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Twenty-Second Judicial District

October 20, 2023

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Re: State of Oregon vs. Randall Richard Kilby
Deschutes County Circuit Court Case No. 21CR13728 & 21CR13733

Dear Counsel:

This matter came before the Court for oral argument on August 22, 2023, on Defendant's Motion to Suppress Defendant's Statements. The State was present, represented by Aaron Brenneman and Kyle Pearson, the Defendant appeared in person, represented by Thomas Spear and Raun Atkinson. Although only case no. 21CR137278 was docketed for a hearing on Defendant's Motion to Suppress Defendant's Statements, parties stipulated to adding case no. 21CR13733 to the docket for the purpose of consideration of the Motion to Suppress Defendant's Statements filed in that case as well, noting the arguments and evidence were similar in both cases and Defendant's Statements were made during the same interview. The Court also took Judicial Notice of the record in Deschutes County cases 19CR50231 and 20CR53541. The Court also clarifies the record of the hearing and accepts Defense Exhibit 103 as proffered but not noted as received by the Court without objection by the State. The Court announced the decision in case 21CR13728 on October 12, 2023, and advised the parties the Court's analysis would be contained herein. The decision in case 21CR13733 is also contained herein. Having heard testimony, received evidence, oral argument, and considered written memorandum, the Court makes the following findings and conclusions of law.



STATEMENT OF FACTS

Defendant had pending cases filed in Deschutes County Circuit Court 19CR50231 and 20CR53541¹ in December 2020 and was assigned court appointed counsel, Michelle McIver² on those cases. Defendant was arrested on December 26, 2020, in connection with injuries sustained by Daphne Banks that occurred at his residence. The State did not file criminal charges related to Daphne Banks and Mr. Kilby was released from custody on December 28, 2020, with no release agreement and no future court date related to that offense. Police continued their investigation of Defendant and the circumstances of Ms. Banks' assault. A short time later, within days after December 29, 2020, the Defendant's attorney, Ms. McIver contacted the Bend Police Department and informed a detective, she believes was Detective Kyle Denney, that she represented the Defendant in the Daphne Banks investigation and Mr. Kilby would no longer be making any statements to police without counsel.³ Ms. Banks subsequently died from her injuries. Police had suspended their investigation pending further evidence however, Mr. Kilby remained a suspect in her death.

On March 21, 2021, police were investigating the deaths of Jeffrey Allen Taylor and Benjamin Harlin Taylor whose bodies had been discovered at the residence where the Defendant lived in the detached garage. Mr. Kilby was arrested and in custody as a suspect in death of Jeffrey Taylor and Benjamin Taylor. He was advised of his *Miranda* rights and Defendant responded that he understood his rights with an affirmative "uh-huh"⁴ and responded that he had no questions regarding those rights. Bend Police Detectives Whitney Dickson and Detective Kinsella interviewed the Defendant about the incident involving the Taylors and what happened "yesterday".⁵

Sgt Dickson of the Bend Police Department (BPD) testified that she was a criminal detective and conducted the interview with Defendant on March 21, 2021. On that day Sgt Dickson was aware that the Defendant was a suspect in the death of Daphne Banks, but no charges had been filed and he had been released on that case. Sgt Dickson was also aware that Mr. Kilby's attorney had advised the BPD that he would not be making any more statements about Ms. Banks without counsel. Sgt. Dickson recalls that she told Mr. Kilby that she didn't want to talk about Daphne specifically. Sgt Dickson stated that her focus of the interview was the death of the Benjamin Taylor and Jeffrey Taylor.

¹ Court took judicial notice Indictment filed in 19CR50231 and the Indictment in 20CR53541 as stipulated by the parties.

² Defendant's Ex 102

³ Id.

⁴ Defendant's Ex. 101, State Ex. 1.

⁵ Id.

Sgt. Dickson further testified that the Defendant was offered food and beverages, no threats or promises were made to the Defendant during the interview. No officer present had a service weapon displayed during the interview. Defendant was given breaks during the course of the 5-hour interview and at no time did he request or demand to leave. Having obtained the Defendant's initial statement of the incident related to the Taylors and that his statement did not make sense compared to evidence obtained, the officers took a 15-minute break to confer and then returned to the interview.

Sgt. Dickson stated upon return to the interview she brought up Daphne Banks' and summarizing her interview statements told the defendant "you know people think that you are a monster because of what happened to Daphne, uhm you didn't do that, and I know you didn't do that uhm but if we don't hear your side of what happened with the Taylors people are going to think that again."⁶

The transcript of the interview contains the following⁷:

Q: Yeah. Well, and I want to do that but it's really hard to me to not have you just be honest with me about things, because you have to help me understand things. And I can see that this would be upsetting to you. But generally, Randall, my concern for you is that this whole thing, people out there are mad at you right now because of what happened with Daphne. You - they are. They're mad at you. You've been built up like a monster.

