

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20130357

State of North Dakota,

Plaintiff-Appellee

- vs -

Ronald William Rogers, Jr.,

Defendant-Appellant

APPEAL FROM THE CRIMINAL JUDGMENTS
EAST CENTRAL JUDICIAL DISTRICT
CASS COUNTY CR. NO. 09-2013-CR-00603
THE HONORABLE LISA K. FAIR MCEVERS, PRESIDING

BRIEF

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STATEMENT OF THE ISSUES

[¶1] ISSUES:

I. Did the trial judge err when she denied Defendant, Ronald William Rogers Jr.'s, Motion to Suppress his confession?

NATURE OF THE CASE

[¶2] Defendant-Appellant, Ronald William Rogers Jr. (Rogers) was charged with one felony offense and one misdemeanor:

1. Murder (felony)
2. Willful disturbance of a dead body (misdemeanor)

[¶3] To the information that was filed on February 22, 2013 Rogers plead not guilty to both counts.

[¶4] On May 7, 2013 Rogers made a Motion to Suppress his confession.

[¶5] On June 6, 2013 the hearing was held on Rogers Motion to Suppress.

[¶6] Both the State and Defendant submitted briefs on Rogers Motion to Suppress.

[¶7] The trial court on June 25, 2013 entered an Order denying Roger's Motion to Suppress.

[¶8] Rogers entered a conditional plea of guilty on September 17, 2013 which allowed him to appeal the trial courts June 25, 2013 Order denying his Motion to Suppress.

[¶9] The criminal judgment in this case was entered on November 6, 2013.

[¶10] Rogers filed his Notice of Appeal on November 6, 2013.

[¶11] The Clerk's Certificate of Appeal was filed on December 5, 2013.

[¶12] The Order for transcript was filed on December 11, 2013.

[¶13] The Clerk's Supplemental Certificate of Appeal was filed on December 12, 2013.

[¶14] This case is now before the North Dakota Supreme Court.

STATEMENT OF FACTS

[¶15] At approximately 10:15 pm on February 19, 2013, Ronald William Rogers Jr., (Rogers) called 911 and reported his wife Elizabeth Rogers had committed suicide. In response to the call emergency medical staff and law enforcement were sent to the Rogers home. When the emergency medical staff and law enforcement arrived, they found Elizabeth Rogers dead with a gun in her right hand a gun shot wound to her head.

[¶16] After law enforcement arrived Rogers had a panic attack and had to be taken to Essentia hospital by ambulance. At Essentia Hospital Rogers was interviewed by law enforcement. During that interview Rogers said his wife with a gun in her right hand shot herself in the head.

[¶17] After Rogers was discharged from Essential Hospital he went to and stayed at the Days Inn Hotel in south Fargo, North Dakota. Fargo Police Detective Joshua Loos on February 20, 2013 came to the Days Inn Motel and met with Rogers. During that meeting Detective Loos gave Rogers warrant returns for items taken from Rogers home. Also Detective Loos and Rogers had a brief discussion about his wife's death and the fact that Detective Loos was going to attend his wife's autopsy.

[¶18] On the morning of February 21, 2013 employees of the Days Inn Motel asked law enforcement to do a welfare check on Rogers. The reason for this request was Rogers had been drinking heavily and would not leave the lobby of the Days Inn Motel.

[¶19] Law enforcement responded by sending Fargo Police Officer Dane Ronning to the Days Inn Motel. Officer Ronning then talked to Rogers. Because of Rogers suicidal comment Officer Ronning took Rogers to Essentia Hospital and had a 72 hour emergency

hold placed on him. Medical staff at Essentia Hospital then interviewed Rogers, and decided to send Rogers to Prairie St. Johns (Prairie) in Fargo, North Dakota.

[¶20] The autopsy of Rogers wife, Elizabeth was conducted on February 21, 2013. Detective Loos was present at that autopsy and learned that the bullet wound entrance was on the left side of Elizabeth's head and not her right. Because of this fact, additional warrants were issued for the Rogers home. The autopsy result and evidence collected by these additional warrants didn't match up with Rogers explanation of this wife's death.

