ROP v. Otei, 11 ROP 240 (Tr. Div. 2003)
REPUBLIC OF PALAU,
Plaintiff,

v.

DAVIS OTEI,
Defendant.

CRIMINAL CASE NO. 03-044

Supreme Court, Trial Division
Republic of Palau

Decided: December 1, 2003

LARRY W. MILLER, Associate Justice:

This matter is before the Court on defendant's motion to suppress a written statement given to police following his arrest. For the reasons stated herein, the motion will be granted.

Four police officers testified at the hearing on the motion. Their testimony, although not entirely consistent with each other, provides the factual background for deciding the motion (and is obviously accepted only for that purpose). On November 15, 2002, following a tip that defendant was trafficking in methamphetamine, the police arranged a controlled buy in which a confidential informant purchased ice from defendant. Defendant was not immediately arrested; instead, the police tried to arrange another buy. Those efforts having failed, the police obtained an arrest warrant in the hope of securing his cooperation against other suspected traffickers. Towards that end, when defendant was arrested near his home on December 27, 2002, he was brought by the ⊥241 arresting officers not to the police station, but to the Sakurakai cemetery in Topside. When he arrived there, he got into a police car occupied by Officers Dolyn Tell and Cedric Tatingal. There he was read his rights and given an advice of rights form to sign. Defendant's responses on that form indicate that he understood his rights. To the question whether he was willing to speak to the police without a lawyer present, his answer was "No."

According to Officer Tell, defendant said that he wished to contact John Rechucher. She handed him her cellphone, but when he told her that he intended to call his brother to find out Rechucher's number, she advised against it, urging that disclosure of his arrest to a third party would hinder his ability to cooperate with the police. At this point, the officers' testimonies diverge. According to Officer Tell, defendant then handed the phone back and got out of the car. Officer Tatingal followed the defendant and started to talk to him. The two of them talked for several minutes, until Officer Tatingal returned and told her that the defendant had told him "some stuff"[1] and now wanted to cooperate. Officer Tell then read defendant his rights again and had him fill out another form. This time, in answer to the question whether he was willing to

[1]On cross-examination, Officer Tell testified that Officer Tatingal had told her that defendant had told him whom he was buying ice for.

speak without an attorney present, he answered "Yes." Defendant then gave a written statement–which the Court has not seen–which is the subject of this motion.

Officer Tatingal did not recall specifically what they had talked about after defendant mentioned John Rechucher, but said that he and/or Officer Tell continued to try to persuade defendant to cooperate with them, saying that they could help him with his case if he agreed. Tatingal did not mention getting out of the car with defendant. It was the Court's impression not that he denied having done so, but that he just didn't remember. To that extent, the Court is inclined to credit Officer Tell's recollection, because she seemed to have a clear memory of what occurred, and because she had no motive to fabricate the account she gave. On either version, the Court believes, the motion must be granted.

The legal rule at issue in this case derives from *Edwards v. Arizona*, 101 S. Ct. 1880, 1884-85 (1981), which held 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 communications, exchanges, or conversations with the police."[2] *Edwards* allowed for the possibility that a suspect could thereafter waive his right to have counsel present, but emphasized that in weighing whether a knowing and intelligent waiver had occurred, it was a "necessary fact that the ⊥242 accused, not the police, reopened the dialogue with the authorities." *Id.* at 1885 n.9. As stated in subsequent cases, "before a suspect can be subjected to further interrogation after he requests an attorney there must be a showing that the 'suspect himself initiates dialogue with the authorities.'" *Oregon v. Bradshaw*, 103 S. Ct. 2830, 2834 (1983) (quoting *Wyrick v. Fields*, 103 S. Ct. 394, 395 (1982)). *Bradshaw* established a "two-step inquiry for determining whether the accused voluntarily waived his right to counsel and right against self-incrimination," the first step of which is to show that the accused initiated further conversations with the police. *Bannister v. Armontrout*, 807 F. Supp. 516, 551 (W.D. Mo. 1991); *accord State v. Wade*, 866 S.W.2d 908, 911 (Mo. Ct. App. 1993).

As the Court reads these cases, the general burden imposed upon the government of showing a waiver of the right to counsel includes the specific burden of showing the "necessary fact" that the accused initiated a new conversation with the police. That showing has not been made here. To Officer Tell's recollection, defendant exited the car and–without invitation–Officer Tatingal "followed him to talk to him," indicating that it was Tatingal, rather than defendant, who started the conversation. To Officer Tatingal's recollection, the circumstances leading to the execution of the second advice of rights form are less clear. However, he acknowledged that their efforts to secure defendant's cooperation continued after he had said that he wanted his lawyer present. While Officer Tatingal did not recall following defendant out of the car, neither did he say that it was the defendant who started talking or who raised the idea of

---

[2] *Edwards* followed from *Miranda v. Arizona*, 86 S. Ct. 1602, 1628 (1966), which had already said: "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." This aspect of *Miranda* is codified at 18 PNC § 218(b)(2), which provides that any person arrested "shall be advised . . . that the police will, if the individual so requests, endeavor to call counsel to the place of detention and allow the individual to confer with counsel there before he is questioned further, and allow him to have counsel present while he is questioned by the police if he so desires."

giving a statement. On either version, therefore, the government has not met its burden of proof, and defendant's statement must be suppressed.

In its argument, the government appeared to suggest that *Edwards* was not violated because the police officers did not interrogate defendant after had he asked for a lawyer, but instead talked to him about the benefits of cooperating with them. The Court disagrees with this assertion for several reasons. First, strictly as a chronological matter, it is not correct to say that there was no interrogation–even in the narrow sense of the police asking questions about defendant's alleged criminal activities–after defendant had invoked his right to counsel. At least after the second advice of rights form was completed, as Officer Tatingal testified, Officer Tell asked defendant questions in the course of preparing his written statement.

Second, even focusing on the period between the demand for an attorney on the first advice of rights form and the waiver of the right to counsel on the second, the Court doubts that the officers' efforts to get the defendant to cooperate fall outside the definition of interrogation, which "refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 100 S. Ct. 1682, 1689-90 (1980) (footnotes omitted). "While the mention of cooperation is not always indicative of interrogation," *United States v. Martin*, 238 F. Supp. 2d 714, 723 (D. Md. 2003), there are numerous cases in which efforts to induce cooperation have been found to be "the functional equivalent of interrogation." *See id.* at 719-22 (collecting and comparing cases). Here, while the Court believes that the police genuinely wanted to secure defendant's cooperation, it also believes that it was not accidental that their efforts led to the taking of a written statement; to the contrary, it was a "reasonably likely" and indeed probably intended aspect of ⊥243 defendant's cooperation that he begin by providing information about his illegal activities.

Finally, as already discussed above, the Court believes that the "necessary fact that the accused, not the police, reopened the dialogue" is a *sine qua non* of a valid waiver of the right of counsel and of the admissibility of any statement. Under *Edwards*, "once a suspect has invoked the right to counsel, any subsequent conversation must be initiated by him." *Solem v. Stumes*, 104 S. Ct. 1338, 1340 (1984). Thus, even if a sharp line could be drawn between inducing cooperation and interrogation, the fact that it was the police who kept talking is enough to require the granting of defendant's motion and the suppression of his statement.