IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO,	)	**CASE NOS. 622817 and 623119**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
-vs-	)	**JUDGMENT ENTRY**
	)	**DENYING THE**
	)	**DEFENDANT'S MOTION**
ANDREW L. BYRD,	)	**TO SUPPRESS**
	)	
Defendant.	)	

John P. O'Donnell, J.:

The indictments

Defendant Andrew L. Byrd is charged in case number 622817 with the October 13, 2017, rape and gross sexual imposition of a four-year-old with the initials L.C. In case number 623119 he is accused of raping and committing gross sexual imposition against a 13-year-old with the initials of S.H. in April 2016 and gross sexual imposition against 15-year-old T.J. in February 2016.

The motion to suppress

The indictments were returned in November 2017. On February 15, 2018, the defendant moved to suppress from evidence a video-recorded interview he had with two detectives of the Cleveland police department. The basis for the motion is that the first part of the statement was made without the police having warned him, as required by *Miranda v. Arizona*, 384 U.S. 436 (1966), that he did not have to submit to the interview and, if he did, it could be used to help convict him, and that he had a right to counsel either retained by him or appointed and paid for

by the government. An evidentiary hearing on the motion was held on March 28, 2018, and this entry follows.

The evidence

Joint Exhibit 1 was admitted into evidence at the hearing. The exhibit is a digital video disc of Byrd's October 26, 2017, interview by Cleveland detectives Christina Cottom and Cynthia Bazilius. The proceeding takes place in an interview room – essentially a small office – in the police department. It begins at 15:50:53 according to the video time stamp. Byrd, who had just been arrested at his home in Lorain and brought to Cleveland, was dressed in blue jeans, what looks to be a t-shirt and a black hooded sweatshirt. He sat opposite of Det. Cottom across a desk with the other detective seated at the corner on Cottom's side. The defendant was handcuffed, but not to a stationary object, and he was not otherwise restrained.

The interview began with biographical questions: name, nickname, social security number, residence, job or volunteer service, known illnesses, tattoos or other distinguishing marks, etc. Byrd's answers were mostly unremarkable except he mentioned that he was considered disabled due to depression and schizophrenia, but that he consistently took medications as prescribed for those illnesses. He also denied using alcohol or illicit drugs and described going to school into college before he had to drop out because of his mother's death.

At 15:59:06 Det. Bazilius said "now you also mentioned that you are a registered sex offender" and she and Byrd began to discuss how he came to be a registered sex offender, during which Byrd gave his version of the facts underlying his prior sex offense. Byrd's sex offender registration obligations – which had ended by the date of the interview – were discussed for more than three minutes. At the suppression hearing, the parties stipulated that the crime that resulted in Byrd being declared a sexually oriented offender was a single count of gross sexual imposition

in case number CR 02 422962 in the Cuyahoga County Court of Common Pleas, for which Byrd eventually served about a year in prison ending in late 2003.[1]

At around 16:03:50 Bazilius asked "do you drive?" and Byrd responded by telling her that he "found out about" the current accusation against him when he received a mailed solicitation from a criminal defense attorney who learned through a "web site" that Byrd was suspected of rape. He then proceeded to begin talking about his living arrangements with co-defendant Jennifer Cummings, the mother of alleged victim L.C., at which point detective Cottom interrupted him, saying "hold on for just for a little bit"[2] and redirected the interview to the biographical information, with some additional discussion about the previous case.

At 16:21:26, Det. Bazilius said "so Andrew, you know why you were arrested, is that correct?" After he acknowledged that he did, she gave him thorough *Miranda* warnings orally and in writing. He verbally agreed to speak to the detectives – "no problem, I didn't do nothing" – and then affirmed that assent in writing. He is then reassured that he can end the interview at any time and indicates he understands because "I've been through this." At 16:23:26 the discussion of these cases started.

During the first nearly 33 minutes of the interview – before the *Miranda* warnings were given – there is no evidence of compulsion, putting aside the fact that the defendant was in custody and handcuffed in front. The door of the office remained open. Neither interviewer hovered over him or otherwise used intimidating body language. He was not threatened, either overtly or subtly. Both questioners employed a conversational, not confrontational, tone. Byrd neither voiced objections to being there nor did he seem to be cowed. Although the defendant digressed with his answers to some questions and tended toward verbosity, there is no outward

[1] He was convicted of two counts of gross sexual imposition but one of the counts was vacated on appeal. Upon resentencing on the remaining count he was sentenced to "time served."
[2] 16:06:29 of the recording.

sign that his mental illness – or anything else – prevented him from understanding what was happening: he gave answers to questions that were responsive to what was asked, he did not perseverate, and he asked reasonable questions as they arose. To a layman's eye he was not out of touch with reality.

The interview then continued for more than two hours during which Byrd never asked to end it.

The defendant's argument

The defendant makes two arguments in favor of suppression. First, he asserts that the pre-*Mirandized* portion of the statement must be suppressed for want of the required *Miranda* advisement. Second, he claims that because "the [*Miranda*] waiver . . . was not obtained until well after the interrogation had begun, any and all evidence stemming from this arrest and statement must be suppressed"[3] on the grounds that Byrd's agreement to speak to the detectives was not voluntary.

