

1993

West Valley City v. Dennis Streeter : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

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IN THE UTAH COURT OF APPEALS.

930206 CA

STATE OF UTAH,

:

Plaintiff-Appellee,

:

Case No. 930206-CA

v.

:

DAVID C. STREETER,

:

Priority No. 2

Defendant-Appellant.

:

BRIEF OF APPELLEE

APPEAL FROM A JUDGMENT AND CONVICTION, BASED
ON A GUILTY PLEA, OF AGGRAVATED ASSAULT, A
THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE
ANN. § 76-5-103 (1990), IN THE THIRD JUDICIAL DISTRICT
COURT, SALT LAKE COUNTY, THE HONORABLE JOHN A.
ROKICH PRESIDING

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FILED

ORAL ARGUMENT REQUESTED; WRITTEN OPINION NOT REQUESTED

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COURT OF APPEAL

IN THE UTAH COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

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DAVID C. STREETER,	:	Priority No. 2
Defendant-Appellant.	:	

BRIEF OF APPELLEE

- - - - -

JURISDICTION AND NATURE OF THE PROCEEDINGS

Defendant entered a conditional guilty plea to aggravated assault, a third degree felony, in violation of Utah Code Ann. § 76-5-103 (1990), in the Third Judicial District Court, Salt Lake County, the Honorable John A. Rokich presiding. He appeals from the judgment and conviction entered on the plea. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1994).

ISSUES PRESENTED ON APPEAL AND STANDARDS OF REVIEW

1. Did alleged illegalities prior to defendant's invocation of his Miranda rights in his first interview taint defendant's confession in a second interview?

Standard of review. "In reviewing a trial court's determination on the voluntariness of a confession, [the appellate court will] apply a bifurcated standard of review. Under the bifurcated standard, the ultimate determination of whether a confession is voluntary is a legal question, and [the appellate court will] review the trial court's ruling for correctness. To the

extent the trial court has made subsidiary factual findings, however, those findings will not be set aside unless they are clearly erroneous. State v. Mabe, 864 P.2d 890, 892 (Utah 1993) (citations omitted).

2. In the second interview, was defendant's waiver of his Fifth Amendment rights knowing and intelligent, and his confession voluntary?

Standard of review. See issue No. 1.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

This case does not turn on the language of any constitutional provisions, statutes, or rules.

STATEMENT OF THE CASE

Defendant and two co-defendants¹ were charged by amended information with the following crimes:

- | | |
|------------------|---|
| Count I | Attempted criminal homicide, murder in the second degree, a second degree felony, in violation of Utah Code Ann. § 76-5-203 (1990); |
| Count II | Aggravated assault, a third degree felony, in violation of Utah Code Ann. § 76-5-103 (1990); |
| Count III | Attempted criminal homicide, murder in the second degree, a second degree felony, in violation of Utah Code Ann. § 76-5-203 (1990); |
| Count IV | Attempted criminal homicide, murder in the second degree, a second degree felony, in violation of 76-5-203 (1990). |

¹ The co-defendants were Dustin Ward and Kevin Harry Neff (R. 11).

Gang enhancements pursuant to Utah Code Ann. § 76-3-203.1 (Supp. 1992) were sought in connection with counts III and IV; a firearms enhancement pursuant to Utah Code Ann. § 76-3-203 (1990) was sought in connection with count IV (R. 11-15, addendum A).

Defendant filed a motion to suppress his partial confession as violative of the Utah Constitution and the United States Constitution as construed in Miranda v. Arizona, 384 U.S. 436 (1966) and Edwards v. Arizona, 451 U.S. 477 (1981) (R. 67-68, 71-72). The trial court denied this motion after an evidentiary hearing (R. 111-116).

Pursuant to a plea bargain, defendant pled guilty to aggravated assault, reserving his right to appeal the denial of his motion to suppress under State v. Sery, 758 P.2d 935 (Utah App. 1988) (R. 161-67, 170).²

On March 1, 1993 defendant was sentenced to the statutory prison term, no fines, and restitution as determined by Adult Probation and Parole (R. 175). Defendant timely filed his Notice of Appeal (R. 177).

The court of appeals remanded to the trial court for entry of a finding as to whether the issue reserved for appeal was dispositive as then required by State v. Montoya, 858 P.2d 1027 (Utah App. 1993). State v. Streeter, 864 P.2d 910 (Utah App. 1993). The Utah Supreme Court granted certiorari in both Montoya and Streeter to consider the conditional guilty plea issue only. It ruled in Montoya that the issue reserved on a conditional guilty

² It is apparent from the plea affidavit and minute entry that the parties were referring to the original three-count information (R. 8-10) rather than the amended four-count information (R. 11-14) in structuring the plea. Neither the Statement of Defendant (R. 161-67) nor the minute entry (R. 170) recognizes the existence of a fourth count. The apparent intent of the parties was to dismiss all counts except the one to which defendant pled guilty.

plea need not be dispositive of the case. State v. Montoya, 253 Utah Adv. Rep. 68, 70 (Utah 1994). Accordingly, the supreme court remanded Streeter "to the court of appeals to consider the merits of Streeter's appeal in that court" (Remittitur dated 15 December 1994).

STATEMENT OF FACTS

This case arises out of two vicious gang attacks in the early morning hours of 22 September 1990.

THE CHARGED CRIMES³

First gang attack. According to the probable cause statement,⁴ a car driven by the Mortensen family was forced to the side of the road at approximately 6407 West 4100 South, West Valley City. Ten or more young men, including defendant, ran to the car and began kicking and beating on it and threatening to kill the four occupants. The driver, Craig Mortensen, managed to drive the car away and stopped at a nearby convenience store. As his wife Karen called 911, defendant and his co-defendant Neff approached the Mortensen's car carrying rocks and again threatening to kill the occupants. At that point,

Craig Mortenson [sic] grabbed a hammer from a tool box, stepped outside the car and stated, "I have the right to defend myself." Streeter and Neff attacked Craig Mortenson, beating on his head with a rock and kicking his face and head. While Karen Mortenson pulled one of the assailants away from Craig Mortenson the other ran at her with a rock. He was prevented from striking Karen Mortenson only by the intervention of one of the Mortenson's teen-age daughters.

³ Because this case arises from a guilty plea rather than a verdict, the State relies on the probable cause statement to inform the Court of the charges against defendant.

⁴ Karen Mortensen, a victim, is the source of the information on the first attack.

Craig Mortenson was rushed by Life Flight to the University Medical Center, where emergency surgery for a compound depressed skull fracture saved his life (R. 14).

Second gang attack. According to the probable cause statement,⁵ Mark Long and Roland Olsen were parked at a convenience store on 7204 West 3500 South, West Valley City. An argument arose between Olsen and Long in one truck and Dustin Ward and a group of juveniles in another truck. "Suddenly there were twelve or more young men in the parking lot," including defendant. A fight developed, and Olsen saw Streeter and his co-defendants "repeatedly jumping on and kicking Mark Long in the face and head." Long was lying on the ground at the time and, after the attack, was unconscious.

Olsen followed defendant and his co-perpetrators and confronted them about Long's condition.

David Streeter pulled a 22 semi-automatic pistol and threatened to blow Olsen's head off. Olsen turned and retreated while others chanted "shoot him, shoot him," [and] Dustin Ward was throwing rocks at Olsen. When Olsen was approximately twenty feet away from the group he heard the gun fire. A projectile landed near his feet. As he turned back around he was struck in the face by a tire iron. Then Kevin Neff struck him with a metal pipe.

Long's life was saved by emergency surgery on his fractured skull (R. 14-15).

DEFENDANT'S TWO INTERVIEWS

First interview. Detective Tracy Cowley interviewed defendant on 22 September 1990 at approximately 8:30 or 9:00 a.m. (R. 189-90). The interview was conducted at the station house and was tape-recorded (R. 190). The tape-recording was transcribed and appears as pages 1 and 2 of defendant's exhibit 1 (addendum B) (R. 191-92).

⁵ Roland Olsen, a victim, is the source of the information on the second attack.

Detective Cowley read defendant his Miranda rights, and defendant said he understood them (R. 194). The following exchange then ensued:⁶

TC: Having these rights in mind do you wish to speak with us now without an attorney present?

DS: No.

(Def. Ex. 1 at 1). Detective Cowley later testified that, in his mind, defendant's response "required clarification" (R. 195). Accordingly, in "an effort to further understand his previous statement" (R. 209), Detective Cowley continued the interview:

TC: You don't want to talk to us?

