Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00021-CR

Robert Allen **NEELY**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 186th Judicial District Court, Bexar County, Texas
Trial Court No. 2014CR7454
Honorable Jefferson Moore, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Jason Pulliam, Justice

Delivered and Filed: October 26, 2016

AFFIRMED

On December 2, 2015, Appellant Robert Allen Neely entered a plea of nolo contendere to one count of second-degree indecency with a child by contact and the State waived and abandoned two additional charges involving the same child. The trial court sentenced Neely to fourteen years' confinement in the Institutional Division of the Texas Department of Criminal Justice and assessed a $1,500.00 fine. On appeal, Neely contends the trial court erred in denying his pretrial motion to suppress his statements. Because Neely was not in custody at the time he provided the statement, we affirm the trial court's order.

FACTUAL AND PROCEDURAL BACKGROUND

On May 3, 2014, San Antonio police officers responded to a domestic dispute involving Neely and his wife. Neely's twelve-year-old stepdaughter, E.N.[1], told her mother that Neely sexually assaulted her. E.N. also told the officer at the scene that Neely sexually assaulted her numerous times during the previous years, most recently one month prior to the domestic dispute incident. Neely denied all allegations of sexual assault. Neely was subsequently charged by indictment with two counts of indecency with a child and one count of continuous sexual assault of a child under fourteen years old.

Neely's trial counsel filed a motion to suppress statements made by Neely to San Antonio Police Detective Reynaldo Montes Jr. and the matter was called for a hearing on June 19, 2015. Detective Montes, the State's only witness, testified that during the investigation of the sexual assault allegations, he contacted Neely. Detective Montes specifically explained any participation by Neely was voluntary and that Neely was not required to meet with him. Neely agreed to meet the detective.

On June 11, 2014, Neely drove himself to the police station. Before any discussions began, Detective Montes reiterated that Neely was not under arrest, any involvement in the investigation by Neely was voluntary, and that Neely was free to leave at any time. Neely confirmed that he understood and desired to talk to Detective Montes.

Neely was escorted to an interview room. The entire conversation between Detective Montes and Neely was audio and video recorded. Detective Montes testified that his exchange with Neely was conversational, and never heated. Detective Montes told Neely that he was investigating sexual assault allegations and that Neely was a suspect. Neely and Detective Montes

[1] Based on the nature of the allegations, the complainant is referred to by her initials through this opinion.

sat on opposite sides of a table, with Detective Montes closest to the door. The door was not locked during the interview. Neely never left, requested to leave, or attempted to leave the room. During the interview, Neely admitted to vaginal and oral penetration of E.N., but contended that E.N.,

> [c]ame on to him and kind of forced him by taking out his penis and her grabbing it and put[ting] it inside her vagina.

Detective Montes thanked Neely for his cooperation and Neely left the police station on his own accord. Following the issuance of an arrest warrant on June 14, 2014, Neely turned himself in to authorities. Prior to denying the motion to suppress, the trial court found that Neely's June 11, 2014 statement "was voluntary, noncustodial, and . . . admissible both as a matter of fact and law."

On December 2, 2015, Neely entered a plea of nolo contendere to one count of second-degree indecent contact with a child and the State waived and abandoned the remaining allegations. The State agreed to cap Neely's potential punishment at fourteen years' confinement and a $1,500.00 fine. Neely requested the trial court defer adjudicating his guilt and place him on deferred adjudication probation. The trial court ordered a substance abuse evaluation and a presentence investigation report and the matter was reset for sentencing on January 7, 2016.

After a hearing, the trial court denied Neely's request to be placed on deferred adjudication probation and assessed punishment at fourteen years' confinement and a $1,500.00 fine. This appeal ensued.

Neely's sole issue on appeal is the trial court's denial of his motion to suppress.

MOTION TO SUPPRESS

A. Standard of Review

When reviewing a motion to suppress based on an alleged *Miranda* violation, an appellate court "affords almost total deference to the trial judge's rulings on questions of historical fact and on application of law to fact questions that turn upon credibility and demeanor, and it reviews de novo the trial court's rulings on application of law to fact questions that do not turn upon credibility and demeanor." *Alford v. State*, 358 S.W.3d 647, 652 (Tex. Crim. App. 2012) (citing *Ripkowski v. State*, 61 S.W.3d 378, 381–82 (Tex. Crim. App. 2001)); *see also State v. Kelly*, 204 S.W.3d 808, 818 (Tex. Crim. App. 2006); *Martinez-Hernandez v. State*, 468 S.W.3d 748, 756 (Tex. App.—San Antonio 2015, no pet.). "The decision as to whether custodial questioning constitutes 'interrogation' under *Miranda* is a mixed question of law and fact, and we defer to the trial court's fact findings that turn on an evaluation of credibility and demeanor." *Alford*, 358 S.W.3d at 652; *accord State v. Saenz*, 411 S.W.3d 488, 494 (Tex. Crim. App. 2013).

B. Neely's Argument

Neely contends the trial court erred in denying his motion to suppress his oral statements because the statements were taken while Neely was subjected to custodial interrogation and without the proper *Miranda* warnings.

C. Custodial Interrogation

Miranda warnings are required when a person is subjected to custodial interrogation. *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966); TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3(a) (West Supp. 2014) (requiring warnings only when interrogation is custodial); *see also Herrera v. State*, 241 S.W.3d 520, 525 (Tex. Crim. App. 2007) (explaining *Miranda* warnings "safeguard an uncounseled individual's constitutional privilege against self-incrimination during custodial interrogation"). "[C]ustodial interrogation . . . mean[s] questioning initiated by law enforcement

officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444; *accord Herrera*, 241 S.W.3d at 525. Thus, the concerns raised by failing to comply with *Miranda* only arise when the individual is subjected to both (1) custