Miranda Revisited: Broadening the Right to Counsel During Custodial Interrogation--Commonwealth v. Sherman

Beth Cohen

Western New England University School of Law, bcohen@law.wne.edu

Follow this and additional works at: http://digitalcommons.law.wne.edu/facschol

Part of the Constitutional Law Commons, and the Criminal Law Commons

Recommended Citation

The judicially created *Miranda* protections require law enforcement officials to inform criminal suspects of their right to counsel prior to proceeding with custodial interrogation. In *Commonwealth v. Sherman*, the Supreme Judicial Court of Massachusetts considered whether a criminal defendant validly waived his right to counsel when a police officer failed to inform him that an attorney, appointed to represent him in an unrelated case, had requested to be present during his interrogation. Concluding that, under the peculiar circumstances of the case, the defendant did not voluntarily waive his right to counsel, the court suppressed the defendant’s in-custody statements to police.

After receiving a tip regarding several recent house burglaries, Leon Manning, a state police officer, encountered Everett L. Sherman on a public street, and ordered him to come to the police station. At the station, Manning informed Sherman that he was suspected of committing the burglaries, and gave the defendant his *Miranda* rights.


3. *Id.* at 289-91, 450 N.E.2d at 567-68.
4. *Id.* at 287, 295-96, 450 N.E.2d at 570-71 (1983). In addition to suppressing the defendant’s inculpatory statements, the *Sherman* court remanded the case for a new trial. *Id.* at 296, 450 N.E.2d at 571. The court, however, did not find sufficient grounds to dismiss all of the charges against the defendant. *Id.* at 295, 450 N.E.2d at 570.
5. *Id.* at 288-89, 450 N.E.2d at 567. Manning had received an anonymous tip that Foster Jones, Sherman’s eventual co-defendant, had committed recent house burglaries. *Id.* Another police officer informed Manning that Sherman and Jones “hung around” together. Brief and Appendix for Appellant at 3, *Commonwealth v. Sherman*, 389 Mass. 287, 450 N.E.2d 566 (1983). Manning learned of Sherman’s possible involvement solely from this conversation. *Id.*
Earlier the same morning, Manning, while in court on a different matter, initiated conversation with Attorney Rita Scales because he knew that she had been, or was presently, representing Sherman. Manning informed Scales of his intention to question Sherman with regard to the burglaries and, although Scales requested that Manning inform her prior to any interrogation, he did not respond.

Manning did not contact Scales when he brought Sherman to the station, and failed to inform Sherman of Scale's request to be present during questioning. After indicating that he understood his Miranda rights and waiving his right to counsel, Sherman made incriminating statements in response to Manning's inquiries. Prior to trial, Sherman moved to suppress these statements, but the judge denied the motion, noting that Sherman had understood his Miranda rights and made an intelligent waiver of counsel. A jury found Sherman guilty on two counts of breaking and entering. The Massachusetts Court of Appeals affirmed the conviction, holding that Sherman voluntarily and intelligently waived his rights. The Supreme Judicial Court,

7. 389 Mass. at 289, 450 N.E.2d at 567. Ms. Scales, a court appointed attorney with the Massachusetts Defenders Committee, had been appointed to represent Sherman in another breaking and entering case. Id.
8. Id.
9. Id.
10. Id. After Sherman implicated himself in the burglaries, Manning transcribed the statements and Sherman signed them. Id.
11. 389 Mass. at 288 n.1, 450 N.E.2d at 567 n.1. Attempting to suppress incriminating statements prior to trial, Sherman argued violations of his fourth, fifth, and sixth amendment rights. Id. The defense also argued prosecutorial misconduct required dismissal of the complaints. Brief and Appendix for Appellant at 15, Commonwealth v. Sherman, 389 Mass. 287, 450 N.E.2d 566 (1983). The motion judge determined that Manning's actions reasonably led the defendant to believe that the police were subjecting him to custodial interrogation, and that, under the circumstances, the defendant's freedom was "limited and restricted." Brief and Appendix for Appellant at 6, Commonwealth v. Sherman, 389 Mass. 287, 450 N.E.2d 566 (1983).

In ascertaining the scope of Scales' representation of the defendant, the motion judge concluded that because a Massachusetts Defenders Attorney does not accept cases until appointed at the arraignment, Scales was not actually representing Sherman at the time of the interrogation. 389 Mass. at 289-90, 450 N.E.2d at 567. Giving great weight to the fact that the defendant signed the incriminating statements three separate times, the motion judge held that Sherman made a valid and intelligent waiver of his right to counsel. See Brief and Appendix for Appellant at R.17-18, Commonwealth v. Sherman, 389 Mass. 287, 450 N.E.2d 566 (1983).

