STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED October 20, 2016
v	No. 329395 Luce Circuit Court
JASON LEE BUFFORD, Defendant-Appellee.	LC No. 15-001235-FC

Before: MARKEY, P.J., and MURPHY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals as of right from the order of the circuit court dismissing without prejudice the criminal case against defendant for solicitation of murder, MCL 750.157b(2), which the circuit court entered after it ordered that the district court's bindover be quashed and that statements made by defendant to the Michigan State Police and to his employer, the Michigan Department of Corrections, be suppressed. We reverse.

I. FACTUAL BACKGROUND

Defendant was a corrections officer at the Newberry Correctional Facility in Luce County Michigan. During the preliminary examination before the district court, an inmate at the correctional facility ("the inmate") testified that one night he and defendant began "chitchatting" about defendant's ex-wife, who also worked at the prison. The inmate claimed that defendant said, "I wish I could find a way to set her up or just get her disposed of," that he asked defendant what he meant and that if he meant "killed," and that defendant replied "yeah." When the inmate asked defendant if he would be able to live with himself if that happened, defendant allegedly said, "You don't know me very well then, do you?" According to the inmate, defendant asked him if he "knew of anybody" and that he told defendant that he did and that he would get back to him on it. The inmate told the prison's inspector, Andy Hubble, of this conversation. Hubble contacted Michigan State Police Detective Michael Schroeder and the two of them convinced the inmate to wear a recording device and discuss the matter with defendant again. The inmate testified that about a week later he told defendant that he knew some people who could kill his ex-wife, describing how the murder would take place and how the body would be disposed of, and that the price would be $800 to $1,000. Defendant allegedly responded, "If you can get that done . . . I'll pay that," and the inmate told defendant that he would "get the ball rolling." However, the recording device malfunctioned and this conversation was not recorded.

The inmate tried again. He testified that the next time he spoke to defendant he told defendant that he had made contact with people who would be up within the month to kill defendant's ex-wife. However, defendant "started backpedaling a little bit," started to question what his daughter would think if her mom was just gone, and worried that in a small town people would suspect him. Defendant said, "I'm not putting a hit out on anybody" and that he "wouldn't do it" because his heart would break for his daughter. The inmate's account is fairly consistent with the recorded conversation during which the inmate repeatedly tells defendant that he is serious about being able to get defendant's ex-wife murdered and defendant, while acknowledging that he believes the inmate is serious, makes repeated statements about his daughter and statements about the small size of the town.

Schroeder testified that after obtaining this recording, he interviewed defendant at the Michigan State Police Department in Newberry, Michigan. Schroeder maintained that defendant was not in custody. Schroeder presented his investigation to defendant and asked defendant if the allegations were true. Defense counsel objected, arguing that any statement Schroeder might relay would be a statement in violation of defendant's *Miranda*[1] rights. During voir dire, Schroeder testified that the conversation with defendant took place on the second floor of the police station, that the door to the interview room was left open a crack, that he had his gun and handcuffs on him, and that defendant came to and left the station on his own. Schroeder claimed that he told defendant he was free to leave at any time. Schroder acknowledged that defendant was not read *Miranda* rights until after the interview and claimed that he was only read them at that point because they were on a form. The district court determined that defendant was not in custody and that, therefore, Schroeder was not required to read defendant his *Miranda* rights. Schroeder then testified that during the interview defendant agreed that he had talked to the inmate and stated that he was just letting the inmate blow off steam, never intending to follow through with anything.

In binding defendant over to circuit court for trial, the district court stated in part:

> The interesting thing is that while, again, saying, "No, don't do it" may be an affirmative defense, which isn't something the Court can necessarily consider here; but when looking at the pieces of evidence together to determine whether or not [the inmate] was credible in his testimony and the Prosecution has met their burden of proof, when [defendant] would have been interviewed by the Detective, at no time did he say, "Well, yeah, I did, but I didn't really mean it. I did say that, but I didn't mean it, and you need to make it stop." Which is the other part of that affirmative defense.

The district also stated that it did not believe it could consider "affirmative defenses."

In circuit court, defendant moved to quash the bindover and to suppress the statement he made to Detective Schroeder, as well as statements made to Hubble during a Department of Corrections interview. Concerning this latter interview, Hubble testified that he had interviewed

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

defendant regarding this matter to look for work rule violations such as "over familiarization" with a prisoner. Hubble stated that he told defendant that he was entitled to union representation at the interview but that defendant declined such representation. Hubble explained that the interview was an opportunity for defendant to tell his side of the story. Hubble acknowledged that had defendant not answered his questions or cooperated with his investigation he could have been disciplined. Regarding the United States Supreme Court's holding in *Garrity v New Jersey*, 385 US 493, 500; 87 S Ct 616; 17 L Ed 2d 562 (1967), that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office," Hubble stated that it never came up but that if it had his understanding was that he was to cease the interview and contact Internal Affairs.

