ADVANCE SHEET HEADNOTE
April 8, 2024

2024 CO 18

No. 23SA121, *People v. Bohler*—Criminal Law—*Miranda*—Custody—Jurisdiction for Interlocutory Appeals.

The supreme court holds that the defendant was not in custody for *Miranda* purposes prior to being handcuffed. Officers encountered the defendant walking down a four-lane street on a March night and inquired into the concerning amount of blood on his shirt and arms. The officers' actions and demeanor objectively resembled a welfare check; the officers did not tell the defendant that he was under arrest; the officers did not touch, accuse, or threaten the defendant; the officers did not draw their weapons; and the exchange lasted less than six minutes. Thus, and despite factors weighing in favor of finding that the defendant was in custody, the court concludes that under the totality of the circumstances, a reasonable person in the defendant's position would not have believed that his freedom of movement was restricted to the degree associated with a formal arrest. Therefore, the court reverses and remands.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2024 CO 18

Supreme Court Case No. 23SA121
Interlocutory Appeal from the District Court
Boulder County District Court Case No. 21CR447
Honorable Patrick D. Butler, Judge

Plaintiff-Appellant:

The People of the State of Colorado,

v.

Defendant-Appellee:

Brandon Mason Bohler.

Order Reversed
en banc
April 8, 2024

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CHIEF JUSTICE BOATRIGHT delivered the Opinion of the Court, in which **JUSTICE MÁRQUEZ, JUSTICE HOOD, JUSTICE GABRIEL, JUSTICE HART, JUSTICE SAMOUR,** and **JUSTICE BERKENKOTTER** joined.

CHIEF JUSTICE BOATRIGHT delivered the Opinion of the Court.

¶1 Brandon Mason Bohler stabbed his roommate to death and then walked down a four-lane street until he encountered police officers dispatched on a welfare check. After a brief exchange, the officers arrested Bohler. He later pleaded not guilty by reason of insanity to first degree murder. After a motions hearing, the district court suppressed the statements Bohler made during the pre-arrest exchange.

¶2 The question before us is whether the district court erred in suppressing those statements. The answer depends on whether Bohler was in custody for *Miranda* purposes when he made the statements. We determine that Bohler was not in custody because a reasonable person in his position would not have believed himself to be deprived of freedom of action to the degree associated with a formal arrest. Accordingly, we reverse the portion of the district court's order suppressing Bohler's initial statements.

I. Facts and Procedural History

¶3 Officers' bodycams captured the events at issue, which spanned less than six minutes.

¶4 On a March night in Boulder, Bohler walked down a four-lane street rather than the parallel sidewalk. It was snowy and icy, and he wore boots, sweatpants, and a white T-shirt stained with a concerning amount of blood. Officers Keith and

Nettles, who had been dispatched on a welfare check,[1] parked their car and approached Bohler on foot. Bohler put his hands up, holding a Bible in one hand and a smartphone in the other.

¶5 Officer Keith asked Bohler to move to the sidewalk: "Hey, man, will you step out [of the road]?" At the same time, Bohler asked Officer Keith not to shoot. With his gun holstered, as it was for the entire exchange, Officer Keith replied in a conversational tone, "I'm not gonna—I don't want to shoot you, man. Will you step out of the road, though? . . . Will you step on the sidewalk, bro?" Bohler clambered across the snow between the street and the shoveled sidewalk. Officer Nettles turned on her flashlight, apparently to help Bohler with his footing. The light revealed the blood on Bohler's shirt, which extended onto his arms.

¶6 "Man, are you covered in blood?" Officer Keith asked. "I'm covered in Jesus's blood," Bohler replied. Officer Keith approached within fifteen feet of Bohler and gestured toward the sidewalk, asking, "Hey, man, will you take a seat for me? Can you take a seat?" Bohler sat down, saying, "Yes, sir," and Officer Keith replied, "Thanks, bro." Although the officers never asked him to do anything with his arms or hands, Bohler sat cross-legged with his arms

[1] There are no findings from the district court about the focus of the welfare check. The court simply found that the officers were "dispatched on a welfare check to the [city block] where [they] encountered [Bohler]."

outstretched. Officer Keith asked what was going on, and Bohler repeated that he was covered in Jesus's blood. When Officer Keith posed the question again, Bohler asked, "Are you the police officer in charge?" Officer Keith replied, "Yeah, I'm in charge right now." Bohler asked if he could kick his phone over to Officer Keith so the officer could speak with Bohler's grandfather. Officer Keith agreed to speak with "her" shortly and asked again about the blood. Bohler corrected Officer Keith that he was referring to his "grand*father*."

