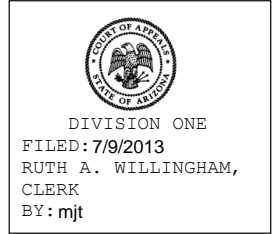


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 12-0542
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
TONY DEANGELO SCOTT,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-159606-001

The Honorable Joseph C. Kreamer, Judge
The Honorable Patricia A. Starr, Judge *Pro Tempore*

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Joseph T. Maziarz, Chief Counsel
Criminal Appeals Section
Attorney for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Margaret M. Green, Deputy Public Defender
Attorney for Appellant

C A T T A N I, Judge

¶1 Tony Deangelo Scott appeals from his convictions and
resulting sentences for one count of possession of marijuana and

one count of possession of drug paraphernalia. Scott argues the superior court erred by failing to suppress his statements to police because his initial confession was made before being advised of his *Miranda*¹ rights, thereby tainting both his unwarned and also his subsequent, warned confession. Because Scott was not in custody at the time of his initial incriminating statements, the court did not err and we therefore affirm.

FACTS AND PROCEDURAL BACKGROUND²

¶2 In August 2011, a Tempe Police detective and officer were dispatched to assist a local hotel in removing Scott and another individual from the premises for smoking in their guest room. The hotel had requested police assistance because Scott and the other individual had been seen with at least one firearm.

¶3 Scott informed the detective that there were two guns in the room. When the detective could find only one, Scott became concerned about the missing gun. Scott indicated the gun might be in his vehicle, and the detective accompanied Scott to

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

² When reviewing the denial of a motion to suppress, we consider only evidence presented at the suppression hearing and view that evidence in the light most favorable to sustaining the superior court's ruling. *State v. Zamora*, 220 Ariz. 63, 67, ¶ 7, 202 P.3d 528, 532 (App. 2009).

the parking lot to help locate the firearm. One other officer later joined them near Scott's vehicle.

¶14 The detective stood two to three feet behind Scott as Scott opened the driver's door. As soon as the door was opened, the detective smelled "the distinct odor of burnt marijuana coming from inside." The detective also saw the top of a "sandwich style bag" in the center console, which Scott opened then closed again quickly. The detective kept his gun holstered and did not touch or attempt to detain Scott at that time.

¶15 Scott turned away from the vehicle, and the detective asked in a conversational tone why the vehicle smelled like burnt marijuana. When Scott did not respond to the question, the detective stated he believed the bag in the center console contained marijuana, and Scott admitted that it did. The detective asked him to retrieve the marijuana, and Scott did so.

¶16 After this initial questioning, the detective and Scott verified that Scott's gun was not in the vehicle.³ The detective arrested Scott, handcuffed him, and advised him of his *Miranda* rights, and Scott then agreed to speak with the detective. During this subsequent interrogation, Scott admitted the marijuana belonged to him, explaining that he used marijuana recreationally. According to Scott, the bag contained

³ A hotel security guard later found the gun in the hotel room under the mattress.

approximately \$10-worth of marijuana, enough for three cigarettes.

¶17 The State charged Scott with possession of marijuana and possession of drug paraphernalia. Before trial, Scott moved to suppress all of his statements to police, arguing that the detective had "interrogated Mr. Scott prior to reading *Miranda* rights, Mirandized him, then continued his interrogation, thus frustrating *Miranda* and the Fifth Amendment" through an impermissible two-step interrogation. After briefing and an evidentiary hearing, the superior court denied the motion to suppress, finding no *Miranda* violation because Scott was not in custody when questioned prior to receiving *Miranda* warnings.

¶18 After a one-day bench trial, the court found Scott guilty of both misdemeanor charges, suspended sentence, and imposed concurrent one-year terms of unsupervised probation. Scott timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031, and - 4033(A)(1).⁴

DISCUSSION

¶19 Scott contends the superior court erred by denying his motion to suppress the statements he made before and after being

⁴ Absent material revisions after the relevant date, statutes cited refer to the current version unless otherwise indicated.

advised of his *Miranda* rights, arguing the initial unwarned questioning violated *Miranda* and that his pre-*Miranda* confession tainted his subsequent statements. See *Missouri v. Seibert*, 542 U.S. 600 (2004). We review the superior court's denial of a motion to suppress for an abuse of discretion, deferring to its factual findings but considering de novo its legal conclusions. *State v. Zamora*, 220 Ariz. 63, 67, ¶ 7, 202 P.3d 528, 532 (App. 2009).

¶10 To protect a suspect "from the 'inherently compelling pressures' of custodial interrogation," police must first warn an individual in custody of his Fifth Amendment rights to remain silent and to the presence of an attorney before initiating interrogation. *Maryland v. Shatzer*, 559 U.S. 98, 103-04, 130 S. Ct. 1213, 1219 (2010) (quoting and citing *Miranda v. Arizona*, 384 U.S. 436, 444, 467 (1966)). The trigger for these *Miranda* warnings is "custodial interrogation." See, e.g., *State v. Smith*, 193 Ariz. 452, 457, ¶ 18, 974 P.2d 431, 436 (1999). "Police are free to ask questions of a person who is not in custody without having to give the person any warnings under *Miranda*." *Zamora*, 220 Ariz. at 67, ¶ 9, 202 P.3d at 532.

¶11 An individual is in custody for *Miranda* purposes if, in light of all the circumstances, "there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Stansbury v. California*, 511 U.S. 318,

322 (1994) (alteration in original) (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam)). The test assesses "the objective circumstances of the interrogation, not [] the subjective views harbored by either the interrogating officers or the person being questioned," *id.* at 323, to determine whether "the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business," *Zamora*, 220 Ariz. at 68, ¶ 10, 202 P.3d at 533. Relevant factors include "the site of the questioning; whether objective indicia of arrest are present; and the length and form of the interrogation." *State v. Cruz-Mata*, 138 Ariz. 370, 373, 674 P.2d 1368, 1371 (1983).

¶12 In light of the circumstances surrounding the initial, pre-*Miranda* questioning, the superior court did not err by concluding Scott was not in custody so as to trigger the need for *Miranda* warnings. The detective accompanied Scott to the parking lot not as a suspect, but rather to assist Scott in looking for his missing firearm. The detective posed questions to Scott in the open-air parking lot, not enclosed in an interview room at the police station. Neither the detective nor the other officer drew his weapon or touched, handcuffed, or otherwise restrained Scott. Although standing within a few feet of Scott, the detective was not holding Scott against the car, nor was the other officer. The detective presented Scott with

three brief queries in a conversational tone, not an extended, accusatory interrogation. These circumstances support the superior court's conclusion that Scott was not in custody during the initial questioning.

¶13 Scott argues the detective's statement during the evidentiary hearing that Scott was not free to leave after the detective smelled burnt marijuana establishes custody for *Miranda* purposes. But the subjective view of the interrogating officer is not dispositive; the objective circumstances control. See *Stansbury*, 511 U.S. at 323. Additionally, despite a subjective intention that Scott not leave, the detective testified that he did not attempt to communicate this to Scott either verbally or nonverbally prior to his arrest. See *Zamora*, 220 Ariz. at 68, ¶ 10, 202 P.3d at 533 (describing test for custody as whether police conduct "communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business").

¶14 Given the circumstances surrounding the detective's initial questions to Scott, the superior court did not err by concluding Scott was not in custody and thus finding no *Miranda* violation. Moreover, even assuming Scott was in custody, the evidence does not establish that law enforcement officers deliberately engaged in a two-step interrogation technique used in a calculated way to undermine *Miranda* requirements. See

Seibert, 542 U.S. at 621-22 (Kennedy, J., concurring). Instead, the initial questioning reasonably arose as a result of the officer's attempt to locate Scott's missing gun.

¶15 Because the initial questioning was not conducted in violation of *Miranda*, the subsequent custodial interrogation after *Miranda* warnings were given was not the product of an impermissible two-step interrogation process, and the court did not err by denying Scott's motion to suppress.

CONCLUSION

¶16 For the foregoing reasons, Scott's convictions and sentences are affirmed.

/S/

KENT E. CATTANI, Judge

CONCURRING:

/S/

JON W. THOMPSON, Presiding Judge

/S/

MICHAEL J. BROWN, Judge