On August 6, 2015, the circuit court entered an order granting defendant's motion to quash the bindover. It concluded that the district court had erred in determining that it did not need to consider defendant's affirmative defense. The circuit court determined that the statement to Schroeder was made in violation of *Miranda* because defendant "was a suspect and was being interviewed regarding a serious crime on the second floor of the state police post by an armed trooper." Regarding the interview with Hubble, the circuit court concluded that Hubble had failed to properly advise defendant of his rights under *Garrity*. The circuit court then dismissed the case without prejudice. Plaintiff now brings this appeal, arguing that the bindover should not have been quashed, that defendant's statements should not have been suppressed, and that the charges should be reinstated.

II. STANDARD OF REVIEW

We review a district court's bindover decision for an abuse of discretion regarding the sufficiency of the evidence but review its "rulings concerning question of law de novo." *People v Flick*, 487 Mich 1, 9; 790 NW2d 295 (2010). "[T]his Court reviews the circuit court's decision regarding the motion to quash a bindover only to the extent that it is consistent with the district court's exercise of discretion." *People v Hudson*, 241 Mich App 268, 276; 615 NW2d 784 (2000). "The circuit court may only affirm a proper exercise of discretion and reverse an abuse of that discretion." *Id.*

"Whether a person is in custody for purposes of the *Miranda* warnings requirement is a mixed question of law and fact that must be answered independently after a review of the record de novo." *People v Cortez*, 299 Mich App 679, 691; 832 NW2d 1 (2013). The trial court's "factual findings regarding the circumstances surrounding the giving of the statement" are reviewed for clear error, and the trial court's ultimate conclusion regarding a motion to suppress is reviewed de novo. *Id.* "This Court reviews a trial court's findings of fact at a suppression hearing for clear error and reviews de novo its ultimate decision on a motion to suppress the evidence." *People v Tavernier*, 295 Mich App 582, 584; 815 NW2d 154 (2012). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Johnson*, 466 Mich 491, 497-498; 647 NW2d 480 (2002).

III. ANALYSIS

A. THE BINDOVER

The district court has the responsibility to bind over a defendant if at the conclusion of a preliminary examination it appears to the court that a felony has been committed "and there is probable cause for charging the defendant therewith." *Hudson*, 241 Mich App at 277. It is not the function of the magistrate to weigh the evidence carefully and discharge the accused when the evidence conflicts or raises a reasonable doubt as to guilt . . . " *People v Coons*, 158 Mich App 735, 738; 405 NW2d 153 (1987). These questions of fact are to be resolved by the trier of fact. See *Hudson*, 241 Mich App at 278. However, "[a]n examining magistrate may weigh the credibility of witnesses." *People v Moore*, 180 Mich App 301, 309; 446 NW2d 834 (1989). "Probable cause to believe that the defendant committed the crime is established by a reasonable ground of suspicion, supported by circumstances sufficiently strong to warrant a cautious person in the belief that the accused is guilty of the offense charged." *People v Woods*, 200 Mich App 283, 288; 504 NW2d 24 (1993).

The circuit court did not overrule the district court's decision to bindover defendant due to any failure of the district court to properly determine that the elements of the crime were met or that there was probable cause to believe that defendant committed the crime under MCL 750.157b(1) & (2). Rather, the circuit court quashed the bindover because it determined that the district court had failed to adequately consider defendant's affirmative defense under MCL 750.157b(4). That statutory provision states:

> (4) It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his or her criminal purpose, the actor notified the person solicited of his or her renunciation and either gave timely warning and cooperation to appropriate law enforcement authorities or otherwise made a substantial effort to prevent the performance of the criminal conduct commanded or solicited, provided that conduct does not occur. The defendant shall establish by a preponderance of the evidence the affirmative defense under this section. MCL 750.157b.

In concluding that the district court erred in binding over defendant, the circuit court relied on *People v King*, 412 Mich 145, 154; 312 NW2d 629 (1981), which held that the district court or magistrate "is required to make his determination after an examination of the whole matter." In *King*, the magistrate bound the defendant over on a charge of manslaughter after finding, based on a review of the whole record, that there was insufficient evidence to believe that first- or second-degree murder had been committed due to a lack of malice and pre-mediation. *Id.* at 154-155. This Court reversed, concluding that the magistrate erred in analyzing conflicting evidence, and reinstated the first-degree murder charge. See *id.* at 151-152. The Supreme Court then reversed this Court and affirmed the decision of the magistrate, concluding that the magistrate had a duty to make "an examination of the whole matter" and could bind the defendant over on a lesser charge if there was probable cause to believe that the defendant committed the lesser charge but not probable cause to believe that the defendant committed the greater charge. *Id.* at 153-155.

In the present case, the district court correctly indicated that it could not consider defendant's affirmative defense. The holding of *King* establishes that a district court may

consider evidence of affirmative defenses. *Id.* at 153-154.[2] However, in *People v Redden*, 290 Mich App 65, 84; 799 NW2d 184 (2010), this court recognized "that affirmative defenses in criminal cases should typically be presented and considered at trial and that a preliminary examination is not a trial." Therefore, the district court did not error when it failed to consider defendant's affirmative defense. Accordingly, we reinstate the bindover.

