

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROBERT W. DRAPER,	§	
	§	No. 147, 2000
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	Court Below: Superior Court
	§	of the State of Delaware
STATE OF DELAWARE	§	in and for Kent County
	§	I.D. No. 9902016536A
Plaintiff Below,	§	
Appellee.	§	

Submitted: November 27, 2001

Decided: January 28, 2002

Before **VEASEY**, Chief Justice, **BERGER** and **STEELE**, Justices.

Upon appeal from the Superior Court. **REVERSED** and **REMANDED**.

Sandra W. Dean, Esquire, Assistant Public Defender, Office of the Public Defender,  
Dover, Delaware, for Appellant,

John Williams, Esquire, Deputy Attorney General, Department of Justice, Dover,  
Delaware, for Appellee.

**BERGER**, Justice:

In this appeal, we consider whether a defendant's incriminating statement was obtained by the police in violation of his constitutional right to remain silent. In the taped portion of his statement, defendant repeatedly said that he wanted to talk to his mother before speaking to the police. We agree with the trial court that defendant's request for his mother was an ambiguous invocation of his right to remain silent, and that the police should have clarified defendant's intent before continuing the interrogation. But defendant also confessed in the earlier, untaped portion of his statement, and the trial court concluded that the first confession was admissible. We find no basis on which to distinguish between the two confessions. The interrogating police officer testified that in the earlier, untaped portion of his statement Draper asked to speak to his mother "right off the bat." The only reasonable inference to draw from this scenario is that he did not wish to continue the interrogation until after he had spoken to his mother, if at all. Accordingly, we conclude that the entire statement was inadmissible.

#### Factual and Procedural Background

Robert W. Draper was arrested for a domestic disturbance at about 8 p.m. on February 24, 1999. He was intoxicated and was being held at the police station until the alcohol wore off. Shortly after midnight, Detective William Porter began

interviewing Draper about a burglary that occurred two months earlier. Porter testified that he read Draper his *Miranda* rights<sup>1</sup> and that Draper said that he understood his rights and was willing to talk. Porter questioned Draper for about thirty minutes before someone in the adjoining room turned on the recording equipment. During the initial interview, Draper reportedly confessed to the burglary in question. After the tape recording began, Porter repeated many of his earlier questions in order to preserve Draper's responses on the videotape.

It is apparent from the transcript of the videotape that Draper had asked to speak to his mother before the tape was activated. At the beginning of the tape, Porter tells Draper what his mother said when Porter called her. Draper then asks, "Is she coming?" and, after some discussion about Draper's domestic problems, the dialogue continues:

Q: Rob, want me to come back? Huh? You want your mom to come in here with us?

A: I want to see my mom.

Q: You do?

A: One last time.

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<sup>1</sup>*Miranda v. Arizona*, 384 U.S. 436 (1966).

Q: You're not going to talk to me? Rob you going to talk to me?

A: I want to see my mother.

Q: I understand that. I'm going to bring her back here. That was part of our deal. Are you going to talk to me? Rob you want me to come back? How much time you need? How much time you need?

A: I just want to see my mom.

Q: I understand that and I won't go back on my word you're going to see your mom. Do you want to talk to me or not?

A: After I talk to (inaudible).

Q: I need to know if you are going to talk to me or not.

A: After I talk to my mother.

Q: Can you talk to me now for a few minutes and we'll (inaudible)?

A: I want to talk to my mother first.

Q: Rob, look at me for a minute. Look at me for one minute. Your mom is going to be here in about forty five minutes. Do you trust me on this? Do you still want me to leave or can we sit down and talk for a minute?

A: I want to talk to (inaudible).

Q: I'm going to let you talk to your mom. Now who else after all you did Robert besides me will let your mom come back here and talk to you. Ain't many people right?

A: You don't have to let me talk to her. I can talk to her in Smyrna.

Q: Point is you want to talk to her now right?

A: I would like to.

Q: Okay.

A: I don't have to but (inaudible).

Q: You want to talk to me any more?

A: After I talk to my mother.

Q: You want to talk to me on tape or not?

A: I don't know yet. I'd have to talk to my mother first.

At no point after this dialogue did Draper say that he changed his mind about waiting for his mother. By changing the subject, however, Porter got Draper to answer questions about the robbery.

The record of the earlier, unrecorded portion of the interrogation is less exact. As noted above, Porter testified that he read Draper his *Miranda* rights and that Draper agreed to talk. Porter acknowledged, however, that Draper immediately said

he wanted to talk to his mother. Despite Draper's request, Porter proceeded with the interrogation "for a while" before calling Draper's mother. During that time, Draper confessed to the burglary and told Porter how he had disposed of some of the stolen guns.

