

unique circumstances of this case, we find that the district court did not abuse its discretion. We therefore affirm the district court's suppression order.

FACTS

Smallen was taken into custody and interviewed at the Muskogee County Sheriff's Office on July 11, 2007.² An Oklahoma State Bureau of Investigation (OSBI) agent and a Muskogee County deputy sheriff conducted the interview. The interview was recorded on videotape. Smallen moved the district court to suppress the videotaped interview on the grounds that his statements during the interview were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

At the hearing on the motion to suppress, the only evidence introduced by the State to prove its position that Smallen waived his rights was the recording of the interview. Neither the agent nor the deputy testified. The video recording of the interview shows that Smallen was given *Miranda* warnings advising him of his rights to remain silent and have an attorney present during questioning. Immediately after being advised of these rights, Smallen stated clearly that "I don't want to waive my rights." For approximately five minutes after that, however, Smallen continued to engage in some discussion with the agent and the deputy before explicitly insisting on

² The State's brief asserts that the interview occurred on July 11, 2007 (Aplt's Br. at 2). Smallen's brief states that the interview occurred on July 17, 2007 (Aplee's Br. at 5). The date printed on the DVD is July 13, 2007 (District Court Exhibit 1). Because the video recorded voice of the OSBI agent conducting the interview stated that the interview was being conducted on July 11, 2007, we assume July 11th is the correct date.

having his attorney present. It is apparent from the video that Smallen was reluctant to talk to the officers throughout the course of the interview.

DISCUSSION

The State contends that Smallen impliedly waived his rights to counsel and silence by initiating further discussion with officers after expressly refusing to waive his rights. We review a district court's decision to suppress evidence obtained during a custodial police interview for an abuse of discretion. *Hopper v. State*, 1987 OK CR 78, ¶ 9, 736 P.2d 538, 540.

The videotape of the interview shows, as the State contends, that Smallen did initiate further conversations with the officers after he refused to waive his rights. It is obvious from the tenor and context of those additional statements, however, that Smallen was only amplifying or attempting to explain why he was refusing to waive his rights: i.e., not knowing "what's going on," "I don't want to say something stupid," etc. These comments do not suggest a willingness to make potentially incriminating statements or deal with police unassisted by counsel. Additionally, it is apparent that the officers themselves did not believe Smallen had waived his rights because they repeatedly attempted to persuade him to talk to them despite his reluctance to do so. The interrogation should have stopped at this point, or at least the officers should have sought clarification of Smallen's intent to waive his rights. See *Davis v. United States*, 512 U.S. 452, 461-62, 114 S.Ct. 2350, 2356, 129 L.Ed.2d, 362 (1994)(declining to adopt rule requiring interviewing officers to ask clarifying questions when suspect makes ambiguous or equivocal

statements concerning rights to silence and attorney, but noting that such questions will minimize chance of confession being suppressed by later judicial second-guessing as to meaning of suspect's statement); *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378 (1981)(holding that an accused who has expressed desire to deal with police only through counsel is not subject to further interrogation). Rather than stop the interrogation after Smallen refused to waive his rights or made the additional statement that he did not want to say anything stupid, however, the videotape shows a continuing conversation that was dominated by officers urging Smallen to talk or otherwise attempting to elicit information from him.

This record is insufficient to establish that Smallen knowingly and voluntarily waived his rights to silence and assistance of an attorney. See *Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 2350, 2355, 129 L.Ed.2d, 362 (1994)(determination of whether an accused has actually invoked right to counsel is objective inquiry based on whether "reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel"); *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378 (1981)(holding that valid waiver of right to silence or presence of attorney "cannot be established by showing only that [accused] responded to further police-initiated custodial interrogation even if he has been advised of his rights"); *Miranda v. Arizona*, 384 U.S. 436, 475, 86 S.Ct. 1602, 1628, 16 L.Ed.2d 694 (1966)(explaining that if defendant is advised of right to remain silent and to have attorney present but "interrogation continues . . . a

heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel"). The district court did not abuse its discretion by ruling that Smallen's statements must be excluded as evidence from the State's case-in-chief.

DECISION

The Order of the District Court suppressing the statements and videotaped interview of Robert Smallen is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2009), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CHEROKEE COUNTY
THE HONORABLE G. BRUCE SEWELL, DISTRICT JUDGE

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C. JOHNSON, P.J.: Concur

LUMPKIN, J.: Concur

CHAPEL, J.: Concur

LEWIS, J.: Concur

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