NO. COA01-643

NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2002

STATE OF NORTH CAROLINA

v. Wake County
Nos. 99CRS5341-43

FRANK W. TIBBETTS, III

Appeal by defendant from judgment entered 23 September 1999 by Judge Ronald L. Stephens in Wake County Superior Court. Heard in the Court of Appeals 18 March 2002.

Attorney General Roy Cooper, by Assistant Attorney General Chris Z. Sinha, for the State.

The Kelly Law Firm, by George E. Kelly, III, for defendant appellant.

McCULLOUGH, Judge.

Defendant was charged with two counts of statutory sex offense of a fourteen-year-old child, one count of indecent liberties with a child, and one count of statutory rape of a fourteen-year-old child. Prior to trial, defendant filed a motion to suppress certain statements he made to police officers. This motion was heard during the 20 September 1999 Session of Wake County Superior Court. After hearing the evidence and arguments of counsel, the trial court denied defendant's motion to suppress the statements made to Detective Maron on 12 January 1999. In an order entered on

or about 20 September 1999, the trial court made some sixteen detailed findings of fact before concluding that defendant "was not in custody" for *Miranda* purposes.

The matter proceeded to trial, where the State's evidence tended to show that defendant engaged in various sex acts with a minor victim on 2 and 3 January 1999, when she was fourteen years old and he was thirty years old. The minor victim was staying for the weekend with defendant; his fiancée, Cynthia Houser; and their roommate, Judy Wood, to babysit Houser's and defendant's young child. After arriving, defendant and his fiancée escorted the minor victim to their bedroom where she would be sleeping that weekend, and subsequently induced the minor victim to participate in a kissing game. When the minor victim became tired and laid down on one of the mattresses, which was on the bedroom floor, defendant began to fondle her, speaking of "sharing energy." Defendant thereafter removed the minor victim's clothing and digitally penetrated her vagina before engaging in sexual intercourse with the minor victim. Defendant's fiancée was present during all of these acts, and provided defendant with a condom when the victim asked that he use protection. While defendant engaged in intercourse with the minor victim, Houser lay nearby masturbating.

Defendant testified in his own behalf and denied engaging in sexual intercourse or any other sexual acts with the minor victim. Defendant stated that the minor victim did, however, initiate an unsolicited kiss, which he did not return. Defendant's and

Houser's roommate, Judy Wood, also testified. Ms. Wood stated that the minor victim told her during the weekend of 2 and 3 January 1999 that defendant had kissed her.

The trial court dismissed the charge of statutory sex offense of a fourteen-year-old child in 99CRS5341, and submitted the remaining charges to the jury. The jury found defendant guilty of taking indecent liberties with a child and statutory rape of a fourteen-year-old child. The jury acquitted defendant of statutory sex offense against a fourteen-year-old child in 99CRS5342. The trial court then consolidated the convictions for judgment, and sentenced defendant to a presumptive term of 216-269 months' imprisonment. Defendant appealed.

Defendant's sole assignment of error on appeal is that the trial court erred in denying his motion to suppress. Defendant contends that his statements made to Wake Forest police officers should have been suppressed, since he was never advised of his *Miranda* rights. We disagree.

The standard of review in evaluating a trial court's ruling on a motion to suppress is well settled. The trial court's "'findings of fact "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting."'" *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000), *cert. denied*, 531 U.S. 1165, 148 L. Ed. 2d 992 (2001) (quoting *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994), *cert. denied*, 513 U.S. 1096, 130 L. Ed. 2d 661 (1995). "'Once this Court concludes that the trial court's findings of fact are supported by

the evidence, then this Court's next task "is to determine whether the trial court's conclusion[s] of law [are] supported by the findings."'" *Id.* at 498-99, 532 S.E.2d at 502 (quoting *State v. Hyde*, 352 N.C. 37, 45, 530 S.E.2d 281, 288 (2000), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001)). "'Conclusions of law that are correct in light of the findings are also binding on appeal.'" *Id.* at 498, 532 S.E.2d at 501 (quoting *State v. Howell*, 343 N.C. 229, 239, 470 S.E.2d 38, 43 (1996)).

It is equally well settled that *Miranda* warnings are only necessary when a defendant is in custody and is being interrogated. In determining whether a person is "in custody" for *Miranda* purposes under the Fifth Amendment, the "'ultimate inquiry,' based on the totality of circumstances, . . . is whether there is a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest."'" *State v. Buchanan*, 353 N.C. 332, 338, 543 S.E.2d 823, 827 (2001) (quoting *Thompson v. Keohane*, 516 U.S. 99, 112, 133 L. Ed. 2d 383, 394 (1995)); *Stansbury v. California*, 511 U.S. 318, 322, 128 L. Ed. 2d 293, 298 (1994); *Berkemer v. McCarty*, 468 U.S. 420, 440, 82 L. Ed. 2d 317, 335 (1984)). *See also Brewington*, 352 N.C. at 499, 532 S.E.2d at 502; *State v. McNeill*, 349 N.C. 634, 644, 509 S.E.2d 415, 421 (1998), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999); *State v. Gregory*, 348 N.C. 203, 207-08, 499 S.E.2d 753, 757, *cert. denied*, 525 U.S. 952, 142 L. Ed. 2d 315 (1998); *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405, *certs. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997); *State v. Daughtry*, 340 N.C. 488, 506-07, 459

S.E.2d 747, 755 (1995), *cert. denied*, 516 U.S. 1079, 133 L. Ed. 2d 739 (1996) (recognizing the use of the "ultimate inquiry" standard for determining whether a person is "in custody" for purposes of *Miranda*). This test is to be distinguished from the "free to leave" test utilized in determining whether a person has been "seized" for Fourth and Fourteenth Amendment purposes. *See Gaines*, 345 N.C. at 663, 483 S.E.2d at 406 (applying the "free to leave" test in Fourth Amendment analysis, but noting that the "ultimate inquiry" of whether defendant's restraint on freedom of movement was to the degree of a formal arrest is the proper test for Fifth Amendment analysis).