Draper moved to suppress his statement on two grounds: (i) that he was too intoxicated to knowingly waive his *Miranda* rights; and (ii) that he invoked his right to remain silent by saying that he did not want to talk until he spoke to his mother. The trial court denied the motion and Draper was convicted. On appeal, Draper confined his argument to the invocation issue. After reviewing the record, this Court remanded the case to the Superior Court to decide whether Draper ever invoked his right to remain silent and, if so, whether any statements made after the invocation were presented to the jury.

On remand, the Superior Court held that the taped portion of Draper's statement should have been excluded from evidence because the interrogation continued after Draper invoked his right to remain silent (by asking to speak to his mother). The trial court decided that the untaped portion of Draper's statement was admissible because, although Draper asked to speak to his mother, he told Porter that he was willing to answer his questions. Finally, since Draper had made the same

confessions in the untaped statement as he did on videotape, the trial court decided that Draper was not prejudiced by the erroneous admission of the videotape.

### Discussion

It is settled law that the police may not conduct a custodial interrogation of a suspect without first obtaining a waiver of the suspect's right to remain silent and to counsel.<sup>2</sup> If, after a knowing and voluntary waiver of *Miranda* rights, a suspect unambiguously states that he no longer wishes to talk to the police, all questioning must cease.<sup>3</sup> If the attempted invocation of *Miranda* rights is not clear and unequivocal, however, our state and federal constitutions provide different levels of protection. As a matter of federal law, the police may continue questioning the suspect.<sup>4</sup> As a matter of Delaware law, the police must clarify the suspect's intention before continuing with the interrogation:

Where a suspect does not unequivocally invoke [the] right [to counsel], the police should be entitled to attempt to determine the suspect's intention. We thus endorse the clarification approach which may include, . . . the repeating of *Miranda* warnings as a means of emphasizing the defendant's constitutional right to counsel. U.S. Const. Amend VI; Del. Const. art. I, § 7. If, however, the police make additional inquiries concerning a suspect's intentions, the clarifying questions may not coerce or intimidate the suspect or otherwise

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<sup>2</sup>*Miranda v. Arizona*, 384 U.S. at 468-471.

<sup>3</sup> *Id.* at 473-474.

<sup>4</sup>*Davis v. United States*, 512 U.S. 452, 461-62 (1994).

discourage his effort to secure counsel, if that is his intention. Nor may the police tender any legal advice or attempt to dissuade the suspect from pursuing an intended course.<sup>5</sup>

Although *Crawford*, and the more recent decision in *Steckel v. State*,<sup>6</sup> dealt with the right to counsel, the right to remain silent is a constitutional right that is subject to the same level of protection as the right to counsel.<sup>7</sup>

The Superior Court correctly applied these standards in its analysis of the taped portion of Draper's statement. The trial court first considered whether Draper's request to talk to his mother constituted an ambiguous invocation of the right to remain silent. The court found Draper's statements to be a "bizarre" way to do it, but concluded that Draper had ambiguously invoked his right to remain silent by saying that he wanted to talk to his mother before he spoke to the police. The trial court then observed that Porter's efforts to clarify Draper's intent were unsuccessful. Since Draper ambiguously invoked his right to remain silent, and the police were unable to obtain clarification, the Superior Court held that the videotaped statements made after Draper's invocation should have been suppressed.

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<sup>5</sup>*Crawford v. State*, 580 A.2d 571, 577 (1990).

<sup>6</sup>711 A.2d 5 (1998).

<sup>7</sup>*Dodson v. State*, 513 A.2d 761 (1986).



The trial court had much less information to work with in considering the untaped portion of Draper's statement. Porter testified that he read Draper his *Miranda* rights and that Draper agreed to talk to him. He acknowledged that Draper asked to talk to his mother "right off the bat," but the record is silent as to the exact nature of Draper's initial request. The trial court apparently concluded that Draper's first request did not include his desire to speak to his mother before speaking to the police.

Based on our review of the record, we find that conclusion to be unsupported. During the taped portion of Draper's statement, his position with respect to his mother never varied. Every time the subject came up, Draper said that he wanted to speak to his mother before talking to the police. There is nothing to suggest that his position was different at the outset of the interrogation. He asked for his mother immediately and, in the absence of any contrary evidence, we must assume that he expressed himself in much the same way that he did later in the interview. Because we find that Draper ambiguously invoked his right to remain silent at the outset of the interview, and because Porter did not clarify Draper's intention, we hold that the entire statement should have been suppressed. We also hold that the erroneous

admission of Draper's statement, which was the primary evidence against him at trial, constituted prejudicial error.<sup>8</sup>

### Conclusion

Based on the foregoing, the judgment of the Superior Court is **REVERSED** and the matter is **REMANDED** for further action consistent with this opinion.

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<sup>8</sup> Draper raised another argument on appeal concerning the failure of the trial court to give a "missing witness" instruction to the jury. That argument is moot because the "missing witness" would have testified about the accuracy of a portion of Draper's statement.