Although the appeals court also dismissed Sherman's claim of prosecutorial misconduct,
however, determined that Manning's failure to inform Sherman of Scales' request precluded a valid, intelligent waiver of his Miranda rights.\textsuperscript{14} The court, therefore, suppressed Sherman's statements and granted him a new trial.\textsuperscript{15}

In \textit{Miranda v. Arizona},\textsuperscript{16} the United States Supreme Court held that officials must warn criminal suspects of their constitutional rights to remain silent and obtain legal assistance prior to commencing custodial interrogation.\textsuperscript{17} After \textit{Miranda}, incriminating statements obtained from defendants during custodial interrogation were inadmissible if the police had not advised a defendant of her or his rights.\textsuperscript{18} A later Supreme Court case built upon \textit{Miranda} to establish that once a suspect opts to exercise her or his right to counsel, further interrogation is prohibited until counsel is provided, unless the suspect initiates the conversation.\textsuperscript{19}

Although the \textit{Miranda} Court acknowledged that a defendant could conceivably waive her or his right to counsel during custody, a defendant's silence alone will not give rise to a presumption of waiver.\textsuperscript{20}

---

\textsuperscript{14} 389 Mass. at 288, 450 N.E.2d at 566; \textit{see infra} notes 31-35 and accompanying text (discussing rationale of \textit{Sherman} court).

\textsuperscript{15} 389 Mass. at 296, 450 N.E.2d at 571.

\textsuperscript{16} 384 U.S. 436 (1966).

\textsuperscript{17} \textit{Id.} at 479. The \textit{Miranda} warnings were adopted to alleviate the coercive and intimidating overtones of custodial interrogation. \textit{Id.} at 457. The \textit{Miranda} Court balanced the need for custodial interrogation as a valid tool of police investigation against the importance of protecting individual rights, concluding that limits on interrogation procedures should not unduly infringe upon a proper law enforcement system. \textit{Id.} at 479-91.

\textsuperscript{18} \textit{Id.} at 478-79. The \textit{Miranda} Court realized that in order for the fifth amendment privilege against self-incrimination to be effective, the defendant needed protections to counterbalance the inherent coercive and compulsive nature of police interrogations. \textit{Id.} at 445-58, 467-73. The Court construed the right to counsel as a mechanism to protect the defendant's fifth amendment privilege against self-incrimination. \textit{Id.} at 467-78. \textit{Miranda} established a presumption that custodial interrogation creates an inherently coercive atmosphere of police domination. \textit{Id.} at 445-58.


\textsuperscript{20} Miranda v. Arizona, 384 U.S. 436, 475-76 (1966). In a prior case, the Court defined a valid waiver as "an intentional relinquishment of a known right or privilege." Johnson v.
Miranda established that when a defendant waives her or his right to counsel, the prosecution must prove that the defendant acted knowingly, intelligently, and voluntarily. The Supreme Court, however, has never clearly articulated waiver of counsel standards.

The Massachusetts Supreme Judicial Court has held that a defendant cannot validly, intelligently, and knowingly waive her or his right to counsel after an attorney has contacted police on the defendant's behalf, unless police inform the defendant of the attorney's offer of assistance prior to the waiver. In Commonwealth v. McKenna, the Supreme Judicial Court suppressed statements made by the defendant during custodial interrogation after an attorney had contacted the police and requested to counsel the defendant during questioning.

Zerbst, 304 U.S. 458, 464 (1938). The specific circumstances of each case will determine the validity of a waiver. Id.; see Carnley v. Cochran, 369 U.S. 506, 513-17 (1962) (no presumption of valid waiver derived from defendant's silence and fact that confession eventually obtained). The Miranda Court stated that although a pre-interrogation request for an attorney secures the defendant's rights, failure to make such a request does not constitute a waiver, because a valid waiver cannot take place until police give a suspect Miranda warnings. Miranda v. Arizona, 384 U.S. 436, 470-75 (1966).

