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IN THE COURT OF APPEALS OF INDIANA

Dylan Noel Theobald,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

June 30, 2022

Court of Appeals Case No.
21A-CR-2746

Appeal from the
Marion Superior Court

The Honorable
Steven J. Rubick, Magistrate

Trial Court Cause No.
49D20-2101-F5-590

Vaidik, Judge.

Case Summary

[1] The police stopped Dylan Noel Theobald after he allegedly struck an officer's side mirror while driving on his motorcycle. Theobald denied doing so but offered to pay the officer whose mirror was hit $100. The police arrested

Theobald for bribery, among other offenses. Theobald later moved to suppress the $100 offer because he hadn't been given *Miranda* warnings even though he was interrogated while in custody. We adopt the federal new-crime exception to the *Miranda* exclusionary rule. Under this exception, a statement made by a person who is subject to custodial interrogation but not given *Miranda* warnings is still admissible if the statement itself is evidence of a new crime (such as bribery or a threat). We agree with the trial court that Theobald's offer of money to the officer is admissible but disagree with the trial court that another statement Theobald made while in custody is admissible.

Facts and Procedural History

[2] One night in January 2021, Indianapolis Metropolitan Police Department Detective De'Joure Mercer conducted surveillance near 10th Street and Country Club Road in Indianapolis. He states a person driving by on a motorcycle "struck" his "department issued undercover vehicle" "with his fist," "breaking [his] side view mirror." Tr. p. 11. According to Detective Mercer, the person on the motorcycle kept driving, and Detective Mercer followed. Detective Mercer radioed for assistance, and IMPD Officer Joseph Doucleff responded. Officer Doucleff eventually caught up to Theobald—who was driving at least 100 miles per hour on I-74 East near Shelbyville—and pulled him over. Detective Mercer arrived on the scene "seconds" later. *Id.* at 12.

[3] Officer Doucleff wore a body camera. The footage shows that Officer Doucleff approached Theobald and asked him if he knew why he was being pulled over.

Theobald said yes. Detective Mercer then walked up and said he was the detective whose side mirror Theobald had hit on 10th Street in Indianapolis and had been following him ever since, but it wasn't "a big deal." Ex. 1. Theobald responded he didn't know what Detective Mercer was talking about and that "it wasn't [him]." *Id.* Officer Doucleff asked Detective Mercer what he wanted to do, and Detective Mercer said to "detain" Theobald for a "hit and run." *Id.*; Tr. p. 23. Officer Doucleff then handcuffed Theobald.

[4] While in handcuffs on the side of the interstate, Theobald maintained he didn't hit Detective Mercer's side mirror. Detective Mercer told Theobald that before Officer Doucleff read him his *Miranda* rights he had two options: (1) Theobald could be "honest" about hitting Detective Mercer's side mirror so he could fill out an accident report or (2) Theobald could go to jail. Ex. 1; Tr. p. 20. Theobald continued to maintain he didn't hit Detective Mercer's side mirror. Detective Mercer repeated that all he wanted Theobald to do was "admit" he had hit his side mirror so he could fill out an accident report, at which point Theobald would be "on his way." Ex. 1. Theobald again said he didn't hit Detective Mercer's side mirror and asked if he was "free to go"; Detective Mercer said no. *Id.* Detective Mercer said he couldn't believe Theobald would choose to go to jail when he could instead admit to hitting his side mirror, which was "not a big deal." *Id.*

[5] Detective Mercer then asked Theobald if someone could pick up his motorcycle so it didn't have to be towed. *Id.* Theobald asked to use his phone. Detective Mercer repeated he couldn't believe Theobald would choose to go to jail "over

nothing." *Id.* In response, Theobald said something unintelligible on the footage[1] followed by, "I'd pay, I'd give you a hundred dollars in my pocket right now." *Id.*

[6] Detective Mercer walked out of the camera's view to call his supervisor. Meanwhile, Officer Doucleff told Theobald that when Detective Mercer returned, he should just answer his questions for the accident report. *Id.* When Detective Mercer returned, he reiterated that he just wanted Theobald to cooperate in the accident report. Theobald told Detective Mercer to fill out the accident report. But when Detective Mercer asked Theobald if he was going to admit to hitting his side mirror, Theobald said no because he didn't do it. Detective Mercer claimed he couldn't fill out the accident report unless Theobald admitted to hitting his side mirror.[2]

[7] As Detective Mercer started to process Theobald's arrest for "reckless driving" and "hit and run," he learned Theobald had a conditional driver's license. *Id.* He then asked Theobald where he was coming from. Theobald answered he was coming from work and collecting rent from his rental properties. Theobald, who was never given *Miranda* warnings, was transported to jail for processing. Tr. pp. 18, 24.

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[1] The unintelligible part seems important, but the parties didn't address it at the suppression hearing or on appeal.

