

Summary of SC89820, *State of Missouri v. Terrell C. Gaw*

Appeal from the Newton County circuit court, Judge Timothy W. Perigo

Attorneys: Gaw was represented by Emmett D. Queener of the public defender's office in Columbia, (573) 888-9855; and the state was represented by Shaun J. Mackelprang of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man convicted of driving while intoxicated challenges the admission into evidence of his statements that he was driving a truck involved in an accident on the grounds that the arresting officer violated his *Miranda* rights against self-incrimination. In a 7-0 decision written by Judge Zel M. Fischer, the Supreme Court of Missouri affirms the trial court's judgment. Under the narrower of two tests outlined in the United States Supreme Court's decision in *Missouri v. Seibert*, 542 U.S. 600 (2004), the record here supports the finding that the arresting officer was not trying to undermine the man's *Miranda* rights deliberately by questioning him before giving him the *Miranda* warnings. Accordingly, the trial court properly admitted the man's post-*Miranda* statements into evidence. In a concurring opinion, Judge Michael A. Wolff agrees with this decision but questions whether a more objective test would be better because it focuses on what the officer did rather than on what was in the officer's mind.

Facts: After responding to the scene of a single-vehicle accident west of Racine, Missouri Highway Patrol Sgt. Michael Frazier saw Terrell Gaw rummaging through the pickup truck involved in the accident. Frazier believed Gaw was intoxicated because he smelled the odor of intoxicants and burned marijuana on Gaw, Gaw's eyes were glassy and bloodshot, and he swayed when he walked. Frazier asked Gaw who was driving the truck, and Gaw said either his girlfriend or her friend. On Frazier's request, Gaw pulled from his pants pocket and gave to Frazier a bag Frazier believed contained marijuana. In patting down Gaw, Frazier also found a small pipe used to smoke marijuana in Gaw's other pocket. He arrested Gaw for possession of marijuana, placed him in handcuffs, and administered a portable breath test that showed Gaw had a high concentration of alcohol. Frazier again asked Gaw who was driving, and Gaw admitted he was. Frazier was the only witness at the trial before the circuit court, without a jury. At trial, Frazier testified that he did not advise Gaw of his rights against self-incrimination until they were on their way to the Newton County jail. The circuit court found Gaw guilty of felony driving while intoxicated and sentenced him as a chronic offender. Gaw appeals.

AFFIRMED.

Court en banc holds: The trial court did not err in admitting into evidence Gaw's admission that he was driving the truck. Under *Miranda v. Arizona*, 384 U.S. 436 (1966), a criminal suspect is entitled to warnings consistent with the Fifth Amendment rights against self-incrimination once the suspect is subjected to a custodial interrogation. A custodial interrogation is defined as questioning initiated by law enforcement officers after a person has been taken into custody. The state concedes the questions Frazier asked Gaw after the arrest but before the warnings were given violated *Miranda*. Whether the statements he made after he was given the *Miranda* warnings are admissible turns on the United States Supreme Court's decision in *Missouri v. Seibert*, 542 U.S. 600 (2004). In that case, a four-justice plurality proposed an objective test for determining whether *Miranda* warnings given after a defendant has responded to law enforcement's questioning are effective, while the concurring opinion of Justice Kennedy – who supplied the crucial fifth vote necessary for affirmance – adopted a narrower, subjective test. Under *Marks v. United States*, 430 U.S. 188, 193 (1977) (holding that, where no single rationale receives the votes of five justices of the United States Supreme Court, the Court's holding is that position taken by the members who concurred in the judgments on the narrowest grounds), this Court must apply Justice Kennedy's narrower test, which relies on a trial court's subjective finding of fact as to whether the arresting officer deliberately was trying to violate *Miranda*'s protections. Viewing the record here in the light most favorable to the trial court's determination, as Missouri law long has required, Frazier's testimony that his pre-*Miranda* questioning was not part of a deliberate plan to undermine Gaw's rights supports the factual finding necessary for the trial court to rule that Gaw's post-*Miranda* admission was made voluntarily and, therefore, to overrule Gaw's motion to suppress his admission that he was driving the truck.

Concurring opinion by Judge Wolff: The author agrees with the Court's decision but writes separately to question whether it would be better to adopt an objective test, as the court of appeals did in this case, because it focuses on what the officer did rather than what was in the officer's mind. He notes that an appellate court should strive to express – in a single, cogent majority opinion – what the law is, and if it cannot do so, then it should decline the case and let the lower court's decision stand.