The Miranda Court required the prosecution to affirmatively demonstrate the voluntariness of a defendant's waiver, rather than have courts consider voluntariness as merely one factor in the totality of the circumstances. Id. at 467-76. To prove a valid waiver of counsel, the prosecution must demonstrate not only that police gave Miranda warnings to the defendant, but also that the defendant understood these rights and intentionally forfeited them. See generally Note, North Carolina v. Butler: Waiver of Rights During Custodial Interrogation, 11 COLUM. HUM. RTS. L. REV. 245, 249 (1980) (discussing background and implications of Miranda and progeny). Given these stringent standards, a state must show an affirmative act by the defendant in order to unquestionably demonstrate the validity of the waiver. Id. Under certain circumstances, however, police may infer a valid waiver from the behavior of a suspect during interrogation. North Carolina v. Butler, 441 U.S. 369, 373-75 (1979).

21. Id. at 475. The Miranda Court required the prosecution to affirmatively demonstrate the voluntariness of a defendant's waiver, rather than have courts consider voluntariness as merely one factor in the totality of the circumstances. Id. at 467-76. To prove a valid waiver of counsel, the prosecution must demonstrate not only that police gave Miranda warnings to the defendant, but also that the defendant understood these rights and intentionally forfeited them. See generally Note, North Carolina v. Butler: Waiver of Rights During Custodial Interrogation, 11 COLUM. HUM. RTS. L. REV. 245, 249 (1980) (discussing background and implications of Miranda and progeny). Given these stringent standards, a state must show an affirmative act by the defendant in order to unquestionably demonstrate the validity of the waiver. Id. Under certain circumstances, however, police may infer a valid waiver from the behavior of a suspect during interrogation. North Carolina v. Butler, 441 U.S. 369, 373-75 (1979).

22. See generally 51 U. COLO. L. REV. 247, 250 & n.26 (1980) (discussing Miranda Court's lack of clear waiver standards and resulting confusion in lower courts). The Supreme Court's inability to articulate a clear waiver of counsel standard led to varied judicial results. See, e.g., Thompson v. Wainwright, 601 F.2d 768, 770 (5th Cir. 1979) (per se rule of admissibility if defendant invokes right to counsel, and statement elicited without presence of attorney); United States v. Hopkins, 433 F.2d 1041, 1044 (5th Cir. 1970) (if suspect refuses to sign waiver, interrogation must cease unless suspect voluntarily initiates conversation), cert. denied, 401 U.S. 1013 (1971); Frazier v. United States, 419 F.2d 1161, 1167-69 (D.C. Cir. 1969) (although suspect signed waiver, his refusal to allow police to take written notes constitutes contradictory non-waiver); United States v. Nielson, 392 F.2d 849, 853 (7th Cir. 1968) (setting strict guidelines for police behavior; heavy burden on interrogators to determine if suspect understood rights).


25. Id. at 324-27, 244 N.E.2d at 566-68.
Broadly construing the defendant’s *Miranda* rights, the *McKenna* court held that an attorney’s actions may invoke the defendant’s right to counsel subsequent to a valid waiver by the defendant.\(^{26}\)

The Supreme Judicial Court similarly suppressed a defendant’s incriminating statements in *Commonwealth v. Mahnke*,\(^{27}\) where police, cognizant of an attorney’s repeated attempts to contact the defendant, failed to notify either the attorney of the ensuing interrogation or the defendant of his attorney’s offers of assistance.\(^{28}\) Reasoning that the police conduct was “calculated to circumvent” the defendant’s rights, the *Mahnke* court held the defendant’s statements inadmissible in the prosecution’s case-in-chief.\(^{29}\) In Massachusetts, therefore, defendants can waive their right to counsel only after police inform them of their *Miranda* rights and notify them of specific offers of counsel.\(^{30}\)

The *Sherman* court found that the failure of police to inform the defendant of his attorney’s request critically affected his knowledge and, thus, his ability to make a valid and intelligent waiver of the *Miranda* right to counsel.\(^{31}\) The short lapse of time between Scale’s

\(^{26}\) *Id.* The *McKenna* court held that a waiver of the right to counsel is effective only when a defendant is fully cognizant of all relevant circumstances. *Id.* Additionally, police must afford the defendant the opportunity to make a fresh waiver if any important circumstances change. See generally Comment, *Criminal Procedure—Admissibility of Confessions—Dancing on the Grave of Miranda?* 10 SUFFOLK U.L. REV. 1141, 1163 (1976) (discussing *McKenna’s* broad interpretation of *Miranda*).


\(^{28}\) *Id.* at 691-92, 335 N.E.2d at 678.

