admissible under the Fifth Amendment and Miranda, 384 U.S. at 444.

SUBMITTED this 14th day of February, 2000.

Catherine E. Lilly

CATHERINE E. LILLY
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, CATHERINE E. LILLY, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, P. O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 3rd Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 14th day of February, 2000.

Catherine E. Lilly
CATHERINE E. LILLY

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this 14th day of February, 2000.

ADDENDUM A

THIRD DISTRICT COURT - SLC COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES SENTENCE, JUDGMENT, COMMITMENT
vs.	:	Case No: 991901631 FS
BRIAN SWINK, Defendant.	:	Judge: TYRONE E. MEDLEY Date: May 17, 1999

PRESENT
Clerk: daleeng
Prosecutor: ESQUEDA, CARLOS A
Defendant
Defendant's Attorney(s): SHAPIRO, DAVID

DEFENDANT INFORMATION
Date of birth: September 13, 1981
Video

CHARGES

1. ATTEMPTED THEFT - 3rd Degree Felony
Plea: Guilty - Disposition: 04/12/1999 Guilty Plea

SENTENCE PRISON

Based on the defendant's conviction of ATTEMPTED THEFT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.
The prison term is suspended.

Case No: 991901631
Date: May 17, 1999

SENTENCE FINE

Charge # 1 Fine: $250.00
Suspended: $0.00
Surcharge: $212.50
Due: $462.50

Total Fine: $250.00
Total Suspended: $0
Total Surcharge: $212.50
Total Amount Due: $462.50

SENTENCE TRUST

The defendant is to pay the following:
Attorney Fees: Amount: $150.00
Pay in behalf of: LDA

Restitution: Amount: $1400.00
Pay in behalf of: RESTITUTION

ORDER OF PROBATION

The defendant is placed on probation for 36 month(s).
Probation is to be supervised by Adult Probation & Parole.
Defendant is to pay a fine of 462.50 where the surcharge has been added to the fine.
Pay fine to The Court.

PROBATION CONDITIONS

Usual and ordinary conditions required by the Department of Adult Probation & Parole.
Submit to searches of person and property upon the request of any Law Enforcement Officer.
Do not use, consume or possess alcohol or illegal drugs, nor associate with any people using, possessing or consuming alcohol or illegal drugs.
Submit to tests of breath and urine upon the request of any Law Enforcement Officer.

Case No: 991901631
Date: May 17, 1999

Violate no laws.
Submit to drug testing.
Not frequent any place where drugs are used, sold, or otherwise distributed illegally.
Refrain from the use of alcoholic beverages.
Pay $1,400.00 restitution.
Interstate compact with the State of Iowa.
Standard gang clause imposed. Work hours have to be completed before defendant goes to Iowa.
The Court orders the defendant to serve 180 days jail and receive 130 days credit for time served.

Dated this 17 day of May, 1999.

Tyrone E. Medley

TYRONE E. MEDLEY
District Court Judge