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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) 1 CA-CR 08-1046  
)  
Appellant, ) DEPARTMENT D  
)  
v. ) **MEMORANDUM DECISION**  
)  
TANGIE JANAY BROOKS, ) (Not for Publication -  
) Rule 111, Rules of the  
Appellee. ) Arizona Supreme Court)  
)  
)  
)

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Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-117153-001 DT

The Honorable Christopher T. Whitten, Judge

**ORDER VACATED**

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Andrew P. Thomas, Maricopa County Attorney Phoenix  
By Elizabeth B. Ortiz, Former Appeals Bureau Chief,  
Appeals and Westside Juvenile Division  
Attorneys for Appellant

James J. Haas, Maricopa County Public Defender Phoenix  
By Mikel P. Steinfeld, Deputy Public Defender  
Attorneys for Appellee

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T H O M P S O N, Judge

¶1 The State appeals the trial court's order granting defendant's motion to suppress her statements for violation of her *Miranda*<sup>1</sup> rights. The sole issue before the trial court and on appeal is whether defendant was "in custody" at the time she made the statements, and whether *Miranda* warnings were required before police asked her about the scratched-out serial number on the handgun she had on her person when she was stopped. Because the trial court had no evidence before it on which to make any factual findings on this disputed issue, we vacate the trial court's order suppressing defendant's statements.

¶2 The background on this issue, as described in the parties' pleadings below, is as follows. Two police officers stopped defendant as she was running alongside the road, secured her with handcuffs, confiscated a handgun protruding from her jacket pocket, placed her in the backseat of a police car, and took her to the site of a nearby violent incident to determine if she was involved. Once police learned that defendant was not connected with the incident, police removed her handcuffs, and allowed her out of the police car. The officer who had confiscated the handgun saw that the serial number had been scratched out, and without advising her of her *Miranda* rights, asked about the scratched off serial number. Defendant admitted

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

that she had scratched off the serial number when she purchased the handgun in case the handgun had been used for criminal activity. A grand jury subsequently indicted defendant on two counts of misconduct involving weapons, for knowingly possessing a defaced handgun, and knowingly defacing a handgun.

¶13 Defendant filed a pre-trial motion to suppress her statements, on the ground they were the product of custodial interrogation in violation of *Miranda*. The procedural safeguards of *Miranda* are required only for a person in custody. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977). An individual is considered in custody when he is "deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. We consider the following factors in determining whether a suspect was in custody: "1) the site of the interrogation; 2) whether the investigation has focused on the accused; 3) whether the objective indicia of arrest are present, and 4) the length and form of the interrogation." *State v. Perea*, 142 Ariz. 352, 354-55, 690 P.2d 71, 73-74 (1984). The test is an objective test, determined by "how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984); see *State v. Rodriguez*, 186 Ariz. 240, 245, 921 P.2d 643, 648 (1996).

¶14 Defendant argued that the failure of police to return her handgun to her would have led a reasonable person to believe

she was not free to leave, and thus she was in custody, and police were required to recite her *Miranda* rights before they questioned her about the scratched-off serial number. The State argued that defendant was out of the police car, in the street, not in handcuffs, and police were asking her only general questions, all factors that persuasively indicated that she was not in custody and general questions in furtherance of an investigation were allowable in the absence of a recitation of *Miranda* rights. The judge rejected the State's argument that police were simply asking general questions in furtherance of an initial investigation, implicitly found that defendant was in custody, and accordingly granted defendant's motion to suppress the statements. The judge subsequently dismissed the charges without prejudice at the State's request, and the State timely appealed.

¶15 We ordinarily review the trial court's ruling suppressing defendant's statements based on the evidence presented at the suppression hearing, viewed in the light most favorable to upholding the trial court's ruling. *State v. Ellison*, 213 Ariz. 116, 126, ¶ 25, 140 P.3d 899, 909, cert. denied, 549 U.S. 1000 (2006). We review the factual findings underlying the determination for abuse of discretion, but review the court's legal conclusions de novo. *State v. Newell*, 212

Ariz. 389, 397, ¶ 27, 132 P.3d 833, 841, *cert. denied*, 549 U.S. 1056 (2006).

¶16 In this case, however, the trial judge did not have before him any evidentiary material before granting defendant's motion to suppress her statements. Although the record reflects that defendant asked for an evidentiary hearing on this motion to suppress and another motion to suppress based on the initial stop, and the trial judge twice set a date for the evidentiary hearing for reasons not on the record, no such hearing was conducted. Insofar as the record reveals, the parties did not stipulate to any facts, nor did they offer any evidence in support thereof. The judge instead apparently accepted as evidence the circumstances of the police interrogation described summarily in virtually identical terms in the parties' pleadings. The additional evidence described by the parties at oral argument in response to the judge's questioning, however, differed significantly: defendant argued that, before eliciting the statements at issue, the police officer had *not* informed defendant that the officer was impounding the handgun and that she was free to go. The State argued, however, that the police officer had elicited the statements only after he informed defendant that he was impounding the weapon and she was free to go. The judge did not resolve this discrepancy in the circumstances on the record, nor could he, in light of the

absence of any actual evidence on which he could make such findings.

¶7 Under these circumstances, in which the record was devoid of any evidence on a disputed issue of fact, the judge abused his discretion in granting defendant's motion to suppress her statements. As an initial matter, having failed to raise any objection on grounds of voluntariness, defendant bore the burden to produce evidence that established a prima facie case that she was in custody at the time she was interrogated, before the prosecutor was required to submit proof that her statement was obtained lawfully. See Ariz. R. Crim. P. 16.2(b) ("the prosecutor's burden of proof shall arise only after the defendant has come forward with evidence of specific circumstances which establish a prima facie case that the evidence taken should be suppressed"); *State v. Hyde*, 186 Ariz. 252, 270-71, 921 P.2d 655, 673-74 (1996) (holding that defendant bears burden of making prima facie case on motion to suppress confession obtained as a result of defendant's arrest under valid arrest warrant). Because she offered no actual evidence to support her claim that she was in custody, defendant failed to meet her burden of going forward with her suppression motion, and the judge accordingly abused his discretion in granting it. See *Hyde*, 186 Ariz. at 270-71, 921 P.2d at 673-74.

¶18 In this case, however, even if defendant did not have the initial burden to offer evidence to support her claim that her statement was the product of un-Mirandized custodial interrogation, the judge abused his discretion in granting defendant's motion to suppress because he had no evidence before him to resolve the factual disputes evidenced at oral argument. The record reveals that the parties disputed critical facts bearing on the issue of custody, that is, whether, before interrogating her, police had informed defendant that they were impounding her handgun and she was free to go. Neither party, however, offered any actual evidence in support of its respective claim. On this record, or, more accurately, the absence thereof, the judge abused his discretion in resolving the factual dispute and granting defendant's motion to suppress her statements. See *Merlina v. Jejna*, 208 Ariz. 1, 3, ¶ 6, 90 P.3d 202, 204 (App. 2004) (judge abuses his discretion if the record fails to support his decision).

¶19 For the foregoing reasons, we vacate the order suppressing defendant's statements. In the event, however, that

the State reinstates the charges, our ruling is without prejudice to the defendant re-urging her motion.

/s/

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JON W. THOMPSON, Judge

CONCURRING:

/s/

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JOHN C. GEMMILL, Presiding Judge

/s/

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PATRICK IRVINE, Judge