[2] The State never explained, either in the trial court or on appeal, why Detective Mercer couldn't do an accident report without an admission from Theobald.

[8] The State charged Theobald with four counts: Level 5 felony bribery (for offering Detective Mercer $100), Class B misdemeanor criminal mischief (for damaging Detective Mercer's side mirror), Class C misdemeanor reckless driving (for driving at "an unreasonably high rate of speed"), and Class C misdemeanor violation of driving conditions (for driving "beyond the scope of a specialized driving privileges order").[3] Appellant's App. Vol. II pp. 15-16.

[9] Theobald moved to suppress "certain" statements he made at the scene of the stop, including the $100 offer to Detective Mercer, because he was subject to custodial interrogation without being given *Miranda* warnings. *Id.* at 17-18. After a hearing and supplemental briefing, the trial court denied Theobald's motion without explanation. *Id.* at 38.

[10] Theobald sought and received permission to bring this interlocutory appeal.

Discussion and Decision

[11] Theobald contends the trial court erred "by failing to suppress self-incriminating statements that were wrongfully elicited from [him] while he was in custody and subject to interrogation in violation of his constitutional rights." Appellant's Br. p. 9. Notably, Theobald asks for only two statements to be suppressed: (1) "the statement made by [him] regarding payment for damage to

[3] According to the probable-cause affidavit, the State claims "it appeared that the route that Mr. Theobald had taken throughout the incident was beyond the scope of the conditions." Appellant's App. Vol. II p. 14.

the vehicle [(Ex. 1 (20:05-20:12)]" and (2) "statements made in response to questions about where he was driving to or from and regarding his driver's license status. [Ex. 1 (39:35-41:30)]." Appellant's Reply Br. p. 7.

[12] We deferentially review a trial court's denial of a defendant's motion to suppress, construing conflicting evidence in the manner most favorable to the ruling. *M.O. v. State*, 63 N.E.3d 329, 331 (Ind. 2016). "Although we do not reweigh the evidence, we will consider any substantial and uncontested evidence favorable to the defendant." *Id.* (quotation omitted). But to the extent the motion raises constitutional issues, our review is de novo. *Id.*

[13] Long ago, the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436 (1966), "held that when law enforcement officers question a person who has been 'taken into custody or otherwise deprived of his freedom of action in any significant way,' the person must first 'be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.'" *Luna v. State*, 788 N.E.2d 832, 833 (Ind. 2003) (quoting *Miranda*, 384 U.S. at 444). Statements elicited in violation of *Miranda* are generally inadmissible in a criminal trial and subject to a motion to suppress. *Loving v. State*, 647 N.E.2d 1123, 1125 (Ind. 1995); *Wright v. State*, 766 N.E.2d 1223, 1229 (Ind. Ct. App. 2002).

[14] *Miranda* is triggered only if the person is subject to "custodial interrogation." *State v. E.R.*, 123 N.E.3d 675, 679 (Ind. 2019). Custody under *Miranda* occurs

when two criteria are met: (1) "the person's freedom of movement is curtailed to the degree associated with formal arrest" and (2) "the person undergoes the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *State v. Diego*, 169 N.E.3d 113, 117 (Ind. 2021). "Interrogation" for purposes of *Miranda* "constitutes questions, words, or actions that the officer knows or should know are reasonably likely to elicit an incriminating response." *State v. Brown*, 70 N.E.3d 331, 335 (Ind. 2017).

[15] The State makes two arguments on appeal. First, it argues the trial court properly denied Theobald's motion to suppress both statements because Theobald was neither in custody nor subject to interrogation and thus not entitled to *Miranda* warnings. We disagree. Theobald was in custody: he was handcuffed on the side of the interstate for around forty-five minutes and told he was not free to leave. *See Wright*, 766 N.E.2d at 1230 ("[W]e have previously held that the use of handcuffs would cause the reasonable person to feel that one was not free to leave, and that one's freedom of movement was restrained to the degree associated with a formal arrest.").

[16] Theobald was also subject to interrogation. He was pulled over when driving at least 100 miles per hour, which can constitute a crime. He was accused of striking Detective Mercer's undercover car but not stopping, which can also constitute a crime. Detective Mercer gave Theobald two options: admit to hitting his side mirror or go to jail. In other words, Theobald could admit to a crime or go to jail. Under these circumstances, Detective Mercer's statements and actions were reasonably likely to elicit an incriminating response. *See*

Loving, 647 N.E.2d at 1126 ("[W]hen Office Benton asked the defendant's name, address, and so forth, no *Miranda* violation had yet occurred. However, before the officer asked what happened at the crime scene, the *Miranda* warnings should have been given.").