¶7 Officer Keith continued to ask Bohler about the blood. Bohler did not answer directly and instead referenced religious matters (e.g., "See, if you knew the Word of God, you would know me, since you don't know the Word of God, you don't know me."). At the conclusion of the religious statements, he said, "I give myself up," before again asking Officer Keith to speak with his grandfather. Officer Keith said that he would do so. While Bohler spoke with Officer Keith, a firetruck arrived behind Bohler and cast a floodlight on his back. At some point, an ambulance, medics, and additional officers arrived behind Officer Keith. Officers Nettles and Keith wondered aloud about the origin of the blood.

¶8 Officer Keith donned latex gloves, asking, "Where are you bleeding from, man?" When Bohler didn't reply, Officer Keith asked him his first name, which he provided. Officer Keith moved closer and asked, "We're just gonna—do you got anything behind you that's gonna hurt us at all?" Bohler said that he had keys.

Officer Keith told Bohler, "I need the medics to check you out" and asked if that was "cool." Bohler agreed.

¶9 Officer Nettles then approached Bohler from the side. She asked Bohler how he was injured, and he again referenced Jesus's blood. Officer Keith asked for Bohler's last name, which he provided. Officer Keith initially misspelled it, but Bohler corrected him. Officer Keith asked Bohler for his birthday, which he also provided.

¶10 Then, having apparently been notified that Bohler was a suspect for a nearby homicide, Officer Keith asked Bohler to put his hands behind his back. The officers handcuffed Bohler and placed him under arrest.

¶11 Later, the People charged Bohler with first degree murder, to which he pleaded not guilty by reason of insanity. Pertinent here, Bohler filed a motion to suppress the statements he made to the police before being handcuffed. The district court granted the motion after determining that Bohler was in custody based on the following considerations:

- The officers "commanded" Bohler to sit;
- "The purpose of the relative positions of the parties was to ensure law enforcement had control over [Bohler]"; and
- The officers "subject[ed]" Bohler to questions that they "should have known were reasonably likely to elicit an incriminating response."

Therefore, the district court concluded, "[Bohler's] degree of movement was restrained to a seated position on the side of the road where a reasonable person in [Bohler's] position would have believed that his freedom of action had been curtailed to a degree associated with a formal arrest."

¶12 The People appealed the district court's order to this court under C.A.R. 4.1. Bohler filed a motion to dismiss the appeal for lack of jurisdiction. We now address both the jurisdictional sufficiency of the appeal and the merits of whether the district court erred in suppressing Bohler's pre-arrest statements.

II. Analysis

¶13 We first address the threshold C.A.R. 4.1 jurisdictional question and determine that we have jurisdiction. Turning to the merits, we conclude that a reasonable person in Bohler's position would not have believed they were deprived of freedom of action to the degree associated with a formal arrest. Therefore, Bohler was not in custody before he was handcuffed, and his statements should not have been suppressed.

A. Jurisdiction via C.A.R. 4.1 Certification

¶14 When a district court grants a defendant's motion to suppress, the People may appeal that decision to this court, "provided that the state certifies . . . that the appeal is not taken for purposes of delay and that the evidence is a substantial part of the proof of the charge pending against the defendant." C.A.R. 4.1(a);

§ 16-12-102(2), C.R.S. (2023). Bohler doesn't dispute that the People facially complied with Rule 4.1's certification requirement. He contends, however, that we must independently review whether the suppressed evidence constitutes a substantial part of the prosecution's proof, and that the People failed to clear that threshold in this case.