\(^{29}\) *Id.* The *Mahnke* court, consistent with restrictive post-*Miranda* decisions, held the defendant’s statements available for impeachment only if voluntary and trustworthy. *Id.* at 692-93, 335 N.E.2d at 678-79; see *Harris v. New York*, 401 U.S. 222, 224 (1971) (promulgating impeachment exception).


\(^{31}\) 389 Mass. at 289-90, 450 N.E.2d at 568. As the *Sherman* court observed, when a statement is obtained from a defendant, in the absence of counsel, a heavy burden rests on the prosecution to prove beyond a reasonable doubt that the defendant’s waiver was knowing and intelligent. *Id.*, 450 N.E.2d at 567-68. The Supreme Court has not clearly defined standards to evaluate waiver of counsel. See *supra* note 22 and accompanying text (discussing Court’s ambiguity regarding waiver of counsel standards).

The *Sherman* court recognized the unusual circumstances of the case, but nevertheless concluded that the fact that Scales’ learned of Sherman’s interrogation from the police was insignificant. 389 Mass. at 295, 450 N.E.2d at 570. The court noted that the defendant or family members of the defendant typically notify an attorney of impending interrogation. *Id.* at 293, 450 N.E.2d at 569; see *Commonwealth v. Mahnke*, 368 Mass. 662, 692, 697, 335 N.E.2d 660, 668, 681 (1975) (family-retained lawyer repeatedly called defendant at police station); *Commonwealth v. McKenna*, 355 Mass. 313, 318, 244 N.E.2d 560, 563 (1969) (defendant told aunt to call attorney).
request and the interrogation of Sherman, and the testimony of Manning that he was aware of the attorney’s representation of Sherman, persuaded the court that Sherman did not knowingly, intelligently, and understandingly waive his right to counsel. Rejecting an argument that McKenna is inapplicable because the police did not affirmatively frustrate the attorney’s attempt to communicate with the defendant, the court stressed the fact that Ms. Scales had clearly requested to be present at Sherman’s interrogation. Recognizing a distinction between the “deliberately misleading” police conduct in McKenna and Mahnke and cases of nonfeasance, the Sherman court, nevertheless, reasoned that under the circumstances, the police officer’s failure to act vitiated the defendant’s waiver of Miranda rights as much as an affirmative act would have. Carefully limiting its holding to the unique facts of the case, the Sherman court suppressed the defendant’s incriminating statements and remanded the case for a new trial.

The Sherman court applied and expanded the McKenna and Mahnke principles, placing an affirmative obligation upon police, beyond the

32. 389 Mass. at 294-95, 450 N.E.2d at 570. Only a few hours passed between Attorney Scales’ request and Officer Manning’s interrogation of Sherman. Id. Additionally, only fifteen minutes lapsed between the defendant’s arrival at the police station and his incriminating statements. See Brief and Appendix for Appellant at 5, Commonwealth v. Sherman, 389 Mass. 289, 450 N.E.2d at 566 (1983).

33. 389 Mass. at 293, 450 N.E.2d at 569; see Commonwealth v. Bradshaw, 385 Mass. 244, 263-64, 431 N.E.2d 880, 892-93 (1982) (statements admissible where attorney first called police station after interrogation ended and police unaware that defendant’s family attempted to retain counsel).

The Sherman court found that it would unfairly elevate form over substance to hold that Manning’s failure to inform Sherman of Scales’ request constitutionally significant only because Scales had not yet been appointed to represent the defendant in the present case. 389 Mass. at 295, 450 N.E.2d at 570; see supra note 11 (discussing attorney Scales’ status). But see State v. Burbine, 451 A.2d 22, 23-24, 29-31 (R.I. 1982) (incriminating statements admissible when police failed to inform defendant of attorney’s availability from Public Defenders Office who called on behalf of the suspect’s attorney).

34. 389 Mass. at 292-96, 450 N.E.2d at 568-570.

