

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY JOSEPH KULPA,

Defendant-Appellant.

UNPUBLISHED
December 1, 2009

No. 285892
Livingston Circuit Court
LC No. 07-016685-FH

Before: Hoekstra, P.J., and Bandstra and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of operating a vehicle while visibly impaired, MCL 257.625(3); driving while license suspended, MCL 257.904(1); and furnishing false information to a police officer, MCL 257.324(1)(h). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent terms of 1 to 8 years' imprisonment for operating a vehicle while visibly impaired, one year imprisonment for driving while license suspended, and 90 days in jail (with credit for 90 days in jail) for furnishing false information to a police officer. Because defendant was not subject to custodial interrogation under the circumstances presented and *Miranda*¹ warnings were unnecessary, because counsel was not ineffective, and because the trial court was not required to consider defendant's ability to pay court-appointed attorney fees before ordering reimbursement, we affirm.

Defendant's first argument on appeal is that the totality of the circumstances surrounding his traffic stop resulted in defendant being "in custody." According to defendant, before the officer asked whether he had been drinking, how much he had to drink, and where he did his drinking, the officer should have advised defendant of his rights pursuant to *Miranda*. Defendant further argues that defense counsel was ineffective for failing to file a motion to suppress the statements even though defense counsel knew that the prosecutor at trial would offer them.

We review de novo whether a defendant was "in custody" at the time he made statements to police. *People v Herndon*, 246 Mich App 371, 395; 633 NW2d 376 (2001). Moreover, to establish ineffective assistance of counsel, defendant must show that his trial counsel's

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial. *People v Toma*, 462 Mich 281, 301; 613 NW2d 694 (2000). To establish prejudice, a defendant must demonstrate a reasonable probability that, but for counsel's errors, the results of the trial would have been different. *Id.* at 302. To establish that trial counsel's performance was deficient, a "defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Id.*

Miranda warnings are not required unless an individual is subject to custodial interrogation. *People v Hill*, 429 Mich 382, 384; 415 NW2d 193 (1987). In determining whether a person is effectively "in custody," the pertinent inquiry is whether, based on the totality of the circumstances, there is restraint on freedom of movement in any significant way such as of the degree associated with a formal arrest. *People v Mayes (After Remand)*, 202 Mich App 181, 190; 508 NW2d 161 (1993); *Yarborough v Alvarado*, 541 US 652, 662; 124 S Ct 2140; 158 L Ed 2d 938 (2004). "[C]ustody must be determined based on how a reasonable person in the suspect's situation would perceive his circumstances" and whether the reasonable person would believe that he was free to leave. *Id.*; *People v Roark*, 214 Mich App 421, 423; 543 NW2d 23 (1995).

In *Berkemer v McCarty*, 468 US 420, 442; 104 S Ct 3138; 82 L Ed 2d 317 (1984), the United States Supreme Court concluded that treatment consisting of a single police officer briefly detaining a defendant and asking him a modest number of questions, cannot fairly be characterized as the functional equivalent of formal arrest. Similarly, in the case at bar, defendant has not presented any evidence to demonstrate that his detention at the scene, prior to his arrest, was not brief or that he was asked an unreasonable number of questions such that a reasonable person would not feel he was free to leave.

Although Deputy Jeremy Gwinn testified that from the time he pulled defendant's vehicle over to the time he finished his work with defendant at the jail, 2-1/2 to 3 hours had passed, no evidence was submitted as to the amount of time that passed between the initial stop and the questions posed by Deputy Gwinn at the scene. The 2-1/2 to 3 hour time frame included the roadside investigation, the time it took to take defendant to a local hospital to have his blood drawn, defendant's transport to the county jail, and the booking process. It appears from the testimony that defendant's roadside questioning took place shortly after his vehicle was stopped. Moreover, the questions that Deputy Gwinn asked related solely to defendant's identity and whether he had been drinking that evening. An "officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." *Id.* at 439. In the instant matter, Deputy Gwinn had suspicions that defendant had been drinking, based on the strong odor of intoxicants emanating from defendant once defendant rolled down the car window to speak with Deputy Gwinn. Furthermore, Deputy Gwinn witnessed defendant driving at a speed of 98 miles per hour and failing to immediately stop when Deputy Gwinn activated his lights and siren. As noted by the Court in *Berkemer*, a temporary detainment under these circumstances does not result in a person being "in custody" for purposes of *Miranda*. *Id.* at 439-440.