¶15 We have not squarely addressed whether Rule 4.1 requires mere facial compliance or whether it also compels a substantiality analysis of the suppressed evidence. *See People v. Thompson*, 2021 CO 15, ¶ 14, 500 P.3d 1075, 1078 (acknowledging that our caselaw "reflects some inconsistency in our approach to jurisdiction in interlocutory appeals," but declining to resolve it without notice to the parties). Either this court has "no authority . . . to review the materiality of evidence" certified as substantial by the People, *id.* at ¶ 44, 500 P.3d at 1083 (Boatright, C.J., dissenting), or this court should, "where the defendant has raised a serious challenge[,] . . . independently review[] the sufficiency of the certification to satisfy ourselves of our power to entertain the appeal," *id.* at ¶ 56, 500 P.3d at 1086–87 (Márquez, J., dissenting). But we need not resolve that issue today. Even assuming that the rule requires us to independently analyze the suppressed evidence, we conclude that the record supports the People's certification.

¶16 Specifically, the People argue that the suppressed evidence is substantial because it goes to Bohler's state of mind, and his insanity defense requires them to

disprove under section 16-8-101.5(1)(a), C.R.S. (2023), that he was "so diseased or defective in mind . . . as to be incapable of distinguishing right from wrong." That is, the People contend that Bohler's avoidance of questions about the blood, juxtaposed against his willingness and ability to answer the officers' other questions, indicates intent after deliberation and legal sanity during the homicide. Further, the People aver that their two proffered expert witnesses determined that Bohler's suppressed statements were material to their finding that he was sane at the time of the murder. We see no reason to second-guess these contentions, which contain record support. *See Thompson*, ¶ 54, 500 P.3d at 1086 (Márquez, J., dissenting) (stating that "we do not second-guess prosecution trial strategy," and arguing that Rule 4.1 creates "an admittedly low bar"). Thus, we are satisfied that the People's certification clears any threshold that may or may not exist in addition to facial compliance. We therefore turn to the merits of their appeal.

B. Standard of Review

¶17 Whether a person was in custody for *Miranda* purposes is a mixed question of law and fact. *People v. Willoughby*, 2023 CO 10, ¶ 18, 524 P.3d 1186, 1191. We apply the law de novo, rely on undisputed facts in the record, and defer to the district court's findings of fact when they're supported by competent evidence. *Id.* However, we may independently review recordings including police bodycam footage. *See id.*

C. Custody for *Miranda* Purposes

¶18 To uphold the Fifth Amendment privilege against self-incrimination, officers must provide certain warnings to individuals prior to a "custodial interrogation." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). But when a suspect is not in custody, *Miranda* warnings are not required. *Effland v. People*, 240 P.3d 868, 873 (Colo. 2010). Here, the People do not contest that Bohler's initial statements resulted from an interrogation without a *Miranda* warning. Consequently, the dispositive issue is whether Bohler was in custody before he was handcuffed.

¶19 Custody for *Miranda* purposes depends on whether a reasonable person in the defendant's position would believe they were in police custody "to a degree associated with a formal arrest." *People v. Cline*, 2019 CO 33, ¶ 2, 439 P.3d 1232, 1234. We rely on nine non-exhaustive factors to make this determination:

> (1) the time, place, and purpose of the encounter;
>
> (2) the persons present during the interrogation;
>
> (3) the words spoken by the officer to the defendant;
>
> (4) the officer's tone of voice and general demeanor;
>
> (5) the length and mood of the interrogation;
>
> (6) whether any limitation of movement or other form of restraint was placed on the defendant during the interrogation;
>
> (7) the officer's response to any questions asked by the defendant;
>
> (8) whether directions were given to the defendant during the interrogation; and

(9) the defendant's verbal or nonverbal response to such directions.

People v. Matheny, 46 P.3d 453, 465–66 (Colo. 2002); *e.g.*, *Willoughby*, ¶¶ 22–46, 524 P.3d at 1192–96 (applying the nine *Matheny* factors). We next apply these factors to this case.