DS: I don't know why I am really even in here. All I was doing was sleeping over at my friends lawn last night and the cops just come ripping in the yard and arrested us and

TC: Well we have a bunch of questions we would like to ask you, would you be willing to answer those questions without a lawyer present.

DS: Maybe some of them. It just depends cause I really don't know why I am here.

TC: So does that mean we can ask you questions and you will answer the ones you want to answer?

DS: Yes I have the right to stop at any time through.

TC: Well, I'll tell you right now that if you take that attitude with us.

DS: Well I ain't trying to

TC: Because we have all the witnesses we need and we know who has done what and who has done what to who. So I want the truth out of you and I want it now. Now do you understand that?

DS: Yes

⁶ "TC" indicates Detective Tracy Cowley; "DS" indicates defendant David Streeter.

TC: Who were you with tonight[?]

DS: J.D.

TC: Who else?

DS: Some of my friends, I want my lawyer here, all you have to do is call my mom and he will be down here.

TC: You want your attorney?

DS: Yes

TC: And you don't want to talk to us?

DS: Yes

TC: O.K.

(Def. Ex. 1 at 1-2). Whereupon the interview concluded (R. 211). Detective Cowley did not attempt to locate an attorney for defendant (R. 202). Defendant was returned to the holding cell (R. 212).

Defendant's request. An hour to two hours later, Officer Robert Dey "was checking on cells again to see if people were, you know, physically all right, if they needed anything" (R. 205, 230). He asked defendant only "if he needed anything"; defendant stated "that he wanted to talk to the detective again" (R. 205, 213, 230).

Second interview. The second interview was recorded and transcribed and appears on pages 3 through 10 of defendant's exhibit 1 (addendum B). Officer Bruce Sterner was also present and asked a single question (R. 206-07).

Detective Cowley began by confirming that defendant recalled being Mirandized and desired to waive his rights:

TC: Do you recall earlier that I had advised you of your rights?

DS: Yes.

TC: And after being advised of your rights you said that you wanted to talk to a lawyer?

DS: Yes

TC: Now is it your desire [--] and you come forth voluntarily [--] that you want to talk to me now?

DS: Yes

TC: And you want to talk to me without a lawyer?

DS: Yes

TC: Go ahead.

(Def. Ex. 1 at 3, addendum B). Thereafter defendant gave a partial and self-serving, but nonetheless incriminating, description of his participation in the crimes. He said he threw a rock that hit Craig Mortensen and admitted kicking him in the chest; he also admitted kicking Mark Long in the head (*see* Def. Ex. 1 at 5-7, addendum B).

SUMMARY OF ARGUMENT

1. Defendant's dilemma in this case arises out of the fact of the two interviews. All the alleged police misconduct occurred in the first interview, but all the incriminating statements were made in the second interview, one to two hours later. He therefore must rely on "attenuation analysis" to demonstrate that alleged illegalities in the first interview "tainted" his confession in the second. Defendant's claim fails because only actual compulsion will taint a subsequent confession, and defendant cannot demonstrate actual compulsion.

2. Defendant's waiver of rights was knowing and intelligent, and his confession voluntary. After defendant terminated the first interview by invoking his rights, he initiated further conversation about the crime with police. Re-recitation of the Miranda warnings was unnecessary because defendant remembered the previous warnings and had demonstrated his understanding by actually exercising his Miranda rights. Police used no illegal or questionable tactics.

ARGUMENT⁷

INTRODUCTORY CLARIFICATIONS

A number of factual assertions in the Brief of Appellant are incorrect, misleading, or otherwise require clarification.

First, footnote 4 on page 6 of Brief of Appellant contains numerous factual assertions regarding defendant's age, IQ, and education. The source of these assertions is a psychological evaluation attached to a diagnostic evaluation report apparently prepared for sentencing purposes.

Although Utah has no rule, most appellate courts, in reviewing the denial of a pretrial motion to suppress evidence, will consider only evidence before the court at the suppression hearing. *See, e.g., United States v. Hicks*, 978 F.2d 722, 724-25 (D.C. Cir. 1992); *Baez v. State*, 425 S.E.2d 885, 890 (Ga. App. 1992); *State v. Ryder*, 315 N.W.2d 786, 788-89 (Iowa 1982); *Aiken v. State*, 647 A.2d 1229, 1232 (Md. App. 1994), *cert. denied*, 651 A.2d

⁷ Since "[n]o attempt has been made to brief state constitutional questions," the State will brief and this Court should consider "only the federal constitutional questions and decline to consider whether any state rights are implicated." *State v. Fulton*, 742 P.2d 1208, 1211 n.2 (Utah 1987), *cert. denied*, 484 U.S. 1044 (1988).

854 (Md. 1995); Commonwealth v. Powers, 398 A.2d 1013, 1014 (Pa. 1979); 4 Wayne R. LaFave, Search and Seizure § 11.1(c) (1987).

Some appellate courts will consider both pretrial and trial evidence in reviewing a pretrial ruling. However, courts endorsing this rule generally do so in the context of affirming the trial court's pretrial ruling. United States v. Muniz, 1 F.3d 1018, 1021-22 (10th Cir.), *cert. denied*, 114 S. Ct. 575 (1993); United States v. Martin, 982 F.2d 1236, 1239-40 n.2 (8th Cir. 1993); United States v. Basey, 816 F.2d 980, 983 n.1 (5th Cir. 1987); State v. Young, 576 So.2d 1048, 1054 n.1, 1055 (La. App. 1991); State v. Duncan, 879 S.W.2d 749, 751 (Mo. App. 1994). *Contra* State v. Kong, 883 P.2d 686, 688 (Hawaii App. 1994) (reversal).

This Court should not consider information unavailable to the district court at the suppression hearing for the purpose of reversing the court's ruling on the motion to suppress.

Second, repeated references to defendant's having "broken down," Br. of Appellant at 8, 18 n.13, 29, 33, are without support in the record or legal parlance. The record indicates merely that defendant spent an hour to two hours in a cell, during which time an officer "may have asked if he needed to go to the rest room or needed a drink of water, anything like that" (R. 231). When an officer "asked him if he needed anything," defendant said "that he wanted to talk to the detective again" (R. 230-31).

Utah courts have consistently used the term "broke down" or "break down" to mean more than making a simple request after being left alone for one to two hours. For example, Mares v. Hill, 118 Utah 484, 493-94, 222 P.2d 811, 815 (Utah 1950), *cert. denied*, 341 U.S. 933 (1951), refers to cases where "the prisoner broke down and confessed only after

days of long relays [sic] of questioning, wherein he was subjected to physical discomforts and disregard for the rudimentary need of life with fear and intimidations exerted, all of which were calculated to break his resistance." *See also State v. Young*, 780 P.2d 1233, 1237 (Utah 1989) (referring to "emotional courtroom outbursts, including instances where the defendant wept and a recess was called because it was not clear whether the defendant 'was going to break down'"); *State v. Hegelman*, 717 P.2d 1348, 1349 (Utah 1986) (after an officer "grabbed defendant . . . by the lapels, moved him sideways against a nearby filing cabinet, and called him a rapist," defendant "broke down and cried for a minute, composed himself, and then confessed to the crimes"); *State v. Johns*, 615 P.2d 1260, 1262 (Utah 1980) (victim "appeared emotionally distraught when she first entered the store and broke down completely and began to cry when the police arrived"); *State v. Pendergrass*, 803 P.2d 1261, 1263 (Utah App. 1990) ("defendant broke down crying"). This case involves none of the fear, intimidation, emotional outbursts, fisticuffs, or tears generally associated in this state with the term "broke down."

Third, defendant's repeated assertion that he was held "*incommunicado*," Br. of Appellant at 24 n.15, 29, 33, 34, is misleading. Defendant was kept in a holding cell with a "large . . . group of people" (R. 230-31). The period during which defendant claims to have been held "*incommunicado*" was at most two hours, hardly time to process and book the large number of people who were sharing his holding cell.

Fourth, the description of defendant as being "of a tender age," Br. of Appellant at 26, is misleading. Even assuming that defendant was 18 years old on the date of the attack, 18 is not "a tender age" as that term is used in Utah. *See, e.g., State v. Butterfield*, 784

P.2d 153, 154 (Utah 1989) (14 years); State v. Wilkerson, 612 P.2d 362, 365 (Utah 1980) (6 years); Thomas v. Union Pacific Railroad, 548 P.2d 621, 623 (Utah 1976) (22 months); State ex rel. Mullen, 29 Utah 2d 376, 377, 510 P.2d 531, 531 (Utah 1973) ("small children"); Baldwin v. Nielsen, 110 Utah 172, 178, 170 P.2d 179, 182 (Utah 1946) (Wolfe, J., dissenting) (4 years).