[¶21] Rogers while he was at Prairie contacted Fargo Police Lieutenant Ross Renner and asked if he could speak to Detectives about the result of his wife's autopsy. Lieutenant Renner responded to Rogers request by sending Fargo Police Detective Matt Ysteboe and Detective Josh Loos to Prairie in the early morning hours of February 22, 2013. When the Detectives arrived at Prairie they spoke to a nurse Carrie Avery and asked if they could speak to Rogers. Because of Prairie's policy nurse Avery could not even confirm that Rogers was a patient at Prairie. Nurse Avery also told the detectives Prairie is not open to law enforcement unless there is a consent by the patient or a court order. To take care of the policy the Detectives explained Rogers had called the Fargo Police and requested that the Detectives come and see him. After this explanation nurse Avery agreed to and did ask Rogers if he wanted to speak to law enforcement. Rogers response was that he wanted to speak to the Detectives.

[¶22] Nurse Avery then went and got the Detectives and took them to a room on the second floor of Prairie, Rogers was also taken to that room. That room had only one entrance/exit.

[¶23] At the time that Detectives interviewed Rogers, Detective Ystebøe had a gun and wore a badge on his belt which were visible. Detective Loos had a coat on during the interview so his gun and badge weren't visible. The interview lasted approximately two and half hours. Audio and video recordings of the interview were made and later transcribed by a certified court reporter.

[¶24] Approximately thirty minutes into the interview and again at approximately one hour and forty five minutes into the interview, Geoffrey Maina an employee at Prairie entered the interview room and asked Rogers if he was doing all right. Tr. at 29, Tr at 106. On both occasions Rogers indicated that he was fine. Tr. at 29, Tr at 106.

[¶25] At no time during this two and half hour interview was Rogers given the Miranda warning. During the interview Rogers confessed to shooting his wife.

[¶26] When Rogers left the interview room he went without the Detectives to his secured unit at Prairie. While Rogers was in his secured unit the Detectives spoke to nurse Avery to arrange for the discharge and arrest of Rogers. About ten to fifteen minutes after Rogers had gone to this secured unit he returned. After Rogers return the Detective arrested him.

ARGUMENT

[¶27] **ISSUE I. Did the trial judge err when she denied Defendant, Ronald William Rogers Jr.'s, Motion to Suppress his confession?**

[¶28] The Standard of Review when the district court denies a suppression motion is according to State vs Hurt, 2007 ND 192, 743 NW2d 102:

[¶5] When this Court reviews a district court's decision to grant or deny a motion to suppress. the district court's findings of fact are given deference, and conflicts in

testimony are resolved in favor of affirmance. State v. Albaugh, 2007 ND 86, ¶8, 732 N.W.2d 712 (citing State v. Goebel, 2007 ND 4, ¶11, 725 N.W.2d 578). Questions of law are fully reviewable on appeal. Id. (citing Goebel, at ¶11). “In this case, there are disputed facts; the review involves a question of law.”

[¶29] In the case now before the court there are both disputed facts and questions of law.

[¶30] The following underlined factors are to be considered in deciding whether or not Rogers’ confession should be suppressed.

[¶31] Rogers was in custody when he confessed.

[¶32] The following language in the City of Devils Lake vs Grove 2008 ND 155, 755 NW2d 485 shows the North Dakota recognizes defacto arrests.

[¶18] We conclude the officers’ transportation of Grove from the site of the traffic stop to the Law Enforcement Center could not be supported on reasonable suspicion alone and constituted a de facto arrest.

[¶33] Groves explains arrest and when it occurs at [¶10]:

[¶10] An arrest is a seizure under the Fourth Amendment. City of Jamestown v. Jerome, 2002 ND 34, ¶5, 639 N.W.2d 478. An arrest occurs when circumstances exist that would cause a reasonable person to conclude he was under arrest and not free to leave. State v. Anderson, 2006 ND 44, ¶22, 710 N.W.2d 392. The existence of an arrest is a question of law. Id. at ¶23.” An arrest is made by an actual restraint of the person of the defendant or by defendant’s

submission to the custody of the person making the arrest.”

