

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

THE STATE OF NEBRASKA,

Plaintiff,

vs.

SHANE DEMPSEY,

Defendant.

Cases Nos. CR01-7 & CR01-8

**ORDER ON MOTIONS
TO SUPPRESS**

DATE OF HEARING: July 16, 2001.
DATE OF RENDITION: August 6, 2001.
DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).
TYPE OF HEARING: Open court.
APPEARANCES:
For plaintiff: Thomas P. Herzog, Holt County Attorney.
For defendant: Rodney J. Palmer with defendant.
SUBJECT OF ORDER: Defendant's motion to suppress.
PROCEEDINGS: See journal entry rendered on July 17, 2001.
FINDINGS: The court finds and concludes that:

1. Findings of fact were stated on the record at the close of the hearing. *State v. Osborn*, 250 Neb. 57, 547 N.W.2d 139 (1996). The court adheres to those findings as supplemented herein.
2. The motion raises the issue of an "illegal phone tap or illegal interception of a private telephone conference" in several contexts. The state presented persuasive evidence that no such conduct occurred and the defendant presented no persuasive evidence to the contrary. Such allegations lacks merit.
3. Although the police did administer *Miranda* warnings and the defendant did invoke his desire to consult with counsel, under the totality of the circumstances the court concludes that the defendant was not in custody and *Miranda* does not apply. *California v. Beheler*, 463 U.S. 1121, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983); *Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977). Because there was no formal arrest nor any restraint on freedom of movement of the degree associated with a formal arrest, the defendant was not in custody. *Id.* Consequently, the Fifth Amendment

and the applicable provisions of the Nebraska Constitution do not require exclusion of the defendant's statements.

4. The Sixth Amendment right to counsel does not attach until a prosecution is commenced. *Texas v. Cobb*, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (2001) (2001 WL 309572); *McNeil v. Wisconsin*, 501 U.S. 171, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991). No such prosecution had occurred at the time of the events disclosed by the evidence. The Sixth Amendment and the applicable provisions of the Nebraska Constitution do not require exclusion of the defendant's statements.

5. The motion seeks to suppress testimony of Channa Dygert and Colin Stevens. As the Nebraska Supreme Court explained in *In re Interest of J.G.*, 231 Neb. 530, 437 N.W.2d 153 (1989), a person's right against compulsory self-incrimination, which is protected by the *Miranda* rules, see *Michigan v. Tucker*, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974), is personal and can only be asserted or waived by the person whose right against self-incrimination is affected. The court explained that it had, in other contexts, recognized that rights guaranteed by the U.S. Constitution are personal. For example, the court had held that the constitutional right to be free from unreasonable searches and seizures is personal, and therefore can only be asserted by the person aggrieved by the unreasonable search and seizure. *State v. Searles*, 214 Neb. 849, 336 N.W.2d 571 (1983), *cert. denied* 466 U.S. 906, 104 S.Ct. 1684, 80 L.Ed.2d 158 (1984). By analogy, the court recognized that it logically follows that a person's right against compulsory self-incrimination is personal. The court then stated that, since the right against self-incrimination is personal, the right to invoke the protections of *Miranda* must also be personal. The defendant lacks standing to assert such claims of Channa Dygert or Colin Stevens.

6. Of course, this does not preclude the defendant from using the factual circumstances surrounding such claims to attack the credibility of the state's witnesses at trial.

7. The defendant's motions to suppress lack merit in all respects and must be denied.

8. The deadline for filing of other pretrial motions has expired and no other motions have been filed that have not been disposed. The matter should be assigned for final pretrial conference.

ORDER: IT IS THEREFORE ORDERED that:

1. The motions to suppress are denied in all respects.

2. The final pretrial conference in each case is assigned for **Monday, August 20, 2001,** at **9:00 a.m.**, or as soon thereafter as the same may be heard.

Signed at O'Neill, Nebraska, on August 6, 2001.
DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

- Mail a copy of this order to all counsel of record and to any pro se parties.
Done on _____, 20__ by ____.
 - 9 Enter judgment on the judgment record.
Done on _____, 20__ by ____.
 - 9 Mail postcard/notice required by § 25-1301.01 within 3 days.
Done on _____, 20__ by ____.
 - Note the decision on the trial docket as: [date of filing] Signed "Order on Motions to Suppress" entered.
Done on _____, 20__ by ____.
- Mailed to:

BY THE COURT:

William B. Cassel
District Judge