Fifth, defendant claims that the police had "concerns that David Streeter would not submit to interrogation after consultation with an attorney." Br. of Appellant at 29. Defendant cites no record support for this factual assertion and the record contains none. The record does reflect that there was a "large . . . group of people" in the holding cell at the time (R. 230-31). The most reasonable inference from this fact is that the officers simply chose to continue processing and interviewing these people rather than to drop their business and do defendant a favor by calling his mother.

Sixth, defendant claims to define "the extent to which David Streeter understood his rights," and asserts that "David Streeter's knowledge of his rights was limited to his prior receipt of Miranda warnings . . ." Br. of Appellant at 30, 32. In fact, the record reflects nothing about the extent of defendant's knowledge of his rights. Perhaps, like 20-year-old Lance Conway Wood, defendant had "heard them a thousand times." State v. Wood, 868 P.2d 70, 86 (Utah 1993).

POINT I

DEFENDANT'S CLAIM FAILS BECAUSE ONLY ACTUAL COMPULSION WILL TAINT A SUBSEQUENT CONFESSION, AND DEFENDANT CANNOT DEMONSTRATE ACTUAL COMPULSION

Defendant's dilemma in this case arises out of the fact of the two interviews. All the alleged police misconduct occurred in the first interview, but all the incriminating statements were made in the second interview, one to two hours later. Defendant's dilemma is heightened by two additional facts: (1) he peremptorily ended the first interview by invoking his Miranda rights, and (2) the police began the second interview by reminding defendant of his Miranda rights and that he had successfully invoked them in the first interview.

In order to succeed in his claim, defendant must link the two interviews in such a way that the alleged illegalities in the first fatally taint the second.

The United States Supreme Court has rejected the "taint" analysis where the prior illegality is merely a Miranda violation. In Oregon v. Elstad, 470 U.S. 298 (1985), an 18-year-old suspect was taken into custody and, in response to police questioning and without a Miranda warning, voluntarily admitted his involvement in a burglary. One hour later and after a proper Miranda warning, the suspect confessed. The Oregon Court of Appeals required suppression of the confession on the ground that it was tainted by the coercive impact of the unconstitutionally obtained statement, since "'the cat was sufficiently out of the bag to exert a coercive impact on [Elstad's] later admissions.'" *Id.* at 303 (quoting State v. Elstad, 658 P.2d 552, 554 (Ore. App. 1983)).

The Supreme Court reversed. The Court stressed that although the Miranda exclusionary rule "serves the Fifth Amendment," it "sweeps more broadly than the Fifth

Amendment itself" and therefore "may be triggered even in the absence of a Fifth Amendment violation." Elstad, 470 U.S. at 306. "The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony." *Id.* at 306-07.

The Court held that, so long as an unwarned interrogation "involved no actual compulsion," a subsequent, warned confession was not "fruit of the poisonous tree." *Id.* at 305, 308. There is thus no need to demonstrate that intervening events break the causal connection between the illegal interrogation and the confession "so that the confession is 'sufficiently an act of free will to purge the primary taint.'" *Id.* at 306 (quoting Taylor v. Alabama, 457 U.S. 687, 690 (1982) (in turn quoting Brown v. Illinois, 422 U.S. 590, 602 (1975))). All that is required is administration of a Miranda warning, which "serves to cure the condition that rendered the unwarned statement inadmissible." Elstad, 470 U.S. at 311.

Moreover, "the fact that the police interview was coercive [is] not enough, by itself, to render the defendant's confession involuntary. To be involuntary there must be a causal relationship between the coercion and the subsequent confession." State v. Mabe, 864 P.2d 890, 893 (Utah 1993).

Thus, in order to prevail, defendant must demonstrate both the existence of "actual compulsion" in the first interview and a causal link to defendant's confession in the second. This he cannot do.

A. Police ceased interrogation when defendant unequivocally invoked his Miranda rights.

Defendant claims that the police continued to interrogate him after he invoked his constitutional right to remain silent and not to be interrogated without an attorney present.

Br. of Appellant at 11-17. This is not a claim of actual compulsion, but of violation of the prophylactic rules of Miranda and its progeny. Therefore, this argument does not advance defendant toward his goal of proving that the second interview was tainted. It is therefore irrelevant to this case. However, no Miranda violation occurred in any event.

Only an unequivocal and unambiguous request for counsel requires police to cease interrogation. The United States Supreme Court has recently held that, in order to invoke the right to counsel, a 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. If the statement fails to meet the requisite level of clarity, Edwards does not require that the officers stop questioning the suspect." Davis v. United States, 114 S. Ct. 2350, 2355 (1994) (holding that phrase "Maybe I should talk to a lawyer" was not a request for counsel). The Court expressly declined to adopt a rule "requiring officers to ask clarifying questions" when a suspect makes an ambiguous or equivocal invocation of counsel. *Id.* at 2356. "If the suspects' statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." *Id.*

It is settled law that "an accused . . . , having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Edwards v. Arizona, 451 U.S. 477, 484-85 (1981) (emphasis added). However, "this prohibition on further questioning--like other aspects of Miranda--is not itself required by the Fifth Amendment's

prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose." Davis, 114 S. Ct. at 2355 (quoting Connecticut v. Barrett, 479 U.S. 523, 528 (1987)).

In the case at bar, the district court found that "[t]he police officer conducting the first interrogation ceased interrogation when the defendant requested counsel" (R. 114, addendum C). Such "subsidiary factual findings" "will not be set aside unless they are clearly erroneous." Mabe, 864 P.2d at 892; *accord* State v. Wood, 868 P.2d 70, 83 (Utah 1993). Defendant has failed to demonstrate that this finding is clearly erroneous.

Initial invocation equivocal. Defendant's first invocation of his rights--or, more precisely, his refusal to waive them--appears to be equivocal. Detective Cowley asked, "Having these rights in mind do you wish to speak with us now without an attorney present?" Defendant answered, "No" (Def. Ex. 1 at 1, addendum B).⁸ Detective Cowley considered this response to be equivocal. He testified as follows at the suppression hearing:

Q. [By defense counsel] That answer was unequivocal, wasn't it?

A. That's right.

Q. It required no clarification, did it?

A. Well, in my mind it did.

(R. 195, emphasis added).

⁸ Although defendant describes his "no" as "emphatic," Br. of Appellant at 12, the record does not support this characterization. It does not reflect defendant's "appearance and demeanor, his manner of expression and tone of voice, . . . or his tendency to hesitate . . ." Child v. Child, 8 Utah 2d 261, 267, 332 P.2d 981, 985 (Utah 1958).

Defendant apparently assumes that the clarity of a response must be judged entirely by the response itself. Br. of Appellant at 13 ("No means no."). However, sometimes the ambiguity of a response may be traced to the question. Thus, "questions with negatives and double negative clauses" State v. McMillan, 588 P.2d 162, 164 (Utah 1978), may cause confusion even where their answers are categorical. In this case, Detective Cowley's question included the word *without*. While technically not negative, *without* is "virtually negative" and so may occasion "negative confusion." H. W. Fowler, A Dictionary of Modern English Usage 716 (Sir Ernest Gowers, ed., Oxford University Press 1965).

Detective Cowley's assertion that "I wanted to clarify and that's why I asked him the next question" (*id.*) is borne out in the transcript. He followed with a series of questions in an obvious attempt to evoke an unequivocal response from an evasive suspect:

TC: You don't want to talk to us?

DS: I don't know why I am really even in here. All I was doing was sleeping over at my friends lawn last night and the cops just come ripping in the yard and arrested us and

TC: Well we have a bunch of questions we would like to ask you, would you be willing to answer those questions without a lawyer present[?]

DS: Maybe some of them. It just depends cause I really don't know why I am here.

TC: So does that mean we can ask you questions and you will answer the ones you want to answer?

DS: Yes I have the right to stop at any time though.

(Def. Ex. 1 at 1-2).⁹ After this waiver, Officer Cowley began the interrogation. Defendant

⁹ That Detective Cowley is sensitive to the potential ambiguity in a yes or no answer is apparent (continued...)

said nothing incriminating. He then asserted his rights unequivocally and the interview promptly concluded (*see* Def. Ex. 1 at 2; R. 211).

Initial invocation unequivocal. Even if defendant's initial refusal to waive his rights had been unequivocal, his rights were still respected because Detective Cowley immediately ceased interrogation.

Strictly speaking, Miranda does not require that all communication or even questioning cease upon the suspect's assertion of his rights, only that *interrogation* cease. Rhode Island v. Innis, 446 U.S. 291 (1980) (holding that officer's comment that it would be too bad if a little girl killed herself with the murderer's discarded shotgun was not interrogation under Miranda); Miranda, 384 U.S. at 473-74 ("If the individual indicates in any manner . . . that he wishes to remain silent, the interrogation must cease."); *id.* at 479 ("unless and until such warnings and waiver are demonstrated . . ., no evidence obtained as a result of interrogation can be used against him").

Interrogation "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." Innis, 446 U.S. at 301.

United States v. Dougall, 919 F.2d 932 (5th Cir. 1990), *cert. denied*, 501 U.S. 1234 (1991), illustrates this distinction. After being Mirandized, Dougall requested an attorney.

⁹(...continued)
from his own examination in the suppression hearing (*see* R. 196-97). He prefers the clearer "That's correct" or "that's right," especially to a question containing a negative element.

Thereafter, officers "requested minimal personal data from Dougall--name, social security number, birth date, birth place, height, weight, and address." *Id.* at 934. They also requested "a hair sample, informing Dougall that they would obtain a court order if he failed to comply voluntarily." *Id.* Dougall began to talk about the charges, then again requested an attorney. The officers sat silently with him in the room for a short time, and Dougall confessed.

The Court of Appeals for the Fifth Circuit ruled for the government. Citing Innis, the court stated that "[n]one of the actions of which Dougall now complains amounts to improper interrogation." *Id.* at 936. Hence, admission of the hair samples and confession were held proper. *See also United States v. Moreno-Flores*, 33 F.3d 1164, 1169-70 (9th Cir. 1994) (after suspect invoked his right to silence, agents told him that they had seized 600 pounds of cocaine and that he was in trouble and asked suspect where he was the night after the drug bust; held, no Miranda violation).

Like the innocuous questions in Dougall, Detective Cowley's question, "You don't want to talk to us?" was not reasonably likely to, and did not, elicit an incriminating response. It was therefore not *interrogation* for Miranda purposes.

Admittedly, Detective Cowley's later statement, "So I want the truth and I want it now" (Def. Ex. 1 at 2, addendum B) was reasonably likely to elicit an incriminating response. It therefore constituted interrogation. However, it followed defendant's waiver:

TC: So does that mean we can ask you questions and you will answer the ones you want to answer?

DS: Yes I have the right to stop at any time though.

(Def. Ex. 1 at 1-2). Hence, Detective Cowley's interrogation was not illegal. And of course, defendant abruptly invoked his rights only seconds later, Detective Cowley just as abruptly and without discussion concluded the interview.

B. The police had no duty to provide counsel to defendant.

Defendant complains that police did not call his mother to obtain him an attorney. Br. of Appellant at 17. Again, defendant does not contend that by not calling his mother to obtain an attorney constituted actual compulsion. Consequently, this omission, even if a violation of Miranda, cannot taint defendant's later confession. See Oregon v. Elstad, *supra*. It is therefore irrelevant to this case. However, even viewed in isolation, defendant's argument fails because defendant cannot establish that the police had any legal duty to assist defendant in obtaining counsel.

Defendant had no Sixth Amendment right to counsel at his arrest. "The Sixth Amendment right to counsel attaches only at the initiation of adversary criminal proceedings, see United States v. Gouveia, 467 U.S. 180, 188 (1984), and before proceedings are initiated a suspect in a criminal investigation has no constitutional right to the assistance of counsel." Davis, 114 S. Ct. at 2354. Accord State v. Wood, 868 P.2d 70, 86 (Utah 1993). Since adversary judicial criminal proceedings had not been initiated at the time of defendant's interviews, his Sixth Amendment right to counsel had not yet attached. Thus, to the extent defendant may claim that the Cowley interview violated his Sixth Amendment right to counsel, see Br. of Appellant at 18, his claim is without merit.

Defendant implies that the Fifth Amendment requires police to provide counsel or access to a telephone so that he could obtain counsel. Yet he cites no controlling authority

supporting this suggestion. The only Utah, United States, or even Tenth Circuit case he cites is State v. Moore, 697 P.2d 233, 236 (Utah 1985), which is not a Sixth Amendment right-to-counsel case.

The foreign precedents he cites are weak. For example, People v. Locke, 200 Cal. Rptr. 20 (Cal. App. 1984), states that a warned suspect must be given an opportunity to telephone an attorney. However, this conclusion rests on a California statute providing that "an arrested person has the right to make at least three completed telephone calls . . ." Cal. Penal Code § 851.5, cited in Locke, 200 Cal. Rptr. at 22.¹⁰

United States v. Guido, 704 F.2d 675 (2d Cir. 1983), also relied upon by defendant, merely opines that "the better procedure would have been to permit Guido to call his attorney on Guido's arrival at the . . . courthouse . . ." *Id.* at 678. Guido involved a suspect who, after his Miranda warning, requested an opportunity to call his attorney. After being told by police that "he should consider cooperating with the authorities in their investigation, and that he should discuss the possibility of cooperation with his attorney" Guido asked about details of the crime, which the police explained. He then confessed. The Second Circuit Court of Appeals affirmed the trial court's finding that Guido's rights had not been violated. This case supports the State's position.

In Commonwealth v. Zook, 553 A.2d 920 (Pa.), *cert. denied*, 493 U.S. 873 (1989), also cited by defendant, the Supreme Court of Pennsylvania split 4-3 on the question of whether the suspect's asking "if he could use the phone to call his mother to see if she could

¹⁰ This was one of two "cites omitted" from defendant's brief. *Cf.* Br. of Appellant at 19. The other is a case applying the statute. *See In re Newbern*, 360 P.2d 43, 46 (Cal. App. 1961).

get him an attorney" was an equivocal or unequivocal invocation of his right not to be interrogated without counsel present. Four justices believed that Zook "clearly invoked his rights under Miranda"; three justices believed the statement was "equivocal." *Id.* at 922-23; 923 (Larsen, J., dissenting). Whether police were required to provide a telephone was not at issue in the case.

That Detective Cowley did not fetch defendant a phone is irrelevant. He had no duty to do so.

C. The police did not threaten defendant.

Defendant claims that he was threatened by Detective Cowley in the first interview. This claim is relevant, because a threat is a tactic, like actual coercion, "calculated to undermine the suspect's ability to exercise his free will." Elstad, 470 U.S. at 309. Here is the passage upon which defendant bases his claim to have been threatened:

TC: So does that mean we can ask you questions and you will answer the ones you want to answer?

DS: Yes I have the right to stop at any time though.

TC: Well, I'll tell you right now that if you take that attitude with us.

DS: Well I ain't trying to

TC: Because we have all the witnesses we need and we know who has done what and who has done what to who. So I want the truth out of you and I want it now. Now do you understand that?

DS: Yes

TC: Who were you with tonight[?]

(Def. Ex. 1 at 2, addendum B, emphasis added). Although defendant now complains that Detective Cowley's comments threatened "some unspecified dire consequences," Br. of Appellant at 21, defendant in fact easily and without consequences shrugged off these purported threats and invoked his rights almost immediately:

TC: Who were you with tonight[?]

DS: J.D.

TC: Who else?

DS: Some of my friends, I want my lawyer here, all you have to do is call my mom and he will be down here.

TC: You want your attorney?

DS: Yes

TC: And you don't want to talk to us?

DS: Yes

TC: O.K.

(Def. Ex. 1 at 2).

Detective Cowley admonished defendant to tell the truth and implied that the police already had the whole truth. Even "telling the accused that it would be better for him to speak or tell the truth does not furnish any inducement, or a sufficient inducement, to render objectionable a confession thereby obtained, unless threats or promises are applied." State v. Griffin, 754 P.2d 965, 970 (Utah App. 1988) (quoting State v. Ashdown, 5 Utah 2d 59, 296 P.2d 726 (1956)).

Also, the mere fact that police may make threatening remarks does not establish that a confession is involuntary. Although the Supreme Court in the nineteenth century held that "any threat or promise, however slight, renders a confession involuntary and inadmissible, later cases do not repeat that rigid rule but follow the totality of all the circumstances test." State v. Strain, 779 P.2d 221, 227 (Utah 1989).

