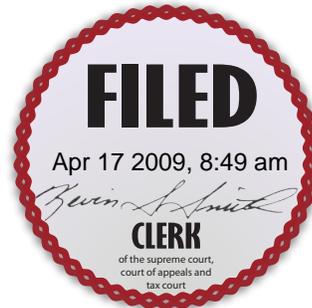


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

FRANK PRICE,)
)
Appellant-Defendant,)
)
vs.) No. 49A04-0809-CR-563
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
Cause No. 49G06-0707-MR-132526

April 17, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Frank Price appeals from his conviction for Felony Murder following a jury trial. Price presents a single issue for review, namely, whether the trial court abused its discretion when it admitted into evidence a statement that Price gave to police.

We affirm.

FACTS AND PROCEDURAL HISTORY

On June 7, 2007, Price was drinking with Shannon Lamont Morgan when Morgan suggested that the two commit a robbery. Morgan drove to the home of Richard Hager, from whom Morgan had recently purchased bait. When Hager answered the door, Morgan said he wanted to buy more bait. Hager started to walk to his garage to retrieve the bait. But Morgan hit Hager on the side of the face, and Hager fell to the ground. Morgan carried Hager into the house, and Price followed.

Once in the house, Morgan shot Hager in the back with a chrome .380-caliber handgun. Morgan then went to the back of the house and retrieved two rifles. Morgan also took Hager's wallet and keys. Hager tried to crawl to a chair, but when Morgan returned with the rifles, he shot Hager in the head, killing him. Morgan and Price then left.

Later that month, Detective Marcus Kennedy received information that made Morgan and Price suspects. On July 7, Detective Kennedy interviewed Price in an interrogation room at the Marion County Jail. Price was incarcerated at the time on an escape charge. In an interrogation room, Detective Kennedy advised Price of his Miranda rights and discussed with Price the waiver of rights form, line by line. Price

stated that he understood his rights and signed the form. Detective Kennedy then began taping the interview and proceeded to question Price about his involvement in Hager's death. In the interview, Price admitted that Morgan had shot Hager and that Price had watched. And Price again stated that he understood his rights.

On July 9, the State charged Price with felony murder, murder, and robbery, as a Class A felony. On February 11, 2008, Price filed a motion to suppress the statements he had made to Detective Kennedy. The trial court held a hearing on the motion immediately before trial. After taking the matter under advisement, the court denied the motion. Following the trial, a jury found Price not guilty of murder but guilty of felony murder and robbery. The court entered judgment of conviction only on felony murder and sentenced Price to eighty-five years for felony murder and for being an habitual offender. Price now appeals.

DISCUSSION AND DECISION

Price contends that the trial court abused its discretion when it denied his motion to suppress the statements he made to Detective Kennedy. But Price is challenging the admission of evidence following his conviction. Thus, the issue is more appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial. Bentley v. State, 846 N.E.2d 300, 304 (Ind. Ct. App. 2006), trans. denied. A trial court is afforded broad discretion in ruling on the admissibility of evidence, and we will reverse such a ruling only upon a showing of an abuse of discretion. Id. An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. Id. In reviewing the trial court's ultimate ruling on

admissibility, we may consider the foundational evidence from the trial as well as evidence from the motion to suppress hearing that is not in direct conflict with the trial testimony. Hendricks v. State, 897 N.E.2d 1208, 1211 (Ind. Ct. App. 2008).

The State has the burden under Miranda to prove that a defendant voluntarily made a knowing and intelligent waiver of his rights. See State v. Keller, 845 N.E.2d 154, 161 (Ind. Ct. App. 2006). Miranda warnings are based upon the Fifth Amendment Self-Incrimination Clause, and were designed to protect an individual from being compelled to testify against himself. Id. As such, “only verbal statements preceding an advisement of Miranda rights that are both testimonial in nature and elicited during custodial interrogation must be suppressed.” Id. (quoting Curry v. State, 643 N.E.2d 963, 976 (Ind. Ct. App. 1994), trans. denied). “A waiver of one’s Miranda rights occurs when the defendant, after being advised of those rights and acknowledging that he understands them, proceeds to make a statement without taking advantage of those rights.” Id.; Ringo v. State, 736 N.E.2d 1209, 1211-12 (Ind. 2000). There is no formal requirement for how the State must meet its burden of advising an individual consistent with Miranda, so this court examines the issue in light of the totality of the circumstances. Keller, 845 N.E.2d at 161; Wessling v. State, 798 N.E.2d 929, 936 (Ind. Ct. App. 2003).

Price first contends that the evidence does not support a finding that he understood the rights waived by his execution of the advice of rights form. In support, he cites Keller, 845 N.E.2d 154. The relevant facts of that case are as follows:

Keller was arrested and taken to Sheriff’s Department headquarters, where Sergeant Gullion and Detective Scott Scheid performed a videotaped interview approximately three hours in duration. As it began, Keller was informed that he was under arrest for the drugs. Detective Scheid asked

Keller's age, to which Keller responded twenty-one. Detective Scheid then began the process of advising Keller of his rights, indicating that he would do so "real quick" to "get this out of the way." He asked whether Keller could read and write, and Keller responded affirmatively. Detective Scheid, sitting across from Keller, slid a piece of paper in front of Keller and described it as an advice of rights form. He explained to Keller: "I need you to read that, okay and then initial each one of those if you understand, okay." The language of the form was as follows:

Before we ask you any questions, you must understand your rights.

1. You have the right to remain silent.
2. Anything you say can be used as evidence against you in court.
3. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.
4. If you cannot afford a lawyer and you want one, one will be appointed for you by the court before any questioning.
5. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

The videotape shows Keller, who was smoking a cigarette, glance quickly over the form before turning away to flick ashes into an ashtray. Returning his attention to the form, Keller looks it over again briefly before signing it. Sergeant Gullion, sitting to Keller's left, asks if Keller has read the form, to which Keller nods affirmatively, saying "Yeah." Sergeant Gullion also asks if Keller understands the form, but it is unclear whether Keller responds. Detective Scheid then reminds Keller to initial each statement of advice on the form. Keller briefly reviews the statements and writes his initials beside each. When Detective Scheid notices that Keller has signed in the wrong place, he directs Keller to resign in the proper location. Following completion of the advice of rights form, Keller is questioned concerning Cook's death. He eventually makes incriminating statements, implicating both himself and another individual.

Keller, 845 N.E.2d at 158-59 (internal footnotes and citations omitted).

This court held that the State had not met its burden of establishing that Keller's waiver was based on his knowledge and understanding of his constitutional rights:

We agree with the trial court that Keller's single prior experience of voluntarily waiving his rights is alone not enough to guarantee his advisement and understanding of those rights in the present context. We also note that the record does not establish the law enforcement officers were aware of or relied upon Keller's past experience with the waiver of his constitutional rights. Furthermore, although Keller made remarks indicating that he understood his statements were self-incriminating, there was no indication that he understood his right to have an attorney present or to stop answering questions at any time. To the contrary, at one point during the questioning, while discussing the protection of Keller's mother, Keller is directly asked, "Who do you think is gonna pay for your lawyer?" Keller's partially inaudible response is that he and/or his mother cannot afford a lawyer. The officer responds "I bet she helps with it," rather than clarifying the contradiction or ascertaining whether Keller understands his constitutional right to the appointment of an attorney.

Id. at 164 (internal footnote and citations omitted).

The present facts are distinguishable from those in Keller.¹ Here, Detective Kennedy read each subparagraph on the advice of rights form to Price. Following each, Detective Kennedy asked whether Price understood, and Price answered affirmatively. There is no evidence that Price ever asked for clarification of his rights or indicated that he did not understand them. And, during the taped interview that followed his execution of the waiver, Price indicated again that he understood his rights and had voluntarily waived them.

Price complains that the evidence is in conflict on whether Detective Kennedy explained the rights to him. In support, Price cites only to his own testimony at the suppression hearing, which ranged from equivocal to contradicting Detective Kennedy's

¹ The State does not argue that Price's prior experience being arrested supports a finding that he understood the advice of rights form and voluntarily waived his rights.

testimony. But we need not consider Price's testimony from the suppression hearing that conflicts with Detective Kennedy's trial testimony. See Hendricks, 897 N.E.2d at 1211. Price also observes that Detective Kennedy did not tape the part of the interrogation where he reviewed the advice of rights form with Price and Price's execution of that form. We strongly encourage law enforcement officers to record the advisement of rights. See Gasper v. State, 833 N.E.2d 1036, 1041 (Ind. Ct. App. 2005), trans. denied. But the lack of a recording of an advisement of rights is not dispositive of whether a defendant knowingly and voluntarily waived those rights. Price's suggestion that his waiver was not knowingly and voluntarily made because he did not understand the advice of rights and because the waiver was not taped must fail.

Price also argues that the State did not show his "level of comprehension." Appellant's Brief at 10. But a defendant's level of comprehension is not by itself dispositive of whether that defendant understood his rights when he waived them. Instead, we determine from the totality of circumstances whether an advisement of rights is sufficient to determine a knowledgeable and intelligent waiver of his constitutional rights. See Keller, 845 N.E.2d at 161. Here, unlike the facts in Keller, the officer read each subparagraph to Price line by line and, after each, asked Price whether he understood. Price answered each time affirmatively. And Price later stated on the taped interview that he understood and had voluntarily waived his rights. And, unlike the defendant in Keller, Price never betrayed a lack of understanding by any question or comment during the interview. See Keller, 845 N.E.2d at 164.

Finally, Price alleges that his waiver of rights was involuntary because it was based on Detective Kennedy's promise to ask the prosecutor to be lenient with Price. But Detective Kennedy denies having made such a promise. Again, we need not consider Price's testimony from the suppression hearing that conflicts with Detective Kennedy's trial testimony. See Hendricks, 897 N.E.2d at 1211.

Price has not demonstrated that, considering the totality of the circumstances, his waiver of rights was not knowingly and voluntarily made. As such, he also has not shown that the trial court abused its discretion when it admitted into evidence the statement he made to Detective Kennedy.

Affirmed.²

FRIEDLANDER, J., and VAIDIK, J., concur.

² Because Price has not shown that the trial court abused its discretion when it admitted the statement he made to Detective Kennedy, we need not address his argument that the admission of that statement was not harmless error.