

Thursday, January 31, 2008

Cops can't play fast and loose with Miranda.

Â Bill of Rights.Â (From the public domain.)Â Miranda warnings are required when "a reasonable man in the suspect's position would have understood his situation" to be one of custody. *Berkemer v. McCarty*, 468 U.S. 420, 422 (1984). To determine whether a reasonable person would have understood the situation to have been one of custody, a court must review the totality of the circumstances. *U.S. v. Colonna*, 2007 U.S. App. LEXIS 29403 (4th Cir. Va. Dec. 20, 2007).Â Cops often are successful in getting suspects to talk by interviewing and interrogating them before formally arresting them and advising them of their right to remain silent under Miranda. I wonder how many suspects mistakenly believe -- having learned about Miranda from movies and television -- that their pre-arrest pre-Miranda statements somehow will not be admissible in court. Â If cops want to be truly wily about Miranda, they might try to make the suspect believe s/he is not free to leave (when the suspect leaves, the cops have no statement from the suspect), but then claim in court through the prosecutor that Miranda warnings were not needed because of an absence of an arrest yet. In *Colonna*, supra, the cops told a child pornography suspect that he was not under arrest, but acted with so many of the hallmarks of a detention as to have required the Miranda warnings that they did not give. *Colonna* describes the circumstances surrounding his interrogation by the police as follows: Â "The district court found that Colonna was awakened by armed agents and guarded by agents until the search and interview concluded. The home was inundated with approximately 24 officers who gave Colonna and his family members instructions; that is, they told them where to sit and restricted their access to the home. Colonna did not voluntarily request to speak with Agent Kahn. Instead, Agent Kahn requested that Colonna accompany him to a FBI vehicle to answer questions, wherein a full-fledged interrogation took place. Agent Kahn questioned Colonna for almost three hours, albeit with breaks. But, even during these breaks, Colonna was constantly guarded. Although Colonna was not placed under formal arrest, he was told twice that lying to a federal agent was a federal offense. And, at no time was he given Miranda warnings or informed that he was free to leave. The district court found that "given the totality of the circumstances, a reasonable person would have believed that his freedom was curtailed." (J.A. 297.) But, according to the district court, because Agent Kahn specifically told Colonna he was not under arrest and did not, in the end, arrest him for two years, a custodial interrogation did not take place. While we find no error in the district court's findings of fact, we do take issue with the district court treating Agent Kahn's statement to Colonna that he was not under arrest as the dispositive fact in its determination of custody. Indeed, there is no precedent for the contention that a law enforcement officer simply stating to a suspect that he is "not under arrest" is sufficient to end the inquiry into whether the suspect was 'in custody' during an interrogation. See *Davis v. Allsbrook*, 778 F.2d 168, 171-72 (4th Cir. 1985) ('Though informing a suspect that he is not under arrest is one factor frequently considered to show lack of custody, it is not a talismanic factor'). Rather, we have held that the 'ultimate inquiry' looks to the totality of the circumstances to determine whether they indicate an individual's freedom of action is curtailed to a degree associated with formal arrest." *U.S. v. Colonna*, 2007 U.S. App. LEXIS 29403 Â Congratulations to Mr. Colonna and his lawyers for this appellate victory. However, I hazard a guess that Mr. Colonna's prison sentence was not stayed pending his appeal, which blunts the sweetness of his victory. Jon Katz.Â ADDENDUM: Thanks to Fourth Circuit Blog for covering this story.

Posted by Jon Katz in Criminal Defense at 19:00