State v. Bishop, 753 P.2d 439 (Utah 1988), is illustrative. There, an interrogating officer said in defendant's presence, "I'm going to punch his lights out." *Id.* at 462. He also implied that Bishop was going to prison, where the other prisoners "would not react well" when they learned he liked to "sleep with little boys." *Id.* The Utah Supreme Court held that "[a]lthough some of [the officer's] remarks during the initial interview may be characterized as 'threatening' in nature, when viewed in the totality of surrounding circumstances, the police interrogation does not reveal utilization of those impermissible methods proscribed by the fourteenth amendment." *Id.*

The salient fact in the case at bar is that defendant did not confess after the alleged threats, but peremptorily terminated the interview. Only later, after being reminded of his rights and that he had previously exercised them, did he confess.

D. Police conduct did not "taint" defendant's confession.

Defendant has failed to establish any actual coercion in violation of the Fifth Amendment, as opposed to the prophylactic Miranda rules. Moreover, he has failed to acknowledge his burden to establish a causal link between the alleged coercion and defendant's subsequent confession. Therefore, the attenuation analysis does not apply here.

However, even under attenuation analysis, defendant's claim fails. The relevant factors are (1) whether Miranda warnings were given, (2) the temporal proximity of the illegality and the confession, (3) the absence or presence of intervening circumstances, and (4) the purpose and flagrancy of the official misconduct. Allen, 839 P.2d at 300-01.

The factors here favor attenuation. (1) Defendant received Miranda warnings at the beginning of the first interview and was reminded of them at the beginning of the second. He also invoked his Miranda rights at least once, to end the first interview. (2) There was a one- to two-hour hiatus between interviews. (3) One intervening circumstance is decisive: after the alleged police illegality, defendant invoked his rights and Detective Cowley ceased all interrogation and conversation immediately. (4) The purposes of the alleged police illegality were to clarify defendant's response and to encourage him to tell the truth. The police conduct cannot by any stretch of the imagination be termed flagrant.

In sum, because defendant cannot establish actual coercion, this case does not qualify for attenuation analysis. But even if it did, that analysis requires admitting the confession.

POINT II

IN THE SECOND INTERVIEW, DEFENDANT'S WAIVER OF RIGHTS WAS KNOWING AND INTELLIGENT, AND HIS CONFESSION VOLUNTARY

A. Full re-recitation of the Miranda warnings was unnecessary.

Defendant claims that his confession in the second interview was unwarned because Detective Cowley did not repeat in full the Miranda warnings he had administered one to two hours earlier in the first interview. Here is what was said in that second interview:

TC: Do you recall earlier that I had advised you of your rights?

DS: Yes.

TC: And after being advised of your rights you said that you wanted to talk to a lawyer?

DS: Yes

TC: Now is it your desire and you come forth voluntarily that you want to talk to me now?

DS: Yes

TC: And you want to talk to me without a lawyer?

DS: Yes

TC: Go ahead.

(Def. Ex. 1 at 3, addendum B).

Defendant did not need to be re-Mirandized, because his initial Miranda warning remained effective. Miranda warnings are not accorded "unlimited efficacy or perpetuity." United States v. Hopkins, 433 F.2d 1041, 1045 (5th Cir. 1970), *cert. denied*, 401 U.S. 1013, 91 S. Ct. 1252 (1971). Nevertheless, a warning once given may have continuing effect past the interview in which it was given, so that statements made in later interrogations will be considered warned. *See, e.g.,* Martin v. Wainwright, 770 F.2d 918, 930 (11th Cir. 1985) (seven days), *cert. denied*, 479 U.S. 909 (1986); Maguire v. United States, 396 F.2d 327, 331 (9th Cir. 1968) (three days), *cert. denied*, 393 U.S. 1099 (1969); Whitmore v. Lockhart, 834 F. Supp. 1105, 1124 (E.D. Ark. 1992) (two days), *aff'd*, 8 F.3d 614 (8th Cir. 1993) (no discussion of Miranda issue); United States v. Smith, 679 F. Supp. 410, 411 (D. Del. 1988) (two and a half hours); State v. Henry, 863 P.2d 861, 869 (Ariz. 1993) (six hours); People v. Mickle, 814 P.2d 290, 305 (Cal. 1991) (en banc) (thirty-six hours), *cert.*

denied, 112 S.Ct. 1679 (1992); State v. Kimble, 546 So. 2d 834, 840 (La. App. 1989) (two days); State v. Butzin, 404 N.W.2d 819, 826 (Minn. App. 1987) (nineteen hours); State v. Fisher, 350 S.E.2d 334, 341 (N.C. 1986) ("very brief"); Babcock v. State, 473 S.W.2d 941, 943 (Tex. Crim. App. 1971) (two days).

The need for a second warning is governed by the totality of circumstances test. Commonwealth v. Ferguson, 282 A.2d 378, 379 (Pa. 1971). Relevant factors include "the amount of time that has passed since the waiver, any change in the identity of the interrogator or the location of the interview, any official reminder of the prior advisement, the suspect's sophistication or past experience with law enforcement, and any indicia that he subjectively understands and waives his rights. People v. Mickle, 814 P.2d 290, 305 (Cal. 1991) (en banc), *cert. denied*, 112 S. Ct. 1679 (1992).

Where the record is clear that defendant "subjectively understands and waives his rights," that fact should conclude the inquiry. Indeed, this appears to be the rule in Utah. State v. Hilfiker, 868 P.2d 826, 831 (Utah App. 1994) (subsequent confession was knowing and intelligent where police told defendant he was "still under Miranda"). Here, Detective Cowley scrupulously obtained defendant's waivers. He specifically reminded defendant that he had been advised of his rights and that he had in fact invoked his rights to remain silent and not to be interrogated without counsel present. Detective Cowley was also careful to ensure that defendant both wanted to talk and wanted to talk without a lawyer. He also confirmed that these waivers were defendant's "desire" and that he was coming forth "voluntarily" to talk (Def. Ex. 1 at 3, addendum B). That should conclude the inquiry.

Defendant's belief that "[r]e-Mirandizing should be required prior to all subsequent interrogations," Br. of Appellant at 30, is inconsequential: this ground was not preserved below; his proposed rule is followed, apparently, only in Hawaii; the rule is not required by the Court that created Miranda; and, as demonstrated by the facts of this case, the rule is poor policy.

B. Defendant demonstrated his understanding of his Miranda rights by terminating the first interview by invoking them.

If anything in this case is clear, it is this: defendant understood his Miranda rights. They were explained to him in the first interview. He later brusquely ended the interview by invoking these rights. Once defendant made clear that he did not want to talk, the police stopped the interrogation without discussion. In the second interview, defendant was reminded of his rights and, further, reminded that he had curtailed the first interview by invoking them. Then he was asked separately about his desire to waive his right to remain silent and his right to have counsel present. He waived both categorically.

Defendant's claim on appeal that his "will was overborne" contradicts the facts.

C. Defendant knowingly, intelligently, and voluntarily waived his right to counsel.

Defendant claims that he did not knowingly, intelligently, and voluntarily waive his right to counsel. Br. of Appellant at 33.

"Statements made by a person after invoking the right to counsel are admissible if (1) the accused, not the law enforcement officers, initiates the conversations in which the incriminating statements are made; (2) the prosecution shows a knowing and intelligent waiver of accused's right to counsel; and (3) the prosecution shows by a preponderance of

evidence that the statements were voluntarily made." State v. Hilfiker, 868 P.2d 826, 830 (Utah App. 1994) (citing State v. Moore, 697 P.2d 233, 236 (Utah 1985)). All three factors are met here.

Initiation. it is undisputed that defendant initiated the conversation in which the incriminating statements were made.

Knowing and intelligent waiver. The trial court found that "[t]he defendant made a knowing and intelligent waiver of his right to counsel." It went on to find that "it is evident that defendant understood that he had a right to counsel and that he elected to proceed without benefit of counsel. . . . There was no evidence presented that would indicate that defendant did not make an intelligent and voluntary decision to proceed with the interrogation" (R. 115, addendum C). Defendant does not acknowledge this finding on appeal. As demonstrated above, it is clearly correct.

Again, the case at bar resembles Hilfiker. Hilfiker terminated an initial interview by invoking his right to counsel. He later initiated discussion about the crime. Speaking of this second discussion, this Court wrote that Hilfiker "was informed of his Miranda rights . . . [The officer] stated, 'I want to make it clear here . . . that you're still under Miranda, you have requested an attorney, . . . if you wish to make a statement, we'll listen to it. . . . I want you to understand that you still have that right to an attorney.'" Hilfiker, 868 P.2d at 831. Hilfiker "acknowledged his rights and still proceeded to make the incriminating statements." *Id.* The court found his waiver to be knowing and intelligent.

