

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

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[REDACTED],)
Appellant,)
v.)
THE STATE OF NEVADA,)
Respondent.)

No. 56900

FILED

JAN 04 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
[Signature]

APPELLANT'S FAST TRACK STATEMENT

1. Name of party filing this fast track statement: [REDACTED]
2. Name, law firm, address, and telephone number of attorney submitting this fast track statement: CHRISTOPHER R. ARABIA, Esq., Attorney at Law, 7473 W. Lake Mead Blvd. #100, Las Vegas, NV 89128, (702) 281-4093.
3. Name, law firm, address, and telephone number of appellate counsel if different from trial counsel: Same as above.
4. Judicial district, county, and district court docket number of lower court proceedings: Fifth, Nye County, #CR6251.
5. Name of judge issuing decision, judgment, or order appealed from: District Judge JOHN P. DAVIS.
6. Length of trial. If this action proceeded to trial in the district court, how many days did the trial last? n/a.
7. Conviction(s) appealed from: Count 1: AIDING PRISONER TO ESCAPE, a category "B" felony in violation of NRS 212.100.
8. Sentence for each count: Count 1: A maximum of 72 months in prison with a minimum parole eligibility of 28 months.
9. Date district court announced decision, sentence, or order appealed from: August 24, 2010.
10. Date of entry of written judgment or order appealed from: The judgment of conviction was entered on August 24, 2010.
 - (a) If no written judgment or order was filed in the district court, explain the basis for seeking appellate review: n/a.
11. If this appeal is from an order granting or denying a petition for writ of habeas corpus, indicate the date written notice of entry of judgment or order was served by the court: n/a
 - (a) Specify whether service was by delivery or mail: n/a
 12. If the time for filing the notice of appeal was tolled by a post-judgment motion,
 - (a) Specify the type of motion, and the date of filing of the motion: n/a

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CLERK OF SUPREME COURT
DEPUTY CLERK

1 (b) date of entry of written order resolving motion: n/a
2 13. Date notice of appeal filed: September 21, 2010.
3 14. Specify statute or rule governing the time limit for
4 filing the notice of appeal, e.g., N.R.A.P. 4(b), NRS 34.560, NRS
5 34.575, NRS 177.015, or other: N.R.A.P. 4(b).
6 15. Specify statute, rule or other authority which grants
7 this court jurisdiction to review the judgment or order appealed
8 from: NRS 177.015(3).
9 16. Specify the nature of disposition below, e.g., judgment
10 after bench trial, judgment after jury verdict, judgment upon
11 guilty plea, etc.: Judgment upon conditional guilty plea with
12 reservation of the right to appeal under NRS 174.035(3).
13 17. Pending and prior proceedings in this court. List the
14 case name and docket number of all appeals or original proceedings
15 presently or previously pending before this court which are
16 related to this appeal (e.g., separate appeals by co-defendants,
17 appeal after post-conviction proceedings): none known.
18 18. Pending and prior proceedings in other courts. List the
19 case name, number and court of all pending and prior proceedings
20 in other courts which are related to this appeal (e.g., habeas
21 corpus proceedings in state or federal court, bifurcated
22 proceedings against co-defendants): none known.
23 19. Proceedings raising same issues. List the case name and
24 docket number of all appeals or original proceedings presently
25 pending before this court, of which you are aware, which raise the
26 same issues you intend to raise in this appeal: none known.
27 20. Procedural history. Briefly describe the procedural
28 history of the case (provide citations for every assertion of fact
to the appendix, if any, or to the rough draft transcript):
Counsel for [REDACTED] has combined the procedural history with the
statement of facts in paragraph 21 below.
21 21. Statement of facts. Briefly set forth the facts
22 material to the issues on appeal: After waiving preliminary
23 hearing, appellant [REDACTED] was held to answer and charged in an
24 Information with one count of AIDING PRISONER TO ESCAPE, a
25 category "B" felony in violation of NRS 212.100. (Appellant's
26 Appendix, pp. 5-8) (hereinafter "App App 5-8").
27 [REDACTED] filed a motion to suppress statements that he made
28 to the police (following a traffic stop) without receiving a
Miranda advisal. (App App 17-26). The motion to suppress was
heard on May 25, 2010. (App App 27-42).