D. Application

1. Time, Place, and Purpose of the Encounter

¶20 The officers encountered Bohler on a four-lane street on a March night. A significant consideration regarding time and place is whether the location was "neutral" or "police-dominated." *Willoughby*, ¶ 24, 524 P.3d at 1192. Here, the setting was neutral because the exchange took place in public next to a street, and the officers did not arrange the time and place. *See Cline*, ¶ 21, 439 P.3d at 1238 (recognizing that familiar public locations are "neutral" rather than "police-dominated"); *People v. Davis*, 2019 CO 84, ¶ 28, 449 P.3d 732, 740 (noting that "police presence—even when unwanted by the defendant—does not automatically render an otherwise neutral or defendant-friendly location police dominated."). Thus, the neutral setting here weighs against custody. *See Davis*, ¶ 26, 449 P.3d at 740.

¶21 Moreover, the officers' reason for being dispatched—a welfare check—weighs even more strongly against custody. *See People v. Garcia*, 2017 CO 106, ¶ 27,

409 P.3d 312, 318 (noting that the purpose of a welfare check weighs against custody).

2. Persons Present During the Interrogation

¶22 Bohler was alone during the exchange. Absence of a "representative or neutral party present" during an interrogation weighs in favor of custody. *People v. Padilla*, 2021 CO 18, ¶ 23, 482 P.3d 441, 447.

3. Words Spoken by the Officers

¶23 Officer Keith's question regarding whether Bohler had anything that could hurt them indicates concern for the safety of emergency responders on the scene. However, Officer Keith's explanation that the question related to a medical check reduces any weight the question adds toward custody.

¶24 Aside from the directions given by the officers and their questions about the blood (both discussed below), the remaining questions were biographical. Neutrally posed biographical questions do not weigh for or against custody. *See Compos v. People*, 2021 CO 19, ¶ 24, 484 P.3d 159, 163 (discussing the "routine booking" exception to *Miranda*).

4. Officers' Tone of Voice and General Demeanor

¶25 Here, Officer Keith used informal diction and a conversational tone that a reasonable person would not associate with commands or a formal arrest. *See Davis*, ¶ 26, 449 P.3d at 740 (noting that a conversational tone weighs against

custody). Furthermore, the officers' questions regarding the blood on Bohler were not accusatorily posed. Instead, the officers posed those questions neutrally ("Man, are you covered in blood?") or with the presumption that the blood was Bohler's own ("Where are you bleeding from, man?"). Thus, this factor weighs against custody.

5. Length and Mood of the Interrogation

¶26 Officer Nettles kept her flashlight on Bohler for most of the exchange, and when additional emergency responders and the firetruck arrived, its floodlight was trained on Bohler. These circumstances would lead a reasonable person in Bohler's position to feel surrounded, typically suggesting custody. That said, the mere presence of firefighters, medics, and even police officers does not necessarily weigh toward custody when other circumstances indicate that welfare is the emergency responders' predominant interest. *See Garcia*, ¶ 27, 409 P.3d at 318.

¶27 Furthermore, the encounter lasted less than six minutes. *See Willoughby*, ¶ 33, 524 P.3d at 1193 (noting that the briefer the encounter, the less likely that it is custodial). The officers also never unholstered their weapons. *See Cline*, ¶ 27, 439 P.3d at 1238 (holding that the defendant was not in custody in part because "[t]here was no show of force by anyone."). Aside from initially asking the officers not to shoot, Bohler did not appear upset once he reached the sidewalk. He answered the officers' identification questions, repeatedly referenced religion, and

corrected Officer Keith regarding his grandparent's gender and the spelling of "Bohler"—all without displaying signs of unease. Although the mood was mixed, on balance, the brevity of the exchange weighs against custody.

6. Limitation of Movement or Other Forms of Restraint

¶28 Bohler acted as though he was in custody or had surrendered. He asked not to be shot, kept his arms outstretched, replied "Yes, sir," and asked for permission to kick his phone over. *Cf. Willoughby*, ¶ 36, 524 P.3d at 1194 (concluding that the defendant was not in custody, in part, because he freely paced around his home and smoked a cigar without asking officers for permission).

¶29 A defendant's subjective perception that he is under formal arrest, however, is not dispositive. Because this is an objective test from a reasonable defendant's point of view, the officers' conduct is more significant. *See Stansbury v. California*, 511 U.S. 318, 323 (1994) ("Our decisions make clear that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned").