The law

The Fifth Amendment to the United States Constitution provides that no person shall be compelled in any criminal case to be a witness against himself. In *Miranda*, supra, The United States Supreme Court held that a criminal suspect in custody must be told that he has a right to remain silent, that anything said can and will be used against him in court, that he has a right to consult with an attorney and that if he is indigent a lawyer will be appointed to represent him.

The purpose of requiring the warnings is to guard against statements compelled in violation of the Fifth Amendment. As the court put it:

> We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling

[3] Defendant's motion to suppress, third page. (The pages are not numbered.)

pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. *Id.*, 467.

In short, the purpose of requiring the warnings is to mitigate the compulsion inherent in a custodial interrogation, i.e. questioning undertaken of a person who is not free to leave.

If custodial interrogation continues in the absence of an attorney after a police officer advises a suspect of his rights, the government bears a heavy burden to demonstrate by a preponderance of the evidence that the suspect knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel before speaking to the police. *State v. Barker*, 149 Ohio St. 3d 1, 2016-Ohio-2708, ¶23. To determine whether a suspect knowingly, intelligently, and voluntarily waived his *Miranda* rights, courts examine the totality of the circumstances. *Id.*, ¶24.

But not all police questioning amounts to an interrogation. Interrogation has been defined as a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support a person's arrest and ultimately his guilt. *People v. Rucker*, 26 Cal. 3d 368, 386 (1980). But the *Miranda* safeguards are not necessary at a proper booking interview at which certain basic information is elicited having nothing to do with the circumstances surrounding any offense with which a defendant has been charged. *Id.* The limited information needed at a booking procedure is required solely for the purposes of internal jail administration, not for use in connection with any criminal proceeding against the arrestee. *Id.* When use of this information is confined to those proper purposes, its elicitation cannot be considered incriminatory. *Id.*

Yet routine booking questions are ordinarily confined to securing the biographical data necessary to complete booking or pretrial services. *Pa. v. Muniz*, 496 U.S. 582, 601 (1990).

Thus, questions that go beyond seeking such information may be considered interrogation. Here, and despite its duration, the first 33 minutes of Byrd's statement was mostly limited to this necessary sort of background information. What should have taken five or ten minutes to complete went much longer because Byrd's expansive answers invited reasonable follow up requests for additional information or clarification, and there is no evidence that Byrd's long-winded answers to simple questions were in any way induced by the detectives. There is nothing unconstitutional about letting a suspect talk during pre-*Miranda* booking (or its equivalent) as long as the question that gets the suspect talking wasn't designed to elicit an incriminating response. Here, the detectives' intention to avoid drawing out information during the first part of the interview about the events surrounding the alleged crimes was demonstrated when Cottom stopped Byrd from talking about his relationship and living arrangements with the mother of one of the alleged victims.

Nevertheless, there were questions on subjects beyond routine booking information raised by the detectives. For example, while routine booking may entail asking an arrestee whether he practices a religion so that his religious practice can be accommodated insofar as possible while he's in jail, there seems to be little justification for Cottom's several questions to Byrd about the extent of his religious practice. Additionally, once the defendant revealed his prior conviction for a sexually oriented offense and his status as a prior registered sex offender, further inquiry on the details of that crime and Byrd's prison term did nothing to advance the practical matter of preparing to book Byrd into the city jail. But while those questions, and some others, didn't fall within the ambit of routine biographical booking information, nor did they qualify as interrogation because they were not questions that would normally elicit incriminating responses.

As a result, the defendant's motion to suppress from evidence at trial the first approximately 33 minutes of his statement on the basis that it constituted an un-*Mirandized* custodial interrogation is denied.

That leaves the question of whether Byrd's waiver of his *Miranda* rights was voluntary. Considering the totality of the circumstances, I find that it was. As already noted above, the physical environment was about as relaxed and unthreatening as a custodial interrogation can be: Byrd was in an office with an open door, not a cell; his hands were cuffed together but in front of his body; he was not chained to a chair or the floor or a wall; he was in street clothes; and the fact that he was being recorded was made clear to him. There is also no indication that his mental illness interfered with his ability to appreciate his situation. To the contrary, he noted that he had been questioned by police in the past. Moreover, the detectives did not obviously employ any coercion to procure the waiver. The form was read and explained to Byrd, he was given an opportunity to read it and to ask questions about it, he signed or initialed it in more than one place, and his ability to stop the interview at any time was highlighted. If the detectives' conduct under the circumstances present here amounted to impermissible coercion then there is no such thing as a voluntary *Miranda* waiver.

Conclusion

For the reasons given here, the defendant's motion to exclude from evidence at trial his October 26, 2017, recorded statement to the police on the basis that the statement was obtained in violation of his constitutional rights is denied.

IT IS SO ORDERED:

3/3/2018

Judge John P. O'Donnell

SERVICE

A copy of this journal entry was sent by email, this 30th day of March, 2018, to the following:

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Judge John P. O'Donnell

3/30/2018