1 Witness DANIEL PINEAU, Nye County Sheriff's Deputy, testified
2 at the suppression hearing that he performed a felony traffic stop
3 on the [REDACTED]'s vehicle and ordered [REDACTED] "out of the
4 vehicle at gunpoint" and ordered [REDACTED] to get down onto the
5 ground. (App App 31).

6 According to his suppression hearing testimony, Deputy Pineau
7 then placed [REDACTED] into custody:

8 Q. You testified he was then put in
9 handcuffs?

10 A. That is correct. He was detained.

11 Q. And so **after having the gun drawn on him,**
12 **putting him into handcuffs,** it would be fair
13 to say that he wasn't free to leave at that
14 time?

15 A. **At that time, no, he was not free to**
16 **leave.**

17 Q. In fact as you wrote in the report, he
18 was taken into custody?

19 A. That is correct.

20 (App App 31-32) [Emphasis added.]

21
22
23 In his police report, Deputy Pineau recounted that he
24 questioned [REDACTED] after this placement of [REDACTED] into
25 custody. (App App 46).

26 [REDACTED]'s counsel asked Deputy Pineau about this custodial
27 questioning of [REDACTED] that occurred in the absence of a Miranda
28

1 **advisal:**

2 Q. And then if I read the report correctly,
3 some time after that there was questioning of
4 Mr. [REDACTED] ?

5 A. There was questioning, yes, sir.

6 Q. And during that conversation, he made
7 statements regarding a pair of jeans; is that
8 correct?

9 A. Yes, he did.

10 Q. So by your report and testimony, he had
11 been taken into custody, and I'm curious as
12 to why you didn't Mirandize him at the point
13 where you took him into custody.

14 A. At that time, he wasn't under arrest. **He**
15 **was in custody. However he was being**
16 **detained. In the report, you can see after**
17 **we spoke he was placed under arrest, not**
18 **before.** I had no reason to place him under
19 arrest when I made the traffic stop. He was
20 being detained with handcuffs.

21 (App App 32-33). [Both emphases added.]
22
23

24 It should be noted that the police had already established (before
25 the custodial questioning without Miranda advisal) that the
26 allegedly escaped prisoner was not in [REDACTED]'s vehicle. (App
27 App 45-47).
28

1 The District Court issued a written order denying the motion
2 on May 28, 2010; the court ruled that the questioning of [REDACTED]
3 **was custodial** but was not an interrogation for the purposes of
4 **Miranda**. (App App 43-44).

5 [REDACTED] entered a conditional guilty plea with reservation
6 of the right to appeal under NRS 174.035(3) on July 27, 2010.
7 (App App 48-53 (Plea Entry), and App App 54-60 (Written Plea
8 Agreement)). The District Court sentenced [REDACTED] on August 24,
9 2010. (App App 72-77, 76). The District Court sentenced
10 [REDACTED] as set out in Paragraph 7 herein. (App App 72-77, 76).

11 A timely notice of appeal was filed on September 21, 2010.
12 (App App 81).

13
14 **22. Issues on appeal. State concisely the principal**
15 **issue(s) in this appeal: THE DENIAL OF THE MOTION TO SUPPRESS WAS**
16 **ERROR.**

17 **23. Legal argument, including authorities:**

18 **I. THE DENIAL OF THE MOTION TO SUPPRESS WAS ERROR**

19 [REDACTED]'s statements should be suppressed because they were
20 the product of a custodial interrogation without a valid **Miranda**
21 advisal and waiver, and therefore violated the holdings of **Miranda**
22 **v. Arizona**, 384 U.S. 436 (1966), and its progeny.

23 **A. [REDACTED] was in custody for Miranda purposes.**

24 Following the United States Supreme Court's pronouncements in
25 Thompson v. Keohane, 516 U.S. 99 (1995) and Miller v. Fenton, 474
26 U.S. 104 (1985) on the issue of "in custody" determinations for
27 purposes of Miranda, the Nevada Supreme Court clarified that a
28

1 trial court's custody and voluntariness determinations present
2 mixed questions of law and fact subject to the High Court's **de**
3 **novo** review. For this standard of review to function properly,
4 "trial courts must exercise their responsibility to make factual
5 legal findings when ruling on motions to suppress." Rosky v.
6 State, 121 Nev. 184, 191, 111 P.3d 690 (2005) (citing to People v.
7 G.O. (In re G.O.), 727 N.E.2d 1003, 1010 (Ill. 2000)).