B. DEFENDANT'S STATEMENT TO THE MICHIGAN STATE POLICE

The Michigan Supreme Court has adopted a "custody test" for determining when *Miranda* warnings are to be given. *People v Hill*, 429 Mich 382, 397-398; 415 NW2d 193 (1987). The two inquiries essential to the determination of whether an individual is "in custody" for purposes of *Miranda*, are "the circumstances surrounding the interrogation; and . . . would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Howes v Fields*, __ US __; 132 S Ct 1181, 1189; 182 L Ed 2d 17 (2012). The United States Supreme Court has emphasized "that the ultimate inquiry is simply whether there is a formal arrest or restraint on movement of the degree associated with formal arrest." *Yarborough v Alvarado*, 541 US 652, 662; 124 S Ct 2140; 158 L Ed 2d 938 (2004) (internal quotations and citation omitted). Factors that are relevant to the determination of how a suspect would evaluate his freedom to leave include the duration of the questioning, the location of the questioning, any statements made during the questioning, whether the suspect was restrained, and whether the suspect was released at the end of the questioning. *Howes*, 132 S Ct at 1189.

Under similar facts, we have held that a defendant was not in custody when he "drove himself to the police station, was left alone and unrestrained for periods of time in an interview room, and, after giving written answers to some questions . . . was allowed to leave." *People v Mendez*, 225 Mich App 381, 383; 571 NW2d 528 (1997). Here, Schroeder testified that the door to the interview room was left open at least a crack, that defendant left on his own, and that defendant was not restrained during any portion of the interview. While the recording of the interview include remarks to defendant that he was free to leave, Schroeder maintained that he did in fact inform defendant that he was free to leave. Schroeder also stated that defendant drove himself to the interview, that it lasted about an hour, and that it was at 4:00 p.m. Nothing about this situation suggests that defendant's movement was restrained to a degree associated with formal arrest. If the mere presence of an armed police officer and the location of the interview at a police station were sufficient to establish custodial interrogation, then this Court would have reached a different conclusion in *Mendez*. We conclude that the circuit court erred in

[2] While the Supreme Court's decision in *King*, stands for the proposition that a magistrate or district court does not abuse its discretion when it considers evidence in mitigation or of an affirmative defense, the decision does not explicitly state that a magistrate or district court abuses its discretion when it chooses not to consider evidence of an affirmative defense. To the contrary, the decision states that the magistrate "*may* consider evidence in defense" and the magistrate "should not, however, discharge 'when evidence conflicts or raises reasonable doubt of [the defendant's] guilt.' " *King*, 412 Mich at 153-154, quoting *People v Doss*, 406 Mich 90, 103; 276 NW2d 9 (1979) (emphasis added) (bracketed material added by *King*).

suppressing statements that defendant made to Schroeder because defendant was not in custody and because Schroeder did not need to read defendant his *Miranda* rights at that interview.

C. DEFENDANT'S STATEMENT TO THE MICHIGAN DEPARTMENT OF CORRECTIONS INVESTIGATOR

In *Garrity*, 385 US at 500, the United States Supreme Court held that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office." In *Garrity*, several New Jersey Police officers were questioned regarding an investigation into the illegal "fixing of traffic tickets." Each officer was told "(1) that anything he said might be used against him in any state criminal proceeding; (2) that he had the privilege to refuse to answer if the disclosure would tend to incriminate him; but (3) that if he refused to answer he would be subject to removal from office." *Id.* at 494. The Supreme Court found that under these facts "[t]he choice imposed on [the police officers] was one between self-incrimination or job forfeiture." *Id.* at 496. The Supreme Court held that this choice amounted to coercion in violation of the Fourteenth Amendment and that statements given under a threat of job loss could not be used in the subsequent criminal proceeding. *Id.* at 499-500.

However, in *People v Coutu*, 235 Mich App 695, 704; 599 NW2d 556 (1999), we held that "because there was no overt threat of employment termination in the event that [the] defendants chose to remain silent instead of answering questions as part of the investigation, [*Garrity*] does not apply." In that case, when several of the defendants requested an attorney or union representation they were not asked any further questions. *Id.* at 703. This Court found it relevant that, although one of the defendants knew he was being interviewed under orders from a superior, there were no "department regulations or rules that provided for automatic termination for failing to answer questions during an interview." *Id.* at 703-704. This Court found that under these facts "[t]ermination [was] not an imminent consequence of failing to answer questions during an investigation." *Id.* at 704.

In the present case, while Hubble testified that defendant could have been disciplined if he had not answered his questions, there was no testimony or other evidence that defendant was given a definitive choice of either answering questions or facing termination. The facts of this case are similar to those in *Coutu*. Hubble testified that had *Garrity* come up during the interview he would have stopped asking questions and contacted internal affairs. Defendant was offered union representation but declined. Similar to *Coutu*, there is no evidence that termination would have been an imminent consequence if defendant failed to answer Hubble's questions. Accordingly, the circuit court erred in suppressing the statements defendant made to Hubble because those statements were not coerced and not made in violation of *Garrity* as interpreted by this Court in *Coutu*.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Amy Ronayne Krause