1984 S.C. Op. Atty. Gen. 307 (S.C.A.G.), 1984 S.C. Op. Atty. Gen. No. 84-131, 1984 WL 159937

Office of the Attorney General

State of South Carolina
Opinion No. 84-131
November 14, 1984

***1** David F. McInnis, Esquire
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Dear Mr. McInnis:

In a letter to this Office you questioned whether the decision of the United States Supreme Court in Berkemer v. McCarty, Op. No. 83–710 52 LW 5023, decided July 2, 1984, impacts on the videotaping of individuals following their arrest for driving under the influence. [1] In Berkemer, the Court clarified the question of the applicability of the procedural safeguards established as to custodial interrogations, recognized by the Court in Miranda v. Arizona, 384 U.S. 436 (1966), as to individuals who are stopped for traffic offenses. As stated in Berkemer,

'(i)n Miranda v. Arizona . . . the Court addressed the problem of how the privilege against compelled self-incrimination guaranteed by the Fifth Amendment could be protected from the coercive pressures that can be brought to bear upon a suspect in the context of custodial interrogation. The Court held:

'(t)he prosecution may not use statements, whether exculpatory or inculpatory stemming from custodial interrogation of (a) defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."

52 LW at 5025.

In its decision in Berkemer, the Court addressed two situations; (1) Does Miranda control the admissibility of statements made by an individual accused of a misdemeanor traffic offense during custodial interrogation; (2) Does the roadside questioning of a motorist who is detained following a routine traffic stop constitute a custodial interrogation under Miranda?

The Supreme Court in Berkemer was concerned with a situation where the driver of a car, which was observed weaving in traffic, was stopped and asked to get out of his vehicle. At such time he was not taken into custody but was asked to perform a field sobriety test which he failed. Following questioning in which the driver, whose speech was slurred, admitted to drinking beer and smoking marijuana, the driver was formally placed under arrest and taken to the jail. At the jail, he was given an intoxilyzer test which failed to detect alcohol in the driver's system. Questioning, however, resumed. The driver replied affirmatively when questioned as to whether he had been drinking. When asked whether he was under the influence, the driver replied, 'I guess, barely.' 52 LW at 5024. He also affirmed his having previously smoked marijuana. At no point was the driver advised of his rights under Miranda.

As to the first question noted above, the Court determined that:

'. . . a person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in Miranda, regardless of the nature or severity of the offense of which he is suspected or for which he was arrested.' 52 LW at 5027.

The Court stated that the driver in Berkemer was 'in custody' at least as of the time he was arrested and told to get into the police car. The Court concluded that inasmuch as the driver was not informed of his constitutional rights at such time, his subsequent admissions should not have been used against him.

***2** As to the remaining question concerning whether roadside questioning of a driver detained following a routine traffic stop constitutes custodial interrogation under Miranda, the Court concluded that while such a stop does curtail the 'freedom of action' of a driver, a warning to such driver as to his constitutional rights is not necessary. It was stated that '. . . persons temporarily detained pursuant to such stops are not 'in custody' for the purpose of Miranda.' 52 LW at 5028. The Court determined that such a stop was more analogous to a 'Terry stop' as recognized in Terry v. Ohio, 392 U.S. 1 (1968) than a formal arrest. In Berkemer, the Court stated that the driver was not 'in custody' until after being formally arrested. Therefore, any statement made prior to such arrest were admissible.

As is apparent, in Berkemer the Supreme Court was concerned with the admissibility of certain statements made by a driver. In your opinion request, you referenced the videotaping of individuals following their arrest for driving under the influence. It is my understanding that such videotaping typically occurs after a driver has been taken into custody and transported to a law enforcement center. In Miranda, the Supreme Court defined custodial interrogation as '. . . questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' 384 U.S. at 444. As noted, in Berkemer, the Court concluded that the defendant there '. . . was 'in custody' at least as of the moment he was formally placed under arrest and instructed to get into the police car.' 52 LW at 5027. Referencing such, obviously, pursuant to Berkemer, any statements made in response to questions by law enforcement officers during a videotaped session could be admitted against a defendant only if the defendant was effectively warned of his constitutional rights pursuant to Miranda prior to his making any such statements. [2]

As to any question concerning whether Miranda rights must be given prior to the videotaping of an individual arrested for driving under the influence where the videotaping does not include custodial questioning by law enforcement officers, it appears that such rights would not have to be provided. The United States Supreme Court has consistently determined that required displays of identifiable physical characteristics by a defendant fail to violate any privilege against self-incrimination established by the Fifth Amendment. See: Schmerber v. California, 384 U.S. 757 (1966) (extraction and chemical analysis of blood sample); United States v. Wade, 388 U.S. 218 (1967) (requiring defendant to utter words in a lineup; the accused was 'required to use his voice as an identifying characteristic, not to speak his guilt.' 388 U.S. at 222–223.); Gilbert v. California, 388 U.S. 263 (1967) (authorized taking of handwriting exemplars): United States v. Dionisio, 410 U.S. 1 (1973) (authorized compelling a grand jury witness to provide a voice exemplar.) In Gilbert, the Court specifically stated that the Fifth Amendment privilege against self-incrimination:

***3** '. . . reaches only compulsion of 'an accused's communications, whatever form they might take, . . . A mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside its protection.' 388 U.S. (Emphasis added.)

In Holt v. United States, 218 U.S. 245 (1910), the Court had earlier stated that:
'. . . the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material.' 218 U.S. at 252–253.

Additionally, in Palmer v. State, 604 P.2d 1106 (1919), the Alaska Supreme Court was faced with the precise question of whether a videotape of a defendant being administered a breathalyzer test and performing certain sobriety tests should have been suppressed at the defendant's trial. Citing Schmerber and Wade, the Alaska court determined that there was no Fifty Amendment violation in administering the tests referenced above to the defendant and, therefore, there was no basis for suppressing the playing of the videotape of defendant performing such tests.

In conclusion, pursuant to Berkemer, statements made in response to interrogation during the videotaping of an individual arrested for driving under the influence could only be admitted if Miranda rights were effectively given prior to the statements being made. However, Miranda does not apply to a situation where the videotaping of an individual arrested for driving under the influence does not include custodial interrogation. If there are any questions, please advise.
Sincerely,

Charles H. Richardson
Assistant Attorney General

Footnotes

1 The decision in Berkemer was cited by the South Carolina Supreme Court in State v. Morgan, Op. No. 22151, filed August 7, 1984. In the decision, the Court concluded that statements made by a defendant during a routine investigation into the cause of an automobile accident were admissible in evidence at defendant's trial The Court noted that when the volunteered statements were made in that case the defendant was '. . . not in custody or significantly deprived of his freedom' and, therefore, Miranda warnings were not necessary.

2 A matter to be separately considered is the issue of whether in a particular situation an intoxicated driver is capable of knowingly and voluntarily waiving his Miranda rights. In United States v. Harvey, 701 F.2d 800 (9th Cir., 1983) the Court in addressing the issue of the need for a formal arrest before nonconsensual blood taking noted an exception where 'a suspect is at the level of incapacity which makes it unnecessary to effect a prior arrest . . ..' 701 F.2d at 806. The Court noted that 'there is no compelling reason why a prior arrest is necessary when it is shown that the suspect could not appreciate the significance of such action. 701 F.2d at 805–806.

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