

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JULY TERM 2009

ROBERT TOTH,

Appellant,

v.

CASE NO. 5D08-2029

STATE OF FLORIDA,

Appellee.

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Decision filed October 30, 2009

Appeal from the Circuit Court
for Brevard County,
W. David Dugan, Judge.

James S. Purdy, Public Defender, and
Dee Ball, Assistant Public Defender,
Daytona Beach, for Appellant.

Bill McCollum, Attorney General,
Tallahassee, and Kellie A. Nielan,
Assistant Attorney General, Daytona
Beach, for Appellee.

PER CURIAM.

AFFIRMED.

LAWSON and COHEN, JJ., concur.
EVANDER, J., concurs and concurs specially, with opinion.

EVANDER, J., concurring specially.

Toth appeared for an interview at the Brevard County Sheriff's Department in conjunction with an investigation of his girlfriend's murder. He was not advised of his *Miranda*¹ rights before or during the interview. I believe that the trial court erred in denying his motion to suppress certain incriminating statements made in the latter portion of this interview. Although the interview was initially a non-custodial voluntary event, it was transformed into a custodial interrogation approximately 47 minutes into the interview. At that time, Toth clearly indicated an understanding that he was not free to leave. Rather than correct this misconception, the detectives continued their prolonged questioning, indicated a disbelief of Toth's story, and suggested that he was a suspect in his girlfriend's murder. While not singularly dispositive, the failure to advise a suspect that he is free to leave militates in favor of a finding of custodial interrogation. *Rigterink v. State*, 2 So. 3d 221, 253 (Fla.), *petition for cert. filed*, No. 08-1229, 77 USLW 3563 (Mar. 31, 2009).

However, I conclude that any error was harmless beyond a reasonable doubt. Toth made even more damaging statements the following day at the hospital and at the Brevard County Detention Center and these statements were properly admitted.

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).