In addition, even though defendant was placed in the back of the patrol car for a brief period of time prior to his actual arrest, defendant was not handcuffed. Deputy Gwinn testified

that defendant was not handcuffed because he was not under arrest at that time. In fact, defendant was permitted to get out of the patrol car and to urinate. The record reveals that defendant was initially placed in the patrol car to enable Deputy Gwinn, the sole officer at the scene, to question defendant's passenger about defendant's identity, given that defendant was not able to produce identification after being pulled over. Although Deputy Gwinn later instructed the troopers to search defendant's vehicle, Deputy Gwinn testified that he possessed no intent to arrest defendant at that time.

On the record, we find that a reasonable man in defendant's position would not have believed that he was restrained in any significant way such as that associated with formal arrest. *Mayes (After Remand)*, *supra*; *Roark*, *supra*. Therefore, because defendant was not "in custody," there was no *Miranda* violation. *Hill*, *supra*.

Accordingly, because there was no *Miranda* violation, defense counsel was not ineffective for failing to move to suppress the statements made by defendant. Defense counsel is not ineffective for failing to make a motion or objection that would be futile. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002); *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Defendant also argues that defense counsel was ineffective for failing to adequately investigate the relevant drunken driving statute and case law. Defendant claims that defense counsel based his trial strategy on the former version of the drunk driving statute, not the statute as amended in 2003. Thus, defendant argues that defense counsel was ineffective because his trial strategy was not sound. We disagree.

At the start of trial, the prosecutor moved to amend the information to remove the language indicating that defendant's blood alcohol level was .08 grams or more. Defense counsel objected and a discussion ensued concerning the presumptions in Michigan law concerning blood alcohol levels. Displaying a knowledge that the law no longer indicated what a .07 blood alcohol level legally meant (.08 being the level at which a defendant is deemed "intoxicated"), defense counsel sought to introduce to the jury the fact that defendant's alcohol level was under .08 grams, thus giving them a point of reference in determining whether defendant was operating his vehicle while impaired or intoxicated. Because a .08 blood alcohol level or higher meant that a defendant was intoxicated, defense counsel's strategy appeared to be an attempt to use this information to create doubt in the jury's mind as to whether defendant was driving while impaired or intoxicated, since defendant's blood alcohol level was .07. In the alternative, defense counsel sought to have the blood alcohol level result of .07 excluded from evidence. Having been unsuccessful in his attempts, defense counsel argued that the jury should give no weight to the test results because they are meaningless to an average person. We find defense counsel's trial strategy sound, and his statements found in the record reflect that he undoubtedly understood the state of the law. Thus, defendant has not overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. *Toma*, *supra*. Effective assistance of counsel is presumed and defendant clearly has not met his heavy burden of proving otherwise. *Id.*

Defendant finally argues that the trial court did not consider his ability to pay court-appointed attorney fees before ordering reimbursement, thus this case should be remanded for further proceedings. Pursuant to the Michigan Supreme Court's holding in *People v Jackson*,

483 Mich 271; 769 NW2d 630 (2009), the trial court does not need to consider a defendant's ability to repay the cost of his court-appointed attorney until imposition of the fee is enforced. At the time enforcement is sought, if defendant contests his ability to pay, the ability-to-pay assessment will occur, and defendant will be entitled to notice and an opportunity to be heard. *Id.*, at 292. Consequently, defendant's argument is without merit.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Richard A. Bandstra

/s/ Deborah A. Servitto