¶30 Here, the officers did not ask Bohler to raise his hands, they did not touch him before handcuffing him, they made no threats, they made no promises,[2] and

[2] As explained below, we find the fact that Officer Keith told Bohler that he would call Bohler's grandfather insignificant.

no one referenced criminal liability. *See Garcia*, ¶ 37, 409 P.3d at 319 (concluding that the defendant was not in custody because he "was never physically restrained and the officers made no threats, promises, or even references to criminal liability"). Although the officers asked him to move out of the street and then sit down on the sidewalk, those requests came in the context of Bohler walking down a four-lane street at night in a bloody shirt. The additional direction to sit down was a minor restraint at most. Overall, the officers' pre-handcuffing words and actions indicated welfare measures rather than preparation for an arrest.

7. Officers' Response to Bohler's Questions

¶31 Bohler repeatedly asked Officer Keith to speak with his grandfather. Officer Keith agreed several times but took no action to do so. In the context of the six-minute encounter and the officers' concern regarding the blood, this fact is insignificant. Similarly, because of the encounter's brevity, we do not give weight to Officer Keith's assurance to Bohler that the officers meant him no harm when he requested, "Don't shoot me."

8. Directions Given to Bohler

¶32 The district court considered Officer Keith's "commands" to Bohler an important factor weighing toward custody. While commands from officers strongly weigh in favor of custody, *see id.* at ¶ 35, 409 P.3d at 319, we determine from our independent review of the bodycam footage that Officer Keith's requests

that Bohler move to the sidewalk and to sit down did not rise to the level of commands.

¶33 As discussed, Officer Keith's requests did not feature force, threats of negative consequences for not complying, or an aggressive tone. Understandably, the officers wanted Bohler out of harm's way. Thus, while Officer Keith's request that Bohler sit down weighs in favor of custody, overall, the requests were related to immediate safety, which does not indicate custody. *See Davis*, ¶ 31, 449 P.3d at 740 (concluding that the defendant was not in custody, in part, because officers instructed him to move into another room "for officer safety reasons").

9. Bohler's Response to Directions

¶34 Without hesitation, Bohler complied with Officer Keith's requests to leave the street and sit on the sidewalk. As discussed, Bohler's actions indicated that he either intended to surrender or believed the officers were depriving him of his freedom of movement. This factor weighs in favor of custody.

10. Weighing the *Matheny* Factors

¶35 We recognize that several factors weigh in favor of custody: (1) Bohler's reaction to the police, especially having his arms outstretched; (2) the fact that Bohler was alone; (3) the police officers' directions to Bohler to sit down on the sidewalk; and (4) the officer's question about what Bohler had in his pockets.

¶36 We conclude, however, that the factors against custody are weightier: (1) the officers' actions and demeanor objectively resembled a welfare check—the reason they were dispatched; (2) the officers did not tell Bohler that he was under arrest; (3) the officers did not touch, accuse, or threaten Bohler; (4) the officers did not draw their weapons; and (5) the exchange lasted less than six minutes. Overall, the exchange was closer to "Please sit down. Why is there blood on you?" rather than "Get down on the ground! Who did you hurt?"

¶37 Moreover, this case strikingly resembles the dispositive facts in *People v. Begay*, 2014 CO 41, 325 P.3d 1026. In that case, we observed:

> Significantly, Begay was questioned in a public setting, near a road, where passersby could see him; he was neither patted down nor handcuffed; he was not told that he was under arrest but was merely asked to sit down; he was calm throughout the encounter and did not try to terminate the interview; and the encounter lasted for less than 20 minutes . . . .

Id. at ¶ 27, 325 P.3d at 1032. Given the similarity of facts, we reach the same conclusion. *See id.* at ¶ 28, 325 P.3d at 1032 ("We hold that Begay was not in custody under *Miranda* until he was formally arrested.").

¶38 Accordingly, we conclude that a reasonable person in Bohler's position would not have believed that they were deprived of freedom of action to a degree associated with a formal arrest. This means Bohler was not in custody until he was handcuffed.

III. Conclusion

¶39 The district court erred in suppressing the statements Bohler made before the officers handcuffed him. Therefore, we reverse that portion of the district court's order and remand this case for further proceedings consistent with this opinion.