Statements voluntary. "[T]he inquiry into voluntariness is never mechanical, but must duly consider both the characteristics of the accused and the details of the

interrogation." Allen, 839 P.2d at 300. "In order for a confession to be admissible, it must be made freely and voluntarily; it must not be extracted by threats or violence or obtained by improper influence or promises." State v. Watts, 639 P.2d 158, 160 (Utah 1981). "The ultimate inquiry is . . . whether physical or psychological force or other improper threats or promises prompted the accused to talk when he otherwise would not have done so." Allen, 839 P.2d at 300. "The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative." Elstad, 470 U.S. at 318.

The district court's finding that defendant waived his rights voluntarily is clearly correct. The police employed no violence, no trickery, no psychological pressure, and no "improper threats or promises." Defendant's confession was entirely legal and admissible.

CONCLUSION

Defendant's conviction should be affirmed.

ORAL ARGUMENT REQUESTED; WRITTEN OPINION NOT REQUESTED

Because the State anticipates a reply brief in this case, oral argument is requested. If no reply brief is filed, the State does not request oral argument. Since the resolution of this case involves no novel legal question, a written opinion is unnecessary.

RESPECTFULLY submitted on 17 March 1995.

JAN GRAHAM
Attorney General

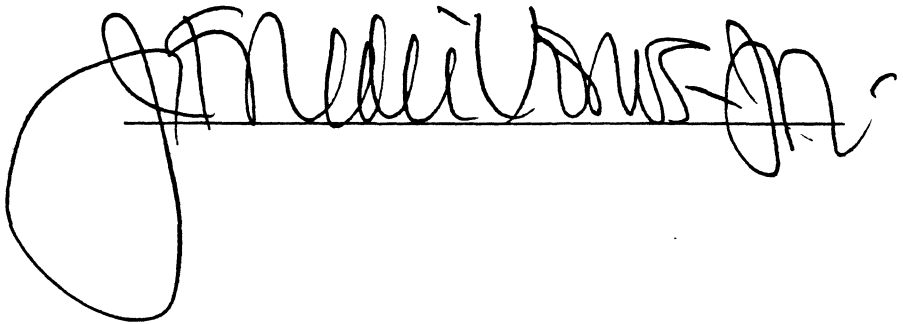

J. FREDERIC VOROS, JR.
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that four copies of the foregoing Brief of Appellee were hand-delivered this 17 March 1995 to an agent for:

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Attorneys for Defendant/Appellant

A handwritten signature in black ink, appearing to read "J. Melville", is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.

ADDENDUM

ADDENDUM A

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CLERK OF DISTRICT COURT
SALT LAKE DEPARTMENT

IN THE THIRD CIRCUIT COURT, SALT LAKE DEPARTMENT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,)	Screened by: B. Byrne
)	Assigned to: B. Byrne
Plaintiff,)	
)	BAIL \$20,000.00 (A)
)	20,000.00 (B)
)	20,000.00 (C)
)	
)	AMENDED INFORMATION
)	
A) DAVID STREETER 9/14/72,)	Criminal No. 901-10868
B) DUSTIN WARD 7/6/72,)	10869
C) KEVIN HARRY NEFF 9/22/72,)	10870
)	
Defendant(s).)	

The undersigned BARBARA J. BYRNE under oath states on information and belief that the defendant(s) committed the crimes of:

COUNT I

ATTEMPTED CRIMINAL HOMICIDE, MURDER IN THE SECOND DEGREE, a Second Degree Felony, at 6000 West 4100 South, in Salt Lake County, State of Utah, on or about September 22, 1990, in violation of Title 76, Chapter 5, Section 203, Utah Code Annotated 1953, as amended, in that the defendants, DAVID STREETER and KEVIN HARRY NEFF, as parties to the offense, intentionally or knowingly attempted to cause the death of Craig Mortenson, and/or intending to cause serious bodily injury to another, committed an act clearly dangerous to human life, and thereby attempted to cause the death of Craig Mortenson, and/or acting under circumstances evidencing depraved indifference to human life, engaged in conduct which created a grave risk of death to another, and thereby attempted to cause the death of Craig Mortenson;

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A) DAVID STREETER, #90 1 81540

B) DUSTIN WARD, 90 1 81540

C) KEVIN HARRY NEFF, 90 1 81540

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COUNT II

AGGRAVATED ASSAULT, a Third Degree Felony, at 6000 West 4100 South, in Salt Lake County, State of Utah, on or about September 22, 1990, in violation of Title 76, Chapter 5, Section 103, Utah Code Annotated 1953, as amended, in that the defendants, DAVID STREETER and KEVIN HARRY NEFF, as parties to the offense, assaulted Karen Mortenson, by attempting to do bodily injury, and/or by threatening to do bodily injury to Karen Mortenson with unlawful force or violence, by the use of a dangerous weapon, to-wit: Rock:

COUNT III

ATTEMPTED CRIMINAL HOMICIDE, MURDER IN THE SECOND DEGREE, a Second Degree Felony, at 7204 West 3500 South, in Salt Lake County, State of Utah, on or about September 22, 1990, in violation of Title 76, Chapter 5, Section 203, Utah Code Annotated 1953, as amended, in that the defendants, DAVID STREETER, DUSTIN WARD and KEVIN HARRY NEFF, as parties to the offense, intentionally or knowingly attempted to cause the death of Mark K. Long, and/or intending to cause serious bodily injury to another, committed an act clearly dangerous to human life, and thereby attempted to cause the death of Mark K. Long, and/or acting under circumstances evidencing depraved indifference to human life, engaged in conduct which created a grave risk of death to another, and thereby attempted to cause the death of Mark K. Long;

SENTENCING ENHANCEMENT: further, that the offense was committed in concert with two or more persons in the commission or furtherance of the offenses, giving rise to enhanced penalties as provided by Section 76-3-203.1, Utah Code Annotated, 1953, as amended;

(Continued on page 3)

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COUNT IV

ATTEMPTED CRIMINAL HOMICIDE, MURDER IN THE SECOND DEGREE, a Second Degree Felony, at 7204 West 3500 South, in Salt Lake County, State of Utah, on or about September 22, 1990, in violation of Title 76, Chapter 5, Section 203, Utah Code Annotated 1953, as amended, in that the defendants, DAVID STREETER, DUSTIN WARD and KEVIN HARRY NEFF, as parties to the offense, intentionally or knowingly attempted to cause the death of Ronald Olson, and/or intending to cause serious bodily injury to another, committed an act clearly dangerous to human life, and thereby attempted to cause the death of Ronald Olson, and/or acting under circumstances evidencing depraved indifference to human life, engaged in conduct which created a grave risk of death to another, and thereby attempted to cause the death of Ronald Olson, and/or while in the commission, attempted commission, or immediate flight from the commission or attempted commission of: Criminal Homicide, attempted to cause the death of Ronald Olson;

SENTENCING ENHANCEMENT: That a firearm or a facsimile of a firearm or the representation of a firearm was used in the commission or furtherance of the Attempted Homicide, giving rise to enhanced penalties as provided by Section 76-3-203, Utah Code Annotated, 1953, as amended; further, that the offense was committed in concert with two or more persons in the commission or furtherance of the offenses, giving rise to enhanced penalties as provided by Section 76-3-203.1, Utah Code Annotated, 1953, as amended;

THIS INFORMATION IS BASED ON EVIDENCE OBTAINED FROM THE FOLLOWING WITNESSES:

Officers: B. Sterner, T. Cowley, A. Call, D. Jensen, R. Day, A. Call, T. Cowley, K. Lindgren, S. Bell, R. Judd and R. Edwards.

(Continued on page 4)

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Others: Maryann Mortensen, Paul Knight, Craig Mortensen, Karrie Mortensen, Dr. David Wilson, Karen Mortensen, Mark K. Long, Roland Olsen, Susan C. Taylor, Charles E. Roberts, Cory Losser, Kody Evans, Ronald Shepherd, Dr. David Wilson and Dr.J. Charles Rich.