8 "The Fifth Amendment privilege against self-incrimination
9 provides that a suspect's statements made during custodial
10 interrogation are inadmissible at trial unless the police first
11 provide a **Miranda** warning. 'Custody' for **Miranda** purposes means
12 a formal arrest or restraint on freedom of movement of the degree
13 associated with a formal arrest. If there is no formal arrest,
14 the pertinent inquiry is whether a reasonable person in the
15 suspect's position would feel 'at liberty to terminate the
16 interrogation and leave.' A court must answer this question by
17 taking an objective look at 'all of the circumstances surrounding
18 the interrogation.'" (internal citations omitted). Rosky, *supra*,
19 121 Nev. at 191-92.

20
21 In the instant case, Deputy Pineau testified that [REDACTED]
22 was ordered "out of the vehicle at gunpoint" and "was pruned out"
23 on the ground. (App App 31).

24 Pineau wrote in his report that [REDACTED] was then "taken
25 into custody" by the police. (App App 46). During the
26 suppression hearing, [REDACTED]'s counsel asked Pineau about the
27 placement of [REDACTED] into custody:
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Q. You testified he was then put in handcuffs?

A. That is correct. He was detained.

Q. And so **after having the gun drawn on him, putting him into handcuffs**, it would be fair to say that he wasn't free to leave at that time?

A. At that time, no, he was not free to leave.

Q. **In fact as you wrote in the report, he was taken into custody?**

A. **That is correct.**

(App App 31-32). [Emphasis added.]

Q. So by your report and testimony, he had been taken into custody, and I'm curious as to why you didn't Mirandize him at the point where you took him into custody.

A. At that time, he wasn't under arrest. **He was in custody. However he was being detained. In the report, you can see after we spoke he was placed under arrest, not before.**

I had no reason to place him under arrest when I made the traffic stop. He was being detained with handcuffs.

(App App 32-33). [Emphasis added.]

1 "In Alward v. State, this court listed several factors
2 pertinent to the objective custody determination: (1) the site of
3 the interrogation, (2) whether the investigation has focused on
4 the subject, (3) whether the objective indicia of arrest are
5 present, and (4) the length and form of questioning." Here, it is
6 undisputed that the detectives interrogated Rosky in a police
7 substation and that the investigation was focused solely upon him.
8 However, as the State correctly notes, this court has previously
9 found interrogations to be non-custodial when suspects voluntarily
10 accompanied officers to the police station, understood that they
11 were not under arrest and voluntarily responded to police
12 questioning. But, because no one factor is dispositive, we turn to
13 an independent analysis of Alward's third and fourth factors,
14 indicia of arrest and length and form of questioning." (internal
15 citations omitted). Rosky, supra, 121 Nev. at 192.

17 "In State v. Taylor, this court provided several objective
18 indicia of arrest: (1) whether the suspect was told that the
19 questioning was voluntary or that he was free to leave; (2)
20 whether the suspect was not formally under arrest; (3) whether the
21 suspect could move about freely during questioning; (4) whether
22 the suspect voluntarily responded to questions; (5) whether the
23 atmosphere of questioning was police-dominated; (6) whether the
24 police used strong-arm tactics or deception during questioning;
25 and (7) whether the police arrested the suspect at the termination
26 of questioning." (internal citations omitted). Id.

27 **Deputy Pineau's report and the evidence adduced at the**
28

1 suppression hearing clearly established that the questioning was
2 not voluntary, [REDACTED] was not free to leave and had no freedom
3 of movement, the atmosphere was coercive, [REDACTED] was the focus
4 of Pineau's efforts, and [REDACTED] was formally arrested after
5 Deputy Pineau's questioning. (App. 31-33, 46-47).

6 Deputy Pineau's testimony is instructive:

7 Q. You testified he was then put in
8 handcuffs?

9 A. That is correct. He was detained.

10 Q. And so after having the gun drawn on him,
11 putting him into handcuffs, it would be fair
12 to say that he wasn't free to leave at that
13 time?
14

15 A. At that time, no, he was not free to
16 leave.

17 Q. In fact as you wrote in the report, he was
18 taken into custody?

19 A. That is correct.

20 (App App 31-32) [Emphasis added.]
21

22 As contemplated by Rosky and Alward, the objective indicia
23 of arrest were present. The District Court found that [REDACTED]
24 was in custody for Miranda purposes. (App App 43). Deputy
25 Pineau's police report is consistent with his suppression hearing
26 testimony that he had taken [REDACTED] into custody by this point.
27 (App App 46-47, 31-33).
28

1 Deputy Pineau then commenced custodial interrogation, without
2 advising ██████████ of his Miranda rights. After obtaining the
3 statements at issue that ██████████ seeks to suppress, Pineau
4 placed ██████████ under formal arrest. (App App 31-33, 46).

5 B. ██████████'s statements were not voluntary because of the
6 coercion and restraint present during the felony stop.

7 "Unlike the objective custody analysis, the voluntariness
8 analysis involves a subjective element as it logically depends on
9 the accused's characteristics. In this context, the prosecution
10 has the burden of proving by a preponderance of the evidence that
11 the statement was voluntary, i.e., that 'the defendant's will was
12 [not] overborne.' '[A] confession is involuntary if it was
13 coerced by physical intimidation or psychological pressure.'
14 Several factors are relevant in deciding whether a suspect's
15 statements are voluntary: 'the youth of the accused; his lack of
16 education or his low intelligence; the lack of any advice of
17 constitutional rights; the length of detention; the repeated and
18 prolonged nature of questioning; and the use of physical
19 punishment such as the deprivation of food or sleep.' 'A
20 suspect's prior experience with law enforcement is also a relevant
21 consideration.'" (internal citations omitted). Rosky v. State,
22 121 Nev. 184, 193-94, 111 P.3d 690 (2005).

23
24 ██████████'s statements were involuntary because the police
25 obtained the statements by overcoming ██████████'s will through
26 intense physical intimidation and psychological pressure, as
27 envisioned by Rosky.
28

1 As shown in Deputy Pineau's suppression hearing testimony,
2 Hartshorn answered Deputy Pineau's questions while in custody and
3 shortly after having been held at gunpoint and handcuffed:

4 Q. And so after having the gun drawn on him,
5 putting him into handcuffs, it would be fair
6 to say that he wasn't free to leave at that
7 time?

8 A. At that time, no, he was not free to
9 leave.

10 Q. In fact as you wrote in the report, he was
11 taken into custody?

12 A. That is correct.

13 (App App 31-32). [Emphasis added.]

14 Q. And then if I read the report correctly,
15 some time after that there was questioning of
16 Mr. [REDACTED]?

17 A. There was questioning, yes sir.

18 Q. And during that conversation, he made
19 statements regarding a pair of jeans; is that
20 correct?

21 A. Yes, he did.

22 (App App 32). [Emphasis added.]

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27 Although [REDACTED] "was in custody," Pineau did not Mirandize
28 [REDACTED] prior to the point in time when the police questioning

1 elicited the incriminating statements that [REDACTED] seeks to
2 suppress. (App. App. 33).

3 C. The questioning of [REDACTED] constituted a custodial
4 *interrogation* as contemplated by Miranda and its progeny.

5 "By custodial interrogation, we mean questioning initiated by
6 law enforcement officers after a person has been taken into
7 custody or otherwise deprived of his freedom of action in any
8 significant way." Miranda v. Arizona, 384 U.S. 436, 444 (1966).
9 [Both emphases added.] This Court recently affirmed,
10 "'Interrogation' means explicit questioning as well as 'words or
11 actions on the part of police (other than those normally attendant
12 to arrest and custody) that the police should know are **reasonably**
13 **likely to elicit an incriminating response.**" Hernandez v. State,
14 194 P.3d 1235, 1242, 124 Nev. Adv. Rep. 83 (2008), citing Rhode
15 Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L.Ed.2d
16 297 (1980). [Emphasis added.]

17
18 The District Court and [REDACTED]'s counsel discussed what
19 constitutes an interrogation during the suppression hearing:

20 THE COURT: I don't think it's an
21 interrogation.

22 MR. ARABIA: Well he asked him questions.

23 THE COURT: I know. It was a question, yes,
24 but not an interrogation. There's a big
25 difference.

26 MR. ARABIA: There were questions that were
27 designed to elicit incriminating statements.
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THE COURT: I still don't think it was an
interrogation.

(App App 37). [Emphasis added.]

The record in this case is clear that Deputy Pineau initiated questioning of [REDACTED] after taking [REDACTED] into custody (according to the District Court's finding in its order denying the suppression motion, App App 43, Deputy Pineau's report, App App 46, and Deputy Pineau's hearing testimony, App App 31-33) and depriving [REDACTED] of his freedom by holding him "at gunpoint" and putting him "in handcuffs." (App App 31-33).

The Deputy explicitly asked questions which were likely to elicit incriminating statements (as contemplated by Hernandez); the questions did in fact elicit potentially incriminating statements, according to Deputy Pineau's suppression hearing testimony:

A. At that time, he wasn't under arrest. He was in custody. However he was being detained. In the report, you can see after we spoke he was placed under arrest, not before.

I had no reason to place him under arrest when I made the traffic stop. He was being detained with handcuffs.

(App App 33). [Both emphases added.]

The District Court contravened Miranda and Hernandez by

1 finding that the questioning of [REDACTED] resulting in the
2 statements did not constitute a Miranda interrogation.


3 24. Preservation of issues. State concisely how each
4 enumerated issue on appeal was preserved during trial. If the
5 issue was not preserved, explain why this court should review the
6 issue: A timely appeal was filed. The appellant brought a
7 pretrial motion to suppress. The appellant expressly and in
8 writing preserved the right to appeal under NRS 174.035(3) in the
9 conditional guilty plea agreement and orally preserved the right
10 to appeal at the sentencing hearing.

11 25. Issues of first impression or of public interest. Does
12 this appeal present a substantial legal issue of first impression
13 in this jurisdiction or one affecting an important public
14 interest: If so, explain: No.

15 **VERIFICATION**

16 I recognize that pursuant to N.R.A.P. 3C I am responsible for
17 filing a timely fast track statement and that the Supreme Court of
18 Nevada may sanction an attorney for failing to file a timely fast
19 track statement, or failing to raise material issues or arguments
20 in the fast track statement, or failing to cooperate fully with
21 appellate counsel during the course of an appeal. I therefore
22 certify that the information provided in this fast track statement
23 is true and complete to the best of my knowledge, information and
24 belief.

25 DATED this 27th day of December, 2010.


26 
27 CHRISTOPHER R. ARABIA, Esq.
28 Nevada Bar #9749

29 **CERTIFICATE OF COMPLIANCE**

30 I hereby certify that I have read this appellate brief, and
31 to the best of my knowledge, information and belief, it is not
32 frivolous or interposed for any improper purpose. I further
33

1 certify that this brief complies with all applicable Nevada Rules
2 of Appellate Procedure, in particular NRAP 28(e), which requires
3 every assertion in the brief regarding matters in the record to be
4 supported by appropriate references to the record on appeal. I
5 understand that I may be subject to sanctions in the event that
6 the accompanying brief is not in conformity with the requirements
7 of the Nevada Rules of Appellate Procedure.

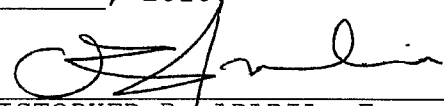
8 DATED this 27th day of December, 2010.

9
10 
11 _____
12 CHRISTOPHER R. ARABIA, Esq.
13 Nevada Bar #9749

14 **IN THE SUPREME COURT OF THE STATE OF NEVADA**
15 **A F F I R M A T I O N - NRS 239B.030**

16 The undersigned does hereby affirm that the preceding
17 document, APPELLANT'S FAST TRACK STATEMENT, filed in case number
18 51196 does **NOT** contain the social security number of any person.

19 DATED this 27th day of December, 2010.

20
21 
22 _____
23 CHRISTOPHER R. ARABIA, Esq.
24 Nevada Bar #9749

1 **CERTIFICATE OF SERVICE**

2 I, CHRISTOPHER R. ARABIA, Esq., certify that on the 28th day
3 of December, 2010, I personally deposited in the United
4 States mail, first class postage prepaid, a true copy of
5 **Appellant's FAST TRACK STATEMENT** and **APPENDIX** and **CD-ROM** to the
6 following persons at the following addresses:

7 Brian Kunzi, Esq.
8 Nye County District Attorney
9 101 Radar Road
10 P.O. Box 593
11 Tonopah, NV 89049

12 Nevada Attorney General [no appendix and no CD ROM]
13 100 North Carson Street
14 Carson City, NV 89701-4717

15 [REDACTED] [no CD ROM]
16 Clark County Detention Center
17 330 S. Casino Center Drive
18 Las Vegas, NV 89101



19 an employee or agent of CHRISTOPHER R. ARABIA, Esq.
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