

JUL 29 2008

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JEFFEREY GRUBBS,

Defendant - Appellant.

No. 03-10311

D.C. No. CR-02-00164-1-WBS

MEMORANDUM*

ON REMAND FROM THE UNITED STATES SUPREME COURT

Before: B. FLETCHER and REINHARDT, Circuit Judges, and RESTANI**,
Judge.

This appeal comes before us on remand from the Supreme Court. The Court reversed our holding that the anticipatory warrant for the search of Grubbs' residence was defective because the postal inspectors executing the search failed to present to Grubbs or his wife the affidavit describing the triggering conditions for

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Jane A. Restani, Chief Judge of the United States Court of International Trade, sitting by designation.

the search. *United States v. Grubbs*, 547 U.S. 90, 97-99 (2006). The Court also held that “neither the Fourth Amendment nor Rule 41 of the Federal Rules of Criminal Procedure imposes” a requirement that officers present a copy of the warrant before conducting the search. *Id.* at 99. We now address the remaining issues in this case, and hold that the statement that Grubbs gave to officers at the beginning of the search was obtained in violation of *Miranda*.

The Supreme Court’s holding in *Miranda* generally precludes the evidentiary use of a statement resulting from a custodial interrogation unless the suspect has first been advised of his constitutional rights. *See Stansbury v. California*, 511 U.S. 318, 322 (1994); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). The district court found that Grubbs was in custody at the time Welsh asserted “You know why we’re here,” but that this statement did not constitute interrogation because it was, “at most,” likely to elicit a “yes” or “no” response.

“To determine whether an individual was in custody, a court must, after examining all of the circumstances surrounding the interrogation, decide ‘whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.’” *United States v. Kim*, 292 F.3d 969, 973 (9th Cir. 2002) (quoting *Stansbury*, 511 U.S. at 322). “The inquiry focuses on the objective circumstances of the interrogation, not the subjective views of the officers or the

individual being questioned.” *Id.* That is, we “examine the totality of the circumstances from the perspective of a reasonable person in the suspect’s position.” *United States v. Crawford*, 372 F.3d 1048, 1059 (9th Cir. 2004) (en banc) (citing *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984)). We have identified several factors that are relevant to the “in custody” determination: (1) the language used by the officer to summon the individual; (2) the extent to which the individual is confronted with evidence of guilt; (3) the physical surroundings of the interrogation; (4) the duration of the detention; and (5) the degree of pressure applied to detain the person. *Kim*, 292 F.3d at 974. Other factors may also be relevant and dispositive. *Id.*

The government concedes that “Grubbs reasonably could have believed that he was not free to leave.” It nevertheless argues that “[t]his is not the end of the inquiry,” because the detention was merely “temporary” or “investigatory.” In effect, the government argues that a reasonable person would not have believed that he would not be permitted to leave after brief questioning.

That argument is not supported by the facts. The record shows that Grubbs was ordered away from his vehicle, walked away from his house, patted down and told to stay where he was and wait; that approximately ten armed and uniformed

officers descended on Grubbs' home;¹ that the officers announced that they had a search warrant before a number of them entered Grubbs' house; and that Grubbs was told "You know why we're here." Grubbs was never told that he was free to leave or terminate the questioning, and at the end of the search and interrogation, he was handcuffed and placed under arrest.

The fact that Grubbs was not handcuffed at the outset and firearms were not drawn, that he was not told that he was under arrest, that the detention prior to Welsh's arrival was short, and that the officers did not make accusatory remarks before Welsh made his statement, is not enough to overcome the effects of detaining Grubbs while armed officers swarmed onto his property and into his home. It is clear that the officers created "a police-dominated atmosphere" that would lead a reasonable person to believe that he was in custody. *See Kim*, 292 F.3d at 977. Thus, the district court did not err with respect to its custody finding.

Grubbs' statement made prior to the *Miranda* warning must therefore be excluded if it was the result of "interrogation." "Interrogation" in the *Miranda* context is defined as "express questioning and its functional equivalent." *United*

¹ Grubbs' wife testified during the suppression hearing that "when I went out the door towards the driveway, I noticed my car was pinned in, and all these officers were kind of swarming all over, and I didn't know what was going in. I was just [sic] total shock."

States v. Padilla, 387 F.3d 1087, 1093 (9th Cir. 2004) (citing *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980)). The latter includes “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *Innis*, 446 U.S. at 301. “The investigating officer’s subjective intent is relevant but not determinative, because the focus is on the perception of the defendant.” *United States v. Chen*, 439 F.3d 1037, 1040 (9th Cir. 2006) (citation omitted). A statement likely to elicit a response therefore serves the same function for *Miranda* purposes as a question designed to do so.