In the present case, the State's evidence at the suppression hearing tended to show that, while investigating allegations of statutory rape against defendant, Detective Mike Maron and Officer Cynthia Perry of the Wake Forest Police Department traveled to defendant's residence at 848 Taylor Street on the evening of 12 January 1999. Both officers were unarmed and dressed casually in T-shirts and jeans, and were driving an unmarked vehicle. After talking briefly with defendant about the allegation made against him, defendant asked the officers for specifics. Because the case file was at the police department, Detective Maron invited defendant to come down to the police station and speak further about the case. Significantly, defendant asked what his chances were of returning home that night. Detective Maron answered, "One hundred percent." Defendant then stated that he did not have a

license, but could get a ride to the police station to discuss the case later that evening.

Defendant's roommate brought him to the police station at 7:35 p.m. After he arrived, Detective Maron showed defendant where the snack and drink machines were located, and arranged for him to be able to freely re-enter through the electronic door when he went outside to smoke. The interview began at 7:53 p.m. Detective Maron, Officer Perry, and defendant were in one of the station's interview rooms, with the door partially open. Detective Maron told defendant that he was not under arrest and was free to leave. Both officers were unarmed, and there were no weapons in the interview room. In addition, both officers were still dressed in civilian clothing. During the interview, defendant told the officers that the criminal allegations made against him were untrue. He stated that his fiancée, Cindy Houser, could corroborate his version of the events. He volunteered to accompany police to the residence he and Ms. Houser shared, so that police could speak with Ms. Houser about the allegations.

Officer Perry drove Detective Maron's unmarked vehicle, with defendant riding in the front seat of the car. The two did not converse during the short drive to defendant's residence. Officer Perry waited for defendant and Ms. Houser to retrieve Ms. Houser's shoes and coat. During the return trip to the police station, defendant and Ms. Houser rode in the backseat of the unmarked vehicle, speaking quietly to each other.

Defendant, Ms. Houser, and Officer Perry arrived back at the station at 9:10 p.m., at which time Detective Maron informed defendant and Ms. Houser that they were not under arrest. The detective explained to both defendant and Ms. Houser that he was only seeking clarification and corroboration. Detective Maron, Officer Perry and Ms. Houser then went into the interview room, while defendant went outside with his roommate, Judy Wood, to smoke another cigarette. Ms. Houser subsequently told Detective Maron that defendant and the minor victim had engaged in consensual intercourse. In fact, Ms. Houser stated that she had been present during the act, and supplied a condom for defendant's use.

At the completion of Ms. Houser's interview, she and defendant left the police station to take a walk. They returned to the station after approximately twenty or thirty minutes, whereupon defendant, Detective Maron and Officer Perry returned to the interview room. Detective Maron again advised defendant that he was not under arrest and was free to leave. As during the first interview, the door remained ajar, and the officers were unarmed and attired in civilian clothing. The officers did not read defendant his *Miranda* rights. During this second interview, which lasted about twenty minutes and ended at 10:33 p.m., defendant admitted that he had engaged in consensual intercourse with the minor victim. Detective Maron did not place defendant under arrest at the conclusion of the second interview, but thanked defendant for his time and indicated he would be in touch in a few days. Defendant, Ms. Houser and Ms. Wood left in Ms. Wood's vehicle.

During the suppression hearing, defendant testified that the officers never told him that he was free to leave. Defendant stated he felt that he could not leave the station during questioning.

The trial court made some eleven findings of fact, which closely tracked the State's evidence. The trial court went on to make the following pertinent mixed findings:

> 12. There is no evidence to suggest that at any time was the defendant in custody;
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> 13. There is no evidence to suggest that the defendant was forced or coerced into speaking with Maron and Perry;
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> 14. There is no evidence from which any reasonable person in the defendant's position would believe that he was in custody at any time before or during the interviews with Maron and Perry[.]

The trial court then concluded that defendant "was not in custody" and was therefore not entitled to *Miranda* warnings, and that "[t]he officers did not violate [any of his] [f]ederal or [s]tate [c]onstitutional rights."

Defendant's citation to cases utilizing the "free to leave" test of the Fourth Amendment to analyze Fifth Amendment concerns are unpersuasive. *See Buchanan*, 353 N.C. at 340, 543 S.E.2d 828 (disavowing those opinions of our Supreme Court and Court of Appeals that use the "free to leave" test in determining whether a defendant is "in custody" for *Miranda* purposes). Based on the record below, the trial court's findings are wholly supported by the evidence, and are therefore binding upon this Court on appeal.

The trial court's mixed findings are also upheld because they are fully supported by fact and existing law and show the proper application of the "ultimate inquiry" test. The totality of the circumstances here tends to show that defendant was not "in custody," and was therefore not entitled to *Miranda* warnings. We conclude that the trial court did not err in denying defendant's motion to suppress.

Having so concluded, we hold that defendant received a fair trial, free from prejudicial error.

No error.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

Report per Rule 30(e).