35. Id. at 295-96, 450 N.E.2d at 570-71. The Sherman court limited its holding as follows: an attorney must learn that police plan to interrogate her or his client, even on an unrelated charge; the attorney must inform police of her or his desire to be present at the interrogation; within a few hours of attorney’s request, the police must interrogate the defendant in compliance with Miranda warnings, yet refrain from telling the defendant of the attorney’s request; and, the defendant must actually make incriminating statements. Id

The sole dissenter, however, found the persuasive determination to be that the privileges afforded Sherman outweighed the factor of police failing to inform Sherman of Scales’ request. Id. at 296-97, 450 N.E.2d at 571 (Nolan, J., dissenting). The dissent was also dissatisfied with the majority’s handling of the publicly appointed attorney by status. See id.; see supra note 33 (discussing majority treatment of attorney’s status); see also State v. Burbine, 451 A.2d 22, 23-24, 29-31 (R.I. 1982) (police need not inform defendant of unappointed public defender’s offer to assist him).
mere generalities of *Miranda* warnings, to communicate specific offers of counsel to criminal defendants. Specifically, the court took an important step by recognizing that Sherman might have chosen to remain silent had he known that Scales wanted to be present during his interrogation. Considering many of the factors that prey upon an individual suspect’s ability to make a knowing and intelligent waiver of counsel, the court broadened the scope of judicial inquiry to include a subjective examination of the defendant’s actual knowledge at the time of the waiver. By examining the defendant’s actual level of comprehension in making the waiver, the *Sherman* decision guides other courts to consider subjective factors, beyond mere voluntariness, when evaluating the validity of a waiver of counsel.

The *Sherman* decision, while remaining consistent with a recent Supreme Court interpretation of *Miranda* rights, goes further by simultaneously recognizing a subjective basis for determining the validity of a waiver. Although the *Sherman* court carefully limited its holding, the decision’s importance lies in the principles it asserts


37. 389 Mass. at 291, 450 N.E.2d at 568. The *Sherman* court made an important contradiction between situations where a specific attorney actually offers assistance and an illusory situation where there is no identifiable attorney. *Id.* The court recognized that a suspect may conceivably react differently when she or he is informed that a particular attorney offers assistance, as opposed to a situation when police give general *Miranda* warnings of a right to counsel. *Id.*

38. See *id.* at 293-96, 450 N.E.2d at 569-70 (court examines subjective knowledge of each party involved). The *Sherman* Court noted that the defendant’s statements are inadmissible when police conduct is “calculated to circumvent” defendant’s rights. *Id.* at 293, 450 N.E.2d at 569; see Commonwealth v. Mahnke, 368 Mass. 662, 691-92, 335 N.E.2d 660, 678 (1975) (statements suppressed when attorney repeatedly tried to contact defendant in police custody, attorney not informed of ensuing interrogation, and defendant not informed of attorney’s actions); Commonwealth v. McKenna, 355 Mass. 313, 317-20, 244 N.E.2d 560, 567 (1969) (incriminating statements suppressed when police misinformed defendant’s attorney as to location of interrogation).


40. *Id.* at 295-96, 450 N.E.2d at 570. Although certain minimum guidelines are mandated for a valid waiver, the *Sherman* court goes further by considering the factual and subjective circumstances of each particular case. *Id.*; see Edwards v. Arizona, 451 U.S. 477, 484 (1981) (courts may not infer waiver of right to counsel when accused responds to police initiated questioning).

41. 389 Mass. at 295-96, 450 N.E.2d at 570-71; see *supra* note 35 (describing limited holding in *Sherman*). Although the *Sherman* court clearly limits the circumstances where incriminating
and upholds. By requiring police to affirmatively act, the *Sherman* court motivates police and attorneys to realize their responsibility for upholding a suspect's constitutional rights in both substance and form.42 Although other courts have rendered decisions effectively diluting *Miranda* rights,43 the *Sherman* court adheres to a comparatively broad application of *Miranda* rights during custodial interrogation.

*Commonwealth v. Sherman* strengthens procedural safeguards in the early, but vital, stages of the criminal justice process. The *Sherman* court decisively balanced the delicate relationship of attorneys, police, and criminal suspects by supplying a standard of conduct, beyond mere formality and procedural acquiescence, to include an element of personal responsibility. Fully realizing that criminal defendants facing custodial interrogation cannot meaningfully exercise their right to counsel without knowing all salient information, the court took precautions to protect a criminal defendant's rights. *Commonwealth v. Sherman* thus succeeds in maintaining a symmetry between the conflicting interests of law enforcement institutions and individual rights.

*Beth d. Cohen*

---

42. *See* 389 Mass. at 295-96, 450 N.E.2d at 570-71 (court concerned with substance rather than form). The court raised the level of personal responsibility by mandating that individuals involved in the interrogation and *Miranda* procedure account to the court for their knowledge and behavior. *Id.*