[17] In the alternative, the State argues the trial court properly denied Theobald's motion to suppress the first statement about offering Detective Mercer $100 because that statement constituted a new crime, that is, bribery. The State points out that federal appellate courts have recognized a "new-crime exception" to the *Miranda* exclusionary rule, under which a statement made by a person who is subject to custodial interrogation but not given *Miranda* warnings is still admissible if the statement itself is evidence of a new crime. *See, e.g.*, *United States v. Paskett*, 950 F.2d 705, 708 (11th Cir. 1992) (holding a defendant's offering of cash to a DEA agent—"an attempt to bribe"—was properly admitted into evidence even though no *Miranda* warnings had been given because "no person has a constitutional right to be warned of his rights before he commits a crime" (quotation omitted)); *United States v. Melancon*, 662 F.3d 708, 712 (5th Cir. 2011) ("Because the statements [the defendant] made were themselves charged as criminal conduct, they were properly admitted as the key evidence on the counts of making false statements [even though no *Miranda* warnings had been given]."); *United States v. Evans*, 581 F.3d 333, 334 (6th Cir. 2009) (holding a defendant's threat to kill a federal law-enforcement officer was admissible, even though no *Miranda* warnings had been given, because "no individual has a constitutional right to be warned of his rights

before he commits" "a new and distinct crime"); *see also United States v. Pryor*, 32 F.3d 1192, 1196 (7th Cir. 1994) ("The exclusionary rule, whether under the fourth or fifth amendment, does not reach [to new crimes]. The Supreme Court devised the exclusionary rule to reduce incentives to violate the Constitution by preventing the prosecutors from using evidence the police turn up. Police do not detain people hoping that they will commit new crimes in their presence . . . ."). The Eleventh Circuit explained the rationale for this rule in *Paskett*, reasoning that if evidence of a bribe (or threat) was inadmissible because *Miranda* warnings hadn't been given, it would

> render it virtually costless for suspects to attempt to bribe arresting officers. As long as the bribe occurred in the context of custodial questioning and *Miranda* warnings had yet to be given, a defendant could not be convicted of bribery because the statement constituting the offense—the bribe itself—would be inadmissible as proof of the crime.

950 F.2d at 708.

[18] The treatise *Criminal Procedure* discusses the new-crime exception to the *Miranda* exclusionary rule as well:

> What if during an interrogation in violation of *Miranda* the suspect responds to questioning with statements which themselves are criminal, such as an attempted bribe or a threat to the officer or on the life of the president? Consistent with the approach taken with respect to the Fourth Amendment exclusionary rule, the courts have answered that the *Miranda* exclusionary rule need not be pushed so far that such crimes-by-words cannot be proved and punished. Although often there will

> exist the added explanation that the crime was not responsive to the question asked and in that sense does not fall within *Miranda*'s coverage, the broader rationale is that the deterrent objective of the *Miranda* doctrine need not be extended so far as to thwart the punishment of such crimes, which are sufficiently infrequent and unpredictable as to be unlikely objectives of a police deviation from *Miranda*.

3 Wayne L. LaFave et al., *Criminal Procedure* § 9.5(e) (4th ed. Nov. 2021 update) (footnotes omitted).

[19] The State acknowledges "no Indiana courts have applied the new-crime exception in the context of *Miranda* before" and asks us to do so here because Theobald committed bribery by "offering to pay Detective Mercer money in exchange for being released." Appellee's Br. pp. 14, 15; *see also* Appellant's App. Vol. II p. 15 (bribery charging information); Ind. Code § 35-44.1-1-2(a)(1) (bribery statute). Theobald doesn't dispute there is a new-crime exception to the *Miranda* exclusionary rule. But he claims it doesn't apply here because he didn't make "an offer of money in exchange for being allowed to leave." Appellant's Reply Br. p. 4. Instead, he claims he made "an admission to causing the damage by offering to pay restitution." *Id.* at 3.

[20] While Theobald might have a convincing argument that he was offering to pay for the damage to Detective Mercer's car rather than bribing him (especially depending on what Theobald said during the unintelligible part of the footage), the State can present evidence of Theobald's statement in prosecuting him for

bribery. Whether the trier of fact finds Theobald guilty of bribery is another matter.

[21] We reverse the trial court's denial of Theobald's motion to suppress the second statement about where Theobald was driving because he was subject to custodial interrogation without being given *Miranda* warnings. However, we affirm the trial court's denial of Theobald's motion to suppress the first statement about offering Detective Mercer $100 under the new-crime exception to the *Miranda* exclusionary rule.[4]

[22] Affirmed in part, reversed in part, and remanded.

Crone, J., and Altice, J., concur.

[4] We note that the federal cases cited above involve prosecutions for the alleged new crime only. Here, in addition to the alleged new crime of bribery, Theobald is charged with other crimes (criminal mischief, reckless driving, and violation of driving conditions). However, he doesn't say anything about severing the charges for trial. He's free to raise that issue in the trial court.