N.D.C.C. § 29-06-09. “[F]ormal words of arrest are not a condition precedent to the existence of an arrest. “ State v. Anderson, 336 N.W.2d 634, 639 (N.D. 1983). An “officer’s subjective intent or outward statements do not necessarily control whether, or when, a party is under arrest.” Linghor, 2004 ND 224, ¶14, 690 N.W.2d 201

[¶34] In the case now before the court, Rogers was taken by Fargo Police Officer Dane Ronning from the Days Inn Motel in Fargo, placed by Officer Ronning in Officer Ronning’s police car and taken to the Essentia Hospital. Officer Ronning then took Rogers from his police car into the Essentia Hospital. Inside the hospital Officer Ronning filled out a 72 hour mental evaluation form placing Rogers on a 72 hour hold at Essentia Hospital. Tr. P. 29, L.22 to P.3, L.17. The above taking of Rogers from the Days Inn, the police car ride Officer Ronning gave Rogers to the Essentia Hospital, and Officer Ronning signing of a 72 hour commitment for Rogers will hereinafter be referred to in this brief as “custody ride and 72 hour commitment.”

[¶35] Because of Rogers serious mental condition the staff at Essentia transferred Rogers to Prairie St. Johns in Fargo, North Dakota. The State in their brief states that App P. 11, [¶8] “the medical staff at Essentia transferred the Defendant to Prairie St. John’s (Prairie) in Fargo. Fargo police officers were not involved in the decision to transfer the Defendant to Prairie.”

[¶36] The above quote from the State is true but the following is the rest of the story.

1. Rogers was taken on the morning of February 21, 2013 from the Days Inn in Fargo, North Dakota by Officer Ronning and put into Officer Ronnings police car.

2. Rogers was not allowed to leave Officer Ronnings police car.

3. Officer Ronning drove Rogers to Essentia Hospital and filled out a 72 hour mental health evaluation form requiring Rogers to be held for 72 hours at Essentia Hospital

4. Because of Ronning signing of the 72 hour mental health form Rogers was not free to leave Essentia Hospital.

5. Rogers would not have been in Essentia Hospital were it not for the ride to Essentia Hospital given to him by Officer Ronning and Officer Ronning making out and signing of a 72 hour mental health form committing Rogers to Essentia hospital for 72 hours.

6. Because of the above, Rogers placement in Prairie was the end result of the “custody ride and 72 hour commitment.”

[¶37] The Fargo police because of the “custody ride and 72 hour commitment” have placed Rogers in a unique situation because patients at Prairie are locked in, can’t leave, can’t bond out, and don’t have attorneys appointed.

[¶38] Because of the above facts Rogers was in custody. Also because of the above facts Rogers had been under a defacto arrest since Officer Ronning removed him from the Days Inn and put him in Ronnings police car.

[¶39] Rogers requested to speak to Law Enforcement about his wife’s autopsy.

[¶40] Rogers while at Prairie on February 21, 2013 did request to speak to Fargo Detectives about his wife’s autopsy. However, in the early morning hours of February

22nd, 2013 when Fargo Detective Ysteboe and Josh Loos went to Prairie to talk to Rogers the following events had occurred on February 21, 2013 on the early morning of February 22, 2013 must be considered.

1. Days Inn Motel employees on the morning of February 21, 2013 had called the Fargo Police about Rogers being very intoxicated in the Motel's lobby.

2. Officer Ronning went to the Motel and saw Rogers and Officer Ronning determined that Rogers was very intoxicated and suicidal.

3. Ronning gave Rogers the "custody ride and 72 hour commitment".

4. The staff at Essentia Hospital determined Rogers mental state required a more secure facility than Essentia Hospital and sent Rogers to Prairie.

5. At Prairie Rogers was medicated and given a sleeping pill.

6. Detective Ysteboe and Detective Loos had Rogers awakened from a sound sleep in the early morning hours of February 22, 2013 so they could talk to Rogers.

7. People don't get placed in Prairie unless they have serious mental problems.

8. Because of all the above there is a good possibility Rogers mental capacity was limited in the early morning hours of February 22, 2013.

[¶41] Another thing to be considered is at the time Detective Ysteboe and Detective Loos went to see Rogers they were aware of what had been discovered during Rogers wife's autopsy. Therefore, Detective Ysteboe and Detective Loos no longer considered Rogers wife's death a suicide but had decided that Rogers had shot her in the head.

[¶42] Rogers freedom of movement was restrained during the interview.