A: I hear you.

Q: Right? And that's bullshit. And that's partly our fault. It is. And I am concerned that the truth of what has happened with (Jeff) and (Ben), because I think I know the truth. I think you are protecting your mom and that's how they got hurt. You're loyal to your mom. You love her. But I'm concerned that when this gets out to everybody, it's gonna be another thing just like Daphne and that you're gonna look like the monster again. And that is not the case. And it was wrong last time and it's wrong this time.

A: Well, I don't know why it would be wrong because the truth is, I really cared about Daphne.

Q: I believe you.

A: And I love her. I mean it was just fucked up. It was just fucked up. I mean I don't know what else to say because I learned a lot. I don't know what else to say besides that, besides saying I'm a loyal dog. I really don't understand. I'm - okay, I'm trying to be sweet to you. Understand?

Q: Yeah.

A: I'm really not trying to put my emotions into this. I'm really just trying to understand exactly w- like because I hear if that's the reason, I mean, it's fucked up. You gotta hear my side.

Q: I want to.

⁶ Defendant's Ex. 101 Transcript of Interview

⁷ Id.

A: With Daphne's deal.

Q: But - but what I know and I don't - I don't even want to go into that because I know that's not your fault. Daphne wasn't your fault. But I'm worried that you're going to be portrayed in that same way again.

A: I know but it's not...

Q: Because people are gonna think.

A: It's not my fault.

Q: No, it's not.

A: And this isn't my fault either.

Q: People are gonna make it sound like it is.

A: Well, that's fucked up.

Q: I know it's not fair.

Q1: But you can tell us your story.

Sgt. Dickson's testified that her intent was not to ask questions about Daphne Banks, she was aware an attorney had advised that the Defendant should not be questioned about her incident, the Detective's intent was expressing to the Defendant that she didn't want him to be painted as a monster because of what had happened to Daphne Banks. She states she redirected him away from discussing Daphne. Sgt. Dickson then went into how the Defendant had to protect his mother, Darlene Allen. The focus of the interview was what happened to the Taylors. He brought up Daphne's name and when he did, she redirected him, she stated she did not ask him questions directly about Daphne Banks. Sgt. Dickson further testified she would not interview a suspect who had asserted their right to counsel on an incident. After encouraging the Defendant to tell his story about what happened the night before, he began making statements about what happened to the Taylors.

After telling the officers what happened to Jeffrey Taylor and Benjamin Taylor, Defendant brings up Daphne's name⁸ and Officer Kinsella asks the Defendant "are you talking about Daphne?" and then the Defendant is asked, "is there anything else that you think that you would or need to take ownership for other than like what we're talking about with Jeff and Ben?" At which point Defendant makes statements about hitting Daphne in the head and officers continue with questions directly about the death of Daphne Banks. ⁹

⁸ State's Ex 1. Transcript p 100.

⁹ Id. p 102

DEFENSE ARGUMENT

Without reiterating counsel's memorandum and arguments in great detail and summarizing for the purpose of argument, Defense seeks to suppress Defendant's statements made to law enforcement on March 21, 2021, arguing that those statements were taken in violation of right to counsel under Oregon Constitution Article I, section 11. The crux of the defense argument is that the interjection of Daphne Banks name during the interview caused Mr. Kilby to start talking about her incident and it also caused him to start talking about the Taylors. Mr. Kilby's right to counsel at that point was infringed, and Defendant was unfairly taken advantage of by police detectives. Defense relies upon State v Prieto-Rubio, 359 Or 16, 24 (2016), at 36 quoting State v. Sparklin, 296 Or. 85 at 96 (1983), at 93 in response, the court established an objective, principled rule for determining when a defendant's Article I, sec 11, right to counsel on charged crimes includes the right to have counsel present for questioning about uncharged crimes, stating: "[T]he appropriate test for determining the permissible scope of questioning of a criminal defendant who is represented by counsel is whether it is objectively reasonably foreseeable that the questioning will lead to incriminating evidence concerning the offense for which the defendant has obtained counsel."

Defense distinguishes State v. Davis, from the State's analysis, arguing the case states Article I, sec 11 attaches once formal proceedings have begun, which at the earliest is the time of the suspect's arrest. 350 Or 440 (2011).

Defense argues that once Ms. McIver advised police she represented him in the Banks matter, constituted affirmative action by counsel. At that point in time, police are prohibited from arresting and interviewing the Defendant without notifying counsel despite no charging document being filed. Following the State's logic, as long as the State doesn't file charges, then police can question anyone even if represented by counsel and not alert counsel of that questioning. Defense argues that formal proceedings began on the Banks incident upon his initial arrest. Defense then argues that the court's analysis is looking to the rule set forth in Prieto-Rubio, 359 or 16 (2016) and affirmed in Craigen, 370 Or 696 (2023), and whether or not the questioning of the Taylors objectively would reasonably elicit a response to the Banks matter.

Defense further argues that the incidents are related because the incidents are similar, the Banks incident took place 3 months prior in the same residence with the same parties in the house making it clear from an objective perspective that questioning about the Taylors is likely to elicit answers about Daphne Banks. Despite the officer redirecting the Defendant, the insertion of her name violated the Defendant's rights under Article I, sec 11 and therefore, his statements should be suppressed.

STATE ARGUMENT

The State relies upon argument at the time of the hearing in addition to their written Memorandum previously submitted and again the Court will not reiterate the arguments but rather summarize. The State argues that there were no formal charges filed for either incident and the Sixth Amendment right to counsel is offense specific and cannot be invoked for future prosecutions rather it attaches once a prosecution is commenced and charges are filed. See Illinois v. Perkins, 496 US 292, 299–300, 110 S Ct 2394, 110 L Ed 2d 243 (1990).

Similar to the Sixth Amendment, is Article I, section 11, of the Oregon Constitution. Article I, section 11, of the Oregon Constitution provides that, “[i]n all criminal prosecutions, the accused shall have the right... to be heard by himself and counsel.” The term “criminal prosecution” as referred to in Article I, section 11 is triggered as early as the commencement of criminal proceeding through formal charges. State v. Prieto-Rubio, 359 Or. 16, 24, 376 P.3d 255. “After a defendant has been charged with a crime and the right to counsel has attached, Article I, section 11, of the Oregon Constitution prohibits the police from asking the defendant about that crime without first notifying his or her lawyer.” *Id*

The State argues that Article I, sec. 11 right to counsel begins at formal charges. State v. Sparklin, 296 Or. 85 (1983). That ruling is reiterated in State v. Davis that Article 1, sec. 11 rights apply only once formal proceedings have begun. 350 Or 440 (2011). Despite Ms. McIver’s notice of representation, formal charges had not been filed against Mr. Kilby and therefore, Article I, sec 11 did not attach beyond Deschutes County cases 19CR50231 and 20CR53541. There was no release agreement in the Banks case, no charges had been filed in the court. Therefore, formal charges had not commenced against Defendant. Law enforcement could interview Defendant on both the Taylor case and Banks case and all statements are admissible.

COURT’S RULING

The Court will address each case in turn on Defendant’s Motion to Suppress Defendant’s Statements. As a preliminary matter, Defendant was arrested on March 21, 2021, as a suspect in the deaths of Jeffrey Taylor and Benjamin Taylor. The Defendant was in custody and a reasonable person would conclude that the circumstances were compelling requiring Miranda advice of rights. Miranda rights were given. The argument in both cases

turns on Article I, section 11, right to counsel. Defense is not arguing that Defendant's statements be suppressed on the basis that the statements were as a product of coercion or in violation of Miranda rights.

21CR13728

The State had initiated a criminal prosecution against defendant in Deschutes County cases 19CR50231 and 20CR53541 and as a result his right to an attorney under Article I, section 11 arose consistent with his federal Sixth Amendment right to counsel, and he was appointed counsel, Michelle McIver. During that representation, Defendant was arrested on December 26, 2020, in connection with injuries sustained by Daphne Banks that occurred at his residence. The State did not file criminal charges related to Daphne Banks and Mr. Kilby was released from custody on December 28, 2020, with no release agreement and no future court date related to that offense. A short time later, within days after December 29, 2020, the Defendant's attorney, Ms. McIver contacted the Bend Police Department and informed a detective, she believes was Detective Kyle Denney, that she represented the Defendant in the Daphne Banks investigation and Mr. Kilby would no longer be making any statements to police without counsel.¹⁰ Sgt. Dickson testified she was aware defendant was represented by counsel on the Daphne Banks investigation. Oregon law is clear, when an attorney-client relationship exists, the lawyer's invocation of rights on behalf of the client does not extend to other crimes on which the lawyer does not represent the arrestee. State v. Charboneau, 323 Or 38 (1996). This is further supported by the ruling in Sparklin, as referenced by both parties that limitations placed on the state's contact with a represented defendant "do not extend to the investigation of factually unrelated criminal episodes". 296 Or at 95. Despite Defendant's argument to the contrary, the Court finds that the Taylor deaths and the death of Daphne Banks are factually unrelated criminal episodes and not so inextricably intertwined that Defendant's Article I, section 11, right to counsel attaches to the Taylor case. State v. Prieto-Rubio, see, 359 Or 16 (2016). Prieto also sets forth the test to be used "[T]he appropriate test for determining the permissible scope of questioning of a criminal defendant who is represented by counsel is whether it is objectively reasonably foreseeable that the questioning will lead to incriminating evidence concerning the offense for which the defendant has obtained counsel." Id.

The issue before the Court is when the police brought up Daphne Banks' name after a break in the interview, whether to bait, push or encourage the defendant to speak, was that a violation of Defendant's Article I, section 11 right to counsel. Irrespective of the officer's

¹⁰ Id.

intent was it objectively reasonable that bringing up Daphne's name would elicit incriminating evidence of the Daphne Banks murder by Defendant? When the defendant responded to Sgt. Dickson when she brought up Daphne Banks' name:

A: With Daphne's deal.

Q: But - but what I know and I don't - I don't even want to go into that because I know that's not your fault. Daphne wasn't your fault. But I'm worried that you're going to be portrayed in that same way again.

Sgt. Dickson stated she didn't want to go into that, she expressly redirected him from responding to what happened to Daphne Banks. The scope of the comments by the officers were focused on what happened last night to Jeffrey Taylor and Benjamin Taylor and his mother's involvement and protecting her. Neither she nor Officer Kinsella asked any questions that could objectively be construed as eliciting incriminating evidence about the murder of Daphne Banks prior to the Defendant's statements about what happened to the Taylors.

Therefore, Defendant's rights under Article I, section 11 were not violated and the statements regarding the Taylors is admissible and Defendant's Motion to Suppress is Denied in Part and Granted in Part. Based on the Court's ruling below in case 21CR13733, there is a clear point in the interview wherein Defendant's Article I, section 11 rights were violated and therefore, any statements made by Defendant after Officer Kinsella asks, "is there anything else that you think that you would or need to take ownership for other than like what we're talking about with Jeff and Ben?" are suppressed.

21CR13733

In this case, Defendant invoked his right to counsel after he had been arrested, interviewed, and on December 28, 2020, released pending further investigation for the assault and subsequent death of Daphne Banks. Law enforcement officers were aware that Defendant had invoked his right to counsel and Sgt. Dickson was aware he could not be interviewed about her without notifying counsel.

During the interview with Defendant on 3-21-21, officers attempted to direct the conversation away from Daphne Banks and focusing on the Taylor's deaths. After the Defendant made statements about what happened to the Taylors, the Defendant continued to make statements regarding Daphne Banks and the officers responded by asking direct questions about her death.

When Officer Kinsella asks the Defendant "are you talking about Daphne?" and then the Defendant is asked, "is there anything else that you think that you would or need to take ownership for other than like what we're talking about with Jeff and Ben?" it was

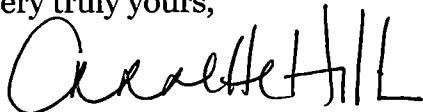
objectively reasonably foreseeable that the questioning will lead to incriminating evidence concerning the offense for which the defendant has obtained counsel. Up until this point officers directed Defendant from any questions that could objectively lead the Defendant to provide incriminating evidence. When he was asked is there anything else that triggered potential responses to the incident with Daphne Banks for which law enforcement had notice he was represented by counsel as supported by Sgt. Dickson's testimony and why she purposely avoided questions related potential incriminating evidence by Defendant.¹¹

The issue before the Court is whether under Article I, section 11, the notice from Ms. McIver that she represents Mr. Kilby and that he will not speak to police without the presence of counsel precludes the police from nonetheless attempting to obtain incriminating evidence from the Defendant without the participation of counsel. The State argued that because no charges were filed against defendant involving the death of Daphne Banks it is uncharged conduct and his Article I, section 11 right to counsel does not attach. The Oregon Supreme Court set forth that at the earliest, the right to counsel attaches at the time a defendant has been taken into formal custody. State v. Davis 350 Or 440 (2011). In this case, Defendant had been arrested and interviewed about the assault of Daphne Banks and released from custody pending further investigation. He had retained counsel on her investigation and therefore, looking at the circumstances in this case, his right to counsel attached. When the police asked about whether there was anything else the defendant wanted to take ownership of, an objectively reasonable person would in the Defendant's position have foreseen the police were referencing the death of Daphne Banks and further their direct questions about her violated the defendant's Article I, section 11 right to counsel and as a result those statements are suppressed. In addition, any additional statements made by Defendant after his Defendant's rights were violated are also suppressed.

Defendant's Motion Granted.

The State is to prepare the Order in case 21CR13728, and the Defense is to prepare the Order in case 21CR13733.

Very truly yours,



Annette C Hillman
Presiding Circuit Court Judge

ACH/jm

¹¹ Defendant's Ex. 102