PROBABLE CAUSE STATEMENT:

Your affiants, Detectives with West Valley City Police Department, and the Salt Lake County Sheriff's Office, bases this Information on the following:

1. Conversation with Karen Mortenson in which she stated that on September 22, 1990, at approximately 6407 West 4100 South, their car was forced to the side of the road and ten or more young men, including the three above named suspects, ran to the Mortenson car, began kicking and beating on the car and threatening to kill the four occupants. The driver of the victim's car, Craig Mortenson, managed to drive the car away and stopped at a 7-Eleven on 6000 West 4100 South. As Karen Mortenson spoke to the 911 dispatcher Streeter and Neff approached the Mortenson's car carrying rocks and threatening again to kill the occupants. Craig Mortenson grabbed a hammer from a tool box, stepped outside the car and stated, "I have the right to defend myself." Streeter and Neff attacked Craig Mortenson, beating on his head with a rock and kicking his face and head. While Karen Mortenson pulled one of the assailants away from Craig Mortenson the other ran at her with a rock. He was prevented from striking Karen Mortenson only by the intervention of one of the Mortenson's teen-age daughters. Craig Mortenson was rushed by Life Flight to the University Medical Center for emergency surgery for compound depressed skull fracture, which was required to save his life.

2. Conversation with Roland Olsen in which he stated that on September 22, 1990, in the early morning hours Mark Long and Roland Olsen were parked at another 7-Eleven on 7204 West 3500

(Continued on page 5)

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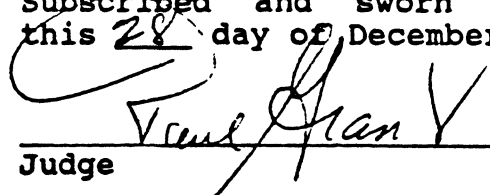
C) KEVIN HARRY NEFF, 90 1 81540

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South. A verbal altercation developed between Roland Olsen and Mark Long in one truck, and Dustin Ward and a group of juveniles in another truck. Suddenly there were twelve or more young men in the parking lot, including David Streeter, Dustin Ward and Kevin Neff. A fight developed, Roland Olsen observed Mark Long lying on the ground and saw David Streeter, Dustin Ward and Kevin Neff repeatedly jumping on and kicking Mark Long in the face and head. Ward, Streeter and Neff along with the others left the area. Roland Olsen found Mark Long was unconscious. He followed Ward, Streeter and Neff and the others and confronted them about Long's Condition. David Streeter pulled a 22 semi-automatic pistol and threatened to blow Olsen's head off. Olsen turned and retreated while others chanted "shoot him, shoot him," Dustin Ward was throwing rocks at Olsen. When Olsen was approximately twenty feet away from the group he heard the gun fire. A projectile landed near his feet. As he turned back around he was struck in the face by a tire iron. Then Kevin Neff struck him with a metal pipe. Mr. Olsen went back to the 7-Eleven. Mark Long required emergency surgery on his fractured skull to save his life.

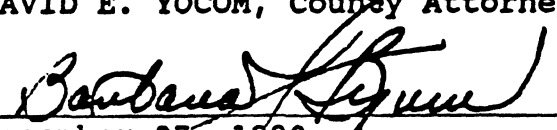

Affiant

Subscribed and sworn to before me
this 28 day of December, 1990.


Judge

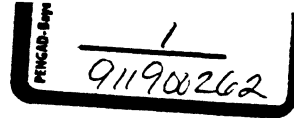
Authorized for presentment and
filing:

DAVID E. YOCOM, County Attorney

, Deputy
December 27, 1990
11s/4426 - Amended 11s [Merg/90181565]

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ADDENDUM B



TC: O.K. I'm Detective Cowley with the police department and what is your name?

DS: David

TC: David what?

DS: David Streeter

TC: Spell your last name for me.

DS: Streeter

TC: What is your date of birth?

DS: 09-14-72

TC: And your address?

DS: 3551 South 7200 West

TC: Your home phone number?

DS: 250-9546

TC: Have you been advised of your rights?

DS: Yes

TC: I'm going to do it again. You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford a lawyer, one will be appointed to represent you before any questioning if you wish. You can decide at anytime to exercise these rights and not answer any questions or make any statements. Do you understand these rights that I have explained to you?

DS: Yes

TC: Having these rights in mind do you wish to speak with us now without an attorney present?

DS: No

TC: You don't want to talk to us?

DS: I don't know why I am really even in here. All I was doing was sleeping over at my friend's lawn last night and the cops just come ripping in the yard and arrested us and

TC: Well we have a bunch of questions we would like to ask you, would you be willing to answer those questions without a

lawyer present.

DS: Maybe some of them. It just depends cause I really don't know why I am here.

TC: So does that mean we can ask you questions and you will answer the ones you want to answer?

DS: Yes I have the right to stop at any time though.

TC: Well, I'll tell you right now that if you take that attitude with us.

DS: Well I ain't trying to

TC: Because we have all the witnesses we need and we know who has done what and who has done what to who. So I want the truth out of you and I want it now. Now do you understand that?

DS: Yes

TC: Who were you with tonight

DS: J.D.

TC: Who else?

DS: Some of my friends, I want my lawyer here, all you have to do is call my mom and he will be down here.

TC: You want your attorney?

DS: Yes

TC: And you don't want to talk to us?

DS: Yes

TC: O.K.

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Interview with David Streeter

TC: Do you recall earlier that I had advised you of your rights?

DS: ✓ Yes

TC: ✓ And after being advised of your rights you said that you wanted to talk to a lawyer?

DS: ✓ Yes

TC: ✓ Now is it your desire and you come forth voluntarily that you want to talk to me now?

DS: / Yes

TC: ✓ And you want to talk to me without a lawyer?

DS: / Yes

TC: / Go ahead.

DS: / Just tell the story.

TC: / Tell the story.

DS: / O.K. we was just coming home from that party...

TC: Now hold on, you say "we" who is "we".

DS: It was me and Bart in the car. In his car.

TC: Now does Bart go by Kevin.

DS: Yes

TC: And who's car is that?

DS: Bart's car, and some guy, he had his brights on, Bart did, and that guy in front of us.

TC: Which direction were you going?

DS: West

TC: So you were going West on?

DS: On 41, so then he pulled over and let us go ahead of him and then he pulled behind us and turned his brights on. So we pulled over and let him go in front of us and we pulled down the street and then he started to get out of his-

car and so we jumped out of our car and he got back in his and I smacked the window.

TC: With what?

DS: My hand, and then (inaud)

TC: You don't know who they were?

DS: No

TC: Did you ever kick the car?

DS: No, I didn't kick the car. And then he drove away and then we was going back to my house and we drove by 41 and we got back from 41 and went to 72 and he was at the 7-11 and he started saying shit to us so we pulled over went back and walked up to him.

TC: So after the occurrence of hitting the car and kicking the car, then he left. Then you left right after him?

DS: No, about 5 minutes.

TC: So, on your way to your house you saw.

DS: Yes, we got back on 41 and he was at the 7-11.

TC: You saw the station wagon at the 7-11?

DS: Yes, and they started yelling shit at us.

TC: Which 7-11 were you at?

DS: The one on 4100 and 6400.

TC: So you drove by and you saw the car there?

DS: And he started yelling shit at us and so we pulled over and walked up there.

TC: Where did you pull over at?

DS: Just on 4100.

TC: So you didn't pull into the 7-11 parking lot?

DS: And he had a hammer and he said "Now I can kick your guys ass", something to that effect. So he was coming at us and so I picked a rock up and threw it at him.

TC: How big was the rock?

DS: Just a little bigger than a golf ball.

BS: Bigger than a golf ball and smaller than a soft ball?

DS: Yes; a lot smaller than a soft ball, smaller than a baseball.

TC: So you picked up a rock, where did you get the rock from?

DS: Just on the ground, I just reached down and grabbed it.

TC: And then you threw it and hit him in the head.

DS: I guess it ~~hit him in the~~ head, I don't know. All I was really going to do was scare him, try to get him to back up with the hammer.

TC: Then what happened?

DS: I guess he hit Bart with that hammer.

TC: Then what happened?

DS: ~~Then the girl jumped on me.~~

TC: What did they do?

DS: Wrestled me to the ground, and then I got up and I got that guy off Bart and I said "let's get out of here".

TC: Did you do anything else to that guy besides throw a rock at him and hit him.

DS: I might have kicked him.

TC: Where?

DS: In the chest (inaud)

TC: Was he laying on the ground when you did that?

DS: He was on top of Bart.

TC: Did you do anything else.

DS: No

TC: You didn't hit him in the head and chest and you didn't grab a rock and hit him in the head with a rock.

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Interview with David Streeter

DS: Oh, (I hit him when I threw that rock the first time.)

TC: But you didn't hit him with a rock after that?

DS: No

TC: But you didn't hit him in the head.

DS: No, (inaud)

TC: Did you hit him with anything else?