[¶43] At the time Detective Ysteboe and Loos came to Prairie, Rogers was confined in a secured area in Prairie because of the “custody ride and 72 hour commitment”. Therefore for Rogers to get to the interview room at Prairie he had to be released from a more secured unit at Prairie. Then when he got to the interview room he was in an area at Prairie where if he tried to leave there was still one locked door before he could get out of Prairie and one locked door before he could get back into his secured unit.

[¶44] The Detectives didn't use any coercive tactics during the interview.

[¶45] Because of Rogers mental problems and condition the Detectives use of coercion probably would have caused Rogers to break down. Therefore, they decided to be decent to Mr. Rogers a mentally sick man, who they had decided had shot his wife.

[¶46] The Detectives nice act took 2½ hours to get Rogers a person who was medicated and had been given a sleeping pill to confess to the murder.

[¶47] The atmosphere of the interview was police dominated.

[¶48] The interview room in this case wasn't selected by Rogers. The interview room was forced onto Rogers because of the “custody and 72 hour commitment”. Because of these circumstances Rogers was in custody while he was in the interview room.

[¶49] Rogers was arrested at the time of the interview.

[¶50] The State in its brief admits: App P. 17, [¶37] after Defendant confessed he was placed under arrest and transferred to the Cass County Jail. “This is the only fact that weighs in favor of a determination that Defendant was in custody.”

[¶51] Because of the above admission by the State this factor has to favor Rogers.

[¶52] The totality of the circumstances show Rogers was in custody.

[¶53] The “custody ride and 72 hour commitment” clearly establish Rogers had

been in custody since Officer Ronning took him from the Days Inn Motel. Rogers custody continued until he confessed in the interview room at Prairie.

[¶54] There are no facts or circumstances in this case to indicate that Rogers could have committed himself to Prairie. The only reason Rogers was at Prairie was because of Officer Ronning “custody ride and 72 hour commitment.”

[¶55] Rogers confession wasn't voluntary.

[¶56] The State in their brief say: App P. 18 [¶41]. Voluntariness is determined by examining the totality of the circumstances. Id. The voluntariness inquiry looks to “(1) the characteristics and conditions of the accused at the time of the confession and (2) the details of the settings in which the confession was obtained.” State v. Pickar, 453 N.W.2D 783, 785 (ND 1990).

[¶57] Rogers prior mental state before his confession on the morning of February 22, 2013 and the totality of all of the circumstances prior to his confession must be considered. The following events establish what Rogers mental state was and the totality of all circumstances prior to his confession.

1. On the morning of February 21, 2013 and the early morning of February 22, 2013 before his confession Days Inn Motel employees had called the Fargo Police about Rogers being very intoxicated in the Motel's lobby.
2. Officer Ronning went to the Motel and while observing Rogers, determined that Rogers was very intoxicated and suicidal.
3. Officer Ronning gave Rogers the “custody ride and 72 commitment”.
4. The staff at Essentia Hospital determined Rogers mental state required a more secure facility than Essentia Hospital and sent Rogers to Prairie.

5. At Prairie Rogers was medicated and given a sleeping pill.

6. Detective Ysteboe and Detective Loos had Rogers in the early morning hours of February 22, 2013 awakened from a sound sleep so they could talk to Rogers.

7. People don't get placed in Prairie unless they have serious mental problems.

8. Because of the above there is a good possibility Rogers mental capacity was limited when he confessed.

[¶58] Another factor that goes to voluntaries is the “custody ride and 72 hour commitment.”

[¶59] Rogers at the time he confessed was in custody and had been in custody since Officer Ronning took him from the Days Inn. So in order for his confession to be voluntary prior to that confession Rogers should have been given his Miranda rights and waved them.

[¶60] Rogers wasn't sober, alert and was under duress when he confessed.

[¶61] Rogers mental condition on the early morning hours of February 22, 2013 has already been described above twice. Rogers had consumed enough alcoholic beverages on the morning of February 21, 2013 to cause a Days Inn employee to call the Fargo Police and ask for a welfare check on Rogers. The welfare check resulted in Rogers getting the “custody ride and 72 hour commitment” to Essentia Hospital. Essentia Hospital decided Rogers mental condition was serious enough to transfer him to Prairie. After Rogers arrived at Prairie, Prairie gave Rogers medication and a sleeping pill.