Welsh testified that he approached Grubbs and immediately asserted, nodding, “You know why we’re here.” Grubbs responded that he did, and that the package was in the garage. Notwithstanding Esteban’s testimony that Welsh’s utterance was phrased as a question, the district court credited Welsh’s testimony and found that it was phrased as an assertion. As noted, however, an assertion can be the functional equivalent of a question if it is reasonably likely to elicit an incriminating response. As the Supreme Court noted in *Innis*, “[t]o limit the ambit of *Miranda* to express questioning would ‘place a premium on the ingenuity of the police to devise methods of indirect interrogation, rather than to implement the plain mandate of *Miranda*.’” 446 U.S. at 299 n.3 (citation omitted). Here we

conclude that Welsh's statement was as likely to elicit a response as if it had been put in the form of a question.

Next we consider whether the statement was likely to elicit the type of response that warrants a finding of a *Miranda* violation. We have previously recognized that seemingly innocuous statements and questions that imply a suspect's guilt can be interrogatory. For example, in *Padilla* when the officer "said something to the effect that this was [Defendant's] last chance to cooperate in the . . . investigation" we concluded that he was interrogating the defendant. *Padilla*, 387 F.3d at 1093; *see also United States v. Jordan*, 557 F.2d 1081, 1083-84 (5th Cir. 1977) (officer told suspect that he had been informed that suspect sometimes carried a sawed-off shotgun); *Combs v. Wingo*, 465 F.2d 96, 99 (6th Cir. 1972) (officer showed suspect a ballistics report implicating him in a murder). It seems clear that an implication of Welsh's statement was that Grubbs had committed an offense. As in *Padilla*, "[i]t is difficult to imagine any purpose for such a statement other than to elicit a response." *Padilla*, 387 F.3d at 1093. Welsh's contention that he made an assertion instead of asking a question because he "didn't want to ask any questions prior to *Miranda*," is of little, if any, consequence. The issue is not whether Welsh asked a question, but whether his statement was reasonably likely to elicit an incriminating response. If it was

improper to ask the question, as Welsh himself was apparently aware it was, it was just as improper for him to make the statement.

The two most likely responses to Welsh's assertion would be either to deny or to admit knowledge as to why the officers were there. It was also reasonably likely that Grubbs would give more than a one-word answer—either denying knowledge with some explanation of the reason for his answer or acknowledging that he was aware of the reasons that had led the agents to conduct a search, such as, “You're here because of the videotape.” Any of these responses is potentially incriminatory. As we stated in *Shedelblower v. Estelle*, an “incriminating” response is “any statement . . . which might be used against the suspect in court. It can be in the form of a denial, an admission . . . or any other inculpatory or exculpatory conduct.” 885 F.2d 570, 573 (9th Cir. 1989), *cert. denied*, 498 U.S. 1092 (1991) (citing *Innis*, 446 U.S. at 301 n.5; *United States v. Booth*, 669 F.2d 1231, 1238 (9th Cir. 1981)). Moreover, in a case such as this, so long as there is a reasonable possibility of a “yes” answer, a *Miranda* violation would certainly occur. For example, the most flagrant violation would be the question, “Did you commit the crime?” Even if there is a likelihood that the suspect will deny that he committed the crime, no one could doubt that a “yes” answer would be highly

incriminatory and that the possibility of such an answer would render the question violative of *Miranda*.

None of the parties addressed the question of prejudice on appeal, and the government has not claimed that the failure to suppress was harmless.

Accordingly, we need not address any harmless error question.²

We reverse the denial of Grubbs' suppression motion and remand for proceedings consistent with this opinion.³

REVERSED and REMANDED.

² In any event, we appear not to apply the harmless error doctrine when the defendant enters a plea conditional on the right to appeal an order denying a motion to dismiss. *See United States v. Orso*, 234 F.3d 436, 440 (9th Cir. 2000); *United States v. Perez-Lopez*, 348 F.3d 839, 848-49 (9th Cir. 2003); *cf. United States v. Salgado*, 292 F.3d 1169, 1174-75 (9th Cir. 2002).

³ Grubbs presented an additional claim on appeal, that former Federal Rule of Criminal Procedure 41(d) required the government to present Inspector Welsh's affidavit at the time of the search. We have held that under Rule 41(d) an affidavit establishing probable cause does not have to be presented as long as the warrant otherwise satisfies the requirements of the Fourth Amendment. *See United States v. Celestine*, 324 F.3d 1095, 1100-01 (9th Cir. 2003); *United States v. Smith*, 424 F.3d 992, 1007-08 (9th Cir. 2005). Now that the Supreme Court has held that an anticipatory warrant satisfies the Fourth Amendment's requirements even if it does not include the affidavit stating the triggering condition of the search, we cannot hold that Rule 41(d) compelled the presentation of the affidavit in this case.