DS: No

TC: Then what happened?

DS: We took off and went back to my house and sat there and everybody was leaving and—Dustin and Ron and Nerd—they was leaving—and I guess they went to the 7-11 to get gas; I don't know. We was all getting ready for bed and the next thing you know Nerd was knocking at the door.

TC: Who is Nerd?

DS: Nerd is Cody.

DS: And he says "some guy started a fight down there with Dustin".

TC: Down where?

DS: The 7-11.

TC: Which one?

DS: 3500 and 7200.

TC: Go ahead.

DS: So we ran down there....

TC: Now you say "we", who is "we"?

DS: Me and J.D. and Nerd was with us.

TC: So Cody.

DS: And that is all that was in the house.

TC: What about Kevin?

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Interview with David Streeter

DS: Oh yes, Bart too.

TC: So you guys went down to the 7-11 to help Dustin out?

DS: Yes

TC: Then what happened?

DS: There were two guys chasing him around the parking lot.

TC: Chasing Dustin?

DS: Yes and I don't know where Ron was. Ron wasn't helping him. And the one run up to Bart, Dustin was backing up and Bart walked up by him and one grabbed Bart and threw him against the car and Dustin came from around the side of him and punched him and dropped him.

TC: With one punch?

DS: Yes

TC: And he fell down on the ground and this was in the parking lot of 7-11.

DS: Yes

TC: Then what happened?

DS: Then the other one had Jay by the hair and so we ran up there and got him off and we just took off.

TC: Who kicked this guy on the ground?

DS: I kicked him once.

TC: Where?

DS: In the head.

TC: Did you see anyone else kick him?

DS: No

TC: So after Dustin hit him and this guy fell down on the ground you kicked him in the head?

DS: Yes

TC: And you didn't see anyone else kick him?

DS: I was getting out of there, all I did was went and got that guy off Jay and ~~we took off running back to my house.~~

TC: Who is "we"?

DS: ~~Me and Jay and Bart~~, Bart was probably already at my house. I just told them to get out of there.

TC: Who had the gun?

DS: Jay had a BB gun.

TC: When did he get that?

DS: Probably after we went back to the house, I didn't even know he had it cause I took off, I was getting out of there I didn't want nothing to do with cops.

TC: So you went back to your house and did you guys come back to the 7-11 again after J.D. got the gun?

DS: No, ~~the Jeep came up by my house from the parking lot with a crowbar and was going to kill Dustin~~

TC: From what parking lot?

DS: Ream's, so ~~we all ran over there~~ and

TC: So you ran over to the Ream's parking lot to help Dustin?

DS: Just to see what was going on because all ~~we~~ could hear was Dustin saying "he's got a crowbar" or something.

TC: And that's when J.D. had the gun.

DS: Yes, cause when I got over there that is when J.D. had the gun.

TC: Who's gun does that belong to?

DS: It was Jay's.

TC: Where is the gun now?

DS: I have no idea.

TC: You don't know what happened to it?

DS: No, I was getting out of there. I didn't want nothing to do with it.

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Interview with David Streeter

TC: What did you see J.D. do with the gun, did you see him point it at anybody?

DS: He just had it in his hand, he didn't point it at anybody.

TC: Did he point it at anybody, did he shoot at anybody?

DS: No, it wasn't loaded (inaud)

TC: Then after the altercation in the parking lot at Ream's what happened?

DS: That guy left and then we left and we went over to Jay's house.

TC: So you didn't go back down by the 7-11 to check on this other guy. So you don't know what happened to him? But ~~you~~ ~~kicked him once in the head while he was on the ground?~~

DS: ~~He was on his way down~~

TC: Did you see anybody else kick him or hit him on the ground, how about Kevin?

DS: The only time I saw Bart was when that guy had him up against the car and Dustin smacked that guy and he was on his was down and I kicked him and that is the last time I seen Kevin. (inaud)

TC: Going back to the first incident at the 7-11 on 6400 West how many times did you hit and kick that guy?

DS: ~~I kicked him one time and I don't even think I hit him~~

TC: You didn't hit him with your fist?

DS: No

TC: So you only hit him once with a rock and that was in the head?

DS: I guess so

TC: And then you kicked him in the head?

DS: No

TC: Where did you kick him?

DS: Across the shoulder

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Interview with David Streeter

TC: Across the shoulder, was he laying on the ground when you kicked him?

DS: He was on top of Bart.

TC: What did you see Bart do to him?

DS: (inaud) I didn't have a chance, them girls jumped on my quick.

TC: What did they do?

DS: Just wrestled me down..

TC: What did you do to the girls?

DS: Just pushed them away and told them to back off.

TC: You didn't hit them with your fist or kick them?

DS: No, I wouldn't hit a girl.

TC: You didn't hit them with a rock.

DS: No, that lady came after me with a hammer.

TC: Did you hit her with a rock?

DS: No

TC: Did you throw a rock at her?

DS: No

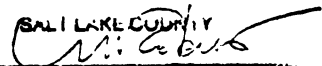
TC: You are sure?

DS: I'm positive.

ADDENDUM C

FILED DISTRICT COURT
Third Judicial District

OCT 16 1991

By 
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	MEMORANDUM DECISION
Plaintiff,	:	CASE NOS. (911900262)
	:	911900263
vs.	:	911900264
DAVID STREETER, DUSTIN WARD,	:	
KEVIN NEFF,	:	
Defendants.	:	
	:	

The Court heard defendant Streeter's Motion to Suppress evidence on the 23rd day of September, 1991. Defendant was represented by Brooke C. Wells. Plaintiff was represented by Barbara J. Byrne. The Court heard the testimony of witnesses, heard oral argument and took the matter under advisement. The Court having read the transcript of the preliminary hearing and the cases cited is now ready to rule.

The facts are undisputed that the defendant, while being interrogated by Detective Cowley unequivocally requested that an attorney be present. At that point in time, Detective Cowley terminated the questioning and defendant was returned to the holding cell.

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Later on that night defendant told Detective Edwards that he would like to talk to Detective Cowley. Detective Edwards arranged for the meeting.

At the time Detective Cowley and defendant met, the following dialogue took place:

TC: Do you recall earlier that I had advised you of your rights?

DS: Yes

TC: And after being advised of your rights you said that you wanted to talk to a lawyer?

DS: Yes

TC: Now is it your desire and you come forth voluntarily that you want to talk to me now?

DS: Yes

TC: And you want to talk to me without a lawyer?

DS: Yes

TC: Go ahead.

DS: Just tell the story.

TC: Tell the story.

DS: O.K. we was just coming home from that party. . .

The issue presented to the Court was whether or not the confession of the defendant should be suppressed inasmuch as defendant had unequivocally requested that counsel be present.

In State v. Sampson, 156 Utah Adv. Rep. 4, this issue was addressed and the Utah Appellate Court ruled that "once right to counsel has been invoked" subsequent incriminating statements made without [the defendant's] attorney present [violates] the rights secured to the defendant by the Fifth and Fourteenth Amendments to the United States Constitution.

However, the Court went on to say in a footnote, "The Edwards Court, Edwards v. Arizona, 451 U.S. 477 (1981), did not foreclose the possibility of waiver of right to counsel when a defendant, once having invoked the right, freely initiates further conversation with officers even though the defendant has not consulted counsel."

The Edwards case also set forth the following criteria for the admission of a confession after a request for an attorney had been made by the defendant.

1. The police officer conducting the first interrogation ceased interrogation when the defendant requested counsel. In this case the police did stop interrogation upon defendant's request for counsel.

2. The defendant, not the police officers, must initiate the conversations in which incriminating statements are made. The evidence was undisputed that defendant initiated the conversations.

3. The defendant made a knowing and intelligent waiver of his right to counsel. In reading lines 1 through 8 of page 3 of the transcript of the interrogation it is evident that defendant understood that he had a right to counsel and that he elected to proceed without benefit of counsel.

There was no evidence presented that would indicate that defendant did not make an intelligent and voluntary decision to proceed with the interrogation.

The Court concludes that the credible evidence requires the Court to deny defendant's Motion to Suppress.

Dated this 12 day of October, 1991.


JOHN A. ROKICH
DISTRICT COURT JUDGE

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MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy
of the foregoing Memorandum Decision, to the following,
this ____ day of October, 1991:

Barbara J. Byrne
Deputy County Attorney
Attorney for Plaintiff
231 East 400 South, Suite 300
Salt Lake City, Utah 84111

Brooke C. Wells
Attorney for Defendant
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

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