[¶62] Alcoholic beverages, medication and sleeping pills all limit a persons mental capacity. Rogers had consumed all three starting with alcoholic beverages on the morning of February 21, 2013 and then later in the day was medicated and given a sleeping pill at

Prairie. Therefore in the early morning hours of February 22, 2013 it is a reasonable conclusion that Rogers mental capacity was still limited because of his prior alcohol consumption, and/or the medication and sleeping pill given to him by Prairie.

[¶63] The interview was conducted in a coercive setting.

[¶64] According to the State there is nothing coercive about Rogers being locked in a secured room at a mental hospital because Rogers was removed from that secured room and placed in a room in a larger locked secured area.

[¶65] The interview room at Prairie wasn't a room selected by Rogers but forced on him because of the "custody ride and 72 hour commitment".

[¶66] Detective Ysteboe and Detective Loos should have talked to Rogers doctor about Rogers mental state and not just to nurse Avery before they interviewed Rogers.

[¶67] Totality of circumstances show Rogers confession was involuntary.

[¶68] Rogers has stated above twice eight reasons why his confession wasn't voluntary. Those reasons above show the totality of the circumstances and why his confession wasn't voluntary.

[¶69] The "custody ride and 72 hour commitment" contains facts sufficient to prevent his confession from being voluntary.

[¶70] Detective Ysteboe and Detective Loos at the time of the interview knew the results of Rogers wife's autopsy. Therefore they had decided this was no longer a suicide case but one where Rogers had murdered his wife. Detective Ysteboe and Detective Loos saw the interview of Rogers as a time where being kind to a mentally ill person, might just get him to confess.

[¶71] According to Miranda - In *Miranda v. Arizona* (1966) 384 U.S. 436, the Supreme Court held that in order to protect a defendant's constitutional right against self-incrimination guaranteed by the Fifth Amendment, the police must inform a defendant who is in custody of certain rights. If police fail to do so, the confession obtained will be excluded from the prosecutor's case in chief.

The *Miranda* rights are well known. Police must tell a person in custody he or she has the right to remain silent, that anything said will be used against her or him in court, that the person has the right to consult with a lawyer and have a lawyer present during questioning, and that if the person cannot afford a lawyer one will be appointed to represent her or him.

CONCLUSION

[¶72] Rogers had been in custody and arrested from the time Officer Ronning took him from the Days Inn on the morning of February 21, 2013. Therefore Rogers should have had a law officer give him his Miranda Rights and wave those rights prior to his confession. Since no law officer gave Mr. Rogers his rights prior to his confession the confession must be suppressed.

DATED this 25th day of February, 2014.

/s/ Benjamin C. Pulkrabek
Benjamin C. Pulkrabek, ID #02908

CERTIFICATE OF SERVICE BY MAIL

[¶73] The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Firm and is a person of such age and discretion as to be competent to serve papers.

That on February 25th, 2014, she served, by e-mail and mail a copy of the following:

APPELLANT'S BRIEF and APPENDIX

to:

Carmell Mattison
Grand Forks County State's Attorney's Office
Carmell.mattison@gfcounty.org

Mailed to:

Ronald Rogers
NDSP
P.O. Box 5521
Bismarck, ND 58506

The undersigned further certifies that on February, 25th, 2014, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLANT'S BRIEF and APPENDIX.

_ /s/ Sharon Renfrow _____
Sharon Renfrow, Admin. Legal Assistant to
Benjamin C. Pulkrabek

CERTIFICATE OF SERVICE BY MAIL

[¶73] The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Firm and is a person of such age and discretion as to be competent to serve papers.

That on February 25th, 2014, she served, by e-mail and mail a copy of the following:

APPELLANT'S BRIEF and APPENDIX

to:

Carmell Mattison
Grand Forks County State's Attorney's Office
Carmell.mattison@gfcounty.org

Served February 27, 2014 to:

Tristan Van de Streek
Cass County State's Attorney's Office
vandestreet@casscountynynd.gov

Mailed to:

Ronald Rogers
NDSP
P.O. Box 5521
Bismarck, ND 58506

The undersigned further certifies that on February 25, 2014, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLANT'S BRIEF and APPENDIX.

/s/ Sharon Renfrow
Sharon Renfrow, Admin. Legal Assistant to
Benjamin C. Pulkrabek