



IN THE DISTRICT COURT OF FRANKLIN COUNTY, KANSAS

THE STATE OF KANSAS,)
)
 Plaintiff,)
)
 vs.) Case No. 13 CR 104
 Kyle Flack,)
)
 Defendant.)

DEFENDANT'S RESPONSE TO STATE'S #18 MOTION TO ADMIT DEFENDANT'S STATEMENTS

COMES NOW the Defendant Kyle Flack and in response to the states Motion to admit Defendant's Statements. Defendant states as follows:

1. Defendant reserves the right to file his own motions to suppress and or limine as to all statements or portions thereof. Defense is conducting its own investigation as to the facts, circumstances and law regarding these issues and said investigation is incomplete.

2. The interrogation lasted approximately 10 hours in a 24 hour period. From the initial contact with police and throughout the interview Mr. Flack was asked about Lana and where she was. At times during the interrogation Mr. Flack tells the detective to cuff him up and take him to jail.

3. Mr. Flack sat with his hands handcuffed behind his back for close to one and one-half hours in the interview room in Emporia. Mr. Flack comments that he is hot. The officer watching him agreed with him that it is hot and that he has no authority to un-cuff Mr.

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Flack's hands from behind his back. Mr. Flack mentions he has a bad rotator cuff and it is twisted up. The officer with Flack acknowledges that he too has a bad shoulder but there is nothing he can do until someone else shows up despite Mr. Flack asking if there is no way to adjust his cuffs. Mr. Flack tells the officer that he is not trying to be difficult about the cuffs behind his back and he again asked to be chained to a grate or for something else to be done. The officer offered to allow Mr. Flack to lean against a wall. A Franklin county detective eventually unhooks Mr. Flack's cuffs from behind his back and secures Mr. Flack with his hands at his front. Mr. Flack's comments were during this period were "That helps a lot. I got pain shooting from my shoulder to my eyeballs." "Oh my god" "Oh man feels so amazing".

4. After waiting two and one half hours the interrogation began. No one asked Mr. Flack when was the last time he slept or if he was under the influence of drugs or alcohol, or if he had any disabilities mental or physical. The next day in his interview he states he was "high" nor had he slept much. This interrogation went from 3:30 a.m. to 9 a.m. with breaks; one was requested by Mr. Flack.

5. The questioning at 23:15 hours May 8th was initiated by law enforcement. Shortly after this interrogation began, Mr. Flack said "Should I get a lawyer, honestly?" and the law enforcement response was, "I can't advise you of what you should and shouldn't do". Defense asserts this is an invocation and questioning should have

ceased or at the least it was an equivocal invocation and when made the law enforcement should be required to ask clarifying questions. An equivocal invocation occurs where the suspect's statements or question appears to contemplate an invocation, as opposed to simply seeking a better understanding of the rights. U.S v. March, 999 F.2d 456 (10th Cir. 1993). Under a clarifying questions rule the officer is required to stop the interrogation and ask clarifying questions that is ministerial, not adversarial, and not designed to influence the suspect against invoking his rights. U.S. v March. Where a defendant made an ambiguous invocation and the police failed to ask questions to clarify it, the invocation was treated as if it were unambiguous. Towne v Dugger, 899 F.2d 1104 (11th Cir.1990).

Edwards v Arizona 451 U.S. 477(1981) held that police questioning must stop, if during questioning, the accused expresses his desire to deal with police only through counsel, and he is not subject to further interrogation. Davis v U.S. 512 U.S. 452 (1994) held that there is no specific rule of clarifying questions when there is an ambiguous or equivocal invocation.

6. An hour and one-half further in the interrogation after the "Should I get a lawyer, honestly?" question, a frustrated Mr. Flack stated "I can't tell ya no more so either do whatever you do or I need an attorney or somethin' because I can't tell you what I don't know and I'm not gonna keep sitting here getting asked the same....question when I'm, telling you what Iknow. So what are we

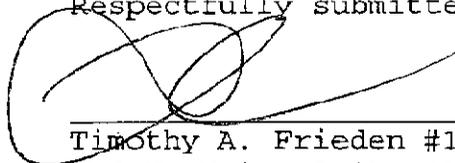
doing?". Defense again asserts this is an invocation or at the least this is an equivocal invocation.

7. The State tells us that it was 4 hours into this interrogation that Mr. Flack unequivocally expresses his desire to stop the interrogation. This portion of the interview does not appear to have been recorded.

8. Prior to the preliminary hearing evidence and argument was made regarding this issue. Defense objected then and continues to object. Defense asserted then and now that references to an attorney are unequivocal invocations of his right to counsel.

WHEREFORE defendant, Kyle Flack request this court deny the motion.

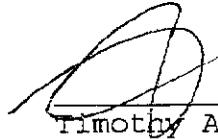
Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Response to states #18 was fax delivered to the Franklin County Attorney Office this 8 day of August, 2014.



Timothy A. Frieden