

A Conversation With Justice Anthony Kennedy

By Greg Westfall

I'm sitting here with Justice Anthony Kennedy, who recently wrote the majority opinion in *Berghuis v. Thompkins*, a case that Devallis Rutledge, a blogger for Police Magazine online (policemag.com) characterizes as "loosen[ing] the rules for questioning suspects" and calls "significant." I wanted to get it from the horse's mouth, so I asked Justice Kennedy if he'd be kind enough to fill us in. Here's an excerpt.

Westfall: So, Justice Kennedy, is it true that you have made it so an accused doesn't have to actually expressly waive his *Miranda* rights? Am I hearing that correctly? And if so, how can you justify that?

Kennedy: Treating an ambiguous or equivocal act, omission, or statement as an invocation of *Miranda* rights "might add marginally to *Miranda*'s goal of dispelling the compulsion inherent in custodial interrogation," but "as *Miranda* holds, full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process." *Thompkins* did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his "right to cut off questioning." Here he did neither, so he did not invoke his right to remain silent.

Westfall: But if you no longer require the person to expressly waive their rights, I mean, how will we know that they actually have?

Kennedy: The course of decisions since *Miranda*, informed by the application of *Miranda* warnings in the whole course of law enforcement, demonstrates that waivers can be established even absent formal or express statements of waiver that would be expected in, say, a judicial hearing to determine if a guilty plea has been properly entered.

Westfall: So, what I'm hearing is that silence equals waiver?

Kennedy: The prosecution ... does not need to show that a waiver of *Miranda* rights was express. An "implicit waiver" of the "right to remain silent" is sufficient to admit a suspect's statement into evidence. [A] waiver of *Miranda* rights may be implied through "the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver." Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent.

Westfall: So silence DOES equal waiver? Well, how can you possibly rationalize that in light of *Miranda* and its reasoning?

Kennedy: The main purpose of *Miranda* is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel. Thus, "[i]f anything, our subsequent cases have reduced the impact of the

Miranda rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief."

Westfall: So, it seems to me that where once we were concerned with coercion, beating confessions out of people, and things like that, we are now more concerned with the burden on law enforcement.

Kennedy: [no response]

Westfall: Sorry, I guess that was kind of a rhetorical statement. So anyway, it would seem to me that once a person has been given their warnings and somehow indicated they understand them, then it's like there is a presumption that they have waived their right to counsel unless they positively say otherwise? Was that what you were intending?

Kennedy: As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford.

Westfall: So it's true. Now an accused is presumed to have waived his right to counsel unless he somehow comes up with the idea to positively say he wants to remain silent. Thanks, Justice Kennedy, for clearing that up for us.

[Editor's Note: As you might have guessed, all of Kennedy's quotes were pulled verbatim from Berghuis v. Thompkins, ___ U.S. ___, No. 08-1470 (June 1, 2010). I didn't cite to the actual pages or the other abominable cases to which the quotes are attributed.]