

Cat's Out of the Bag

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Recently we have seen police practices that include an officer who has developed a suspicion of criminal activity engaging the suspect while in custody (not free to leave) in pre-Miranda questioning, including eliciting incriminating statements followed by searches which produced evidence. These pre-Miranda activities are followed by the giving of Miranda warnings and the request to search and informing the suspect of his right to stop the search unless a warrant is obtained. The defendant then gives the same incriminating information, plus, and consents to the search followed by charges that relate to the evidence obtained via the incriminating statements and the discovered evidence.

This practice is not legal. Washington v. Lavaris , 99 Wn2d 851, 664 P2d 1234, 1983 Wash.

While defendant was held in jail awaiting trial for first degree murder, two detectives offered to take defendant across the street to their office to talk about the murder. Defendant indicated he was willing to talk because he did not want somebody else to get in trouble for something he did. Forty-five minutes later, defendant was informed of his Miranda rights in both Spanish and English but was not advised this pre-Miranda confession could not be used against him. Defendant gave a detailed account of his participation in the murder. The trial court suppressed the pre-Miranda oral statement, admitted the post-Miranda written statement, and convicted defendant for murder. The lower appellate court affirmed. On appeal, the court reversed. The court held that defendant's post-Miranda statement was inadmissible because there was no break in the causative chain nor was there some other insulating factor after the tainted and inadmissible pre-Miranda statement. The Miranda warnings did not remove the constitutional infirmity from any post-Miranda statements. After defendant let the cat out of the bag with his oral confession, the subsequent Miranda warnings had little significance.

That outcome is going to occur absent the presence of an insulating factor which separates the pre-Miranda confession from any subsequent statement.

In this case the post-Miranda statements followed immediately after the pre-Miranda incriminating statement and the custodial setting did not change, nor did the defendant consult with an attorney following the recitation of his Miranda rights.

The cat couldn't be put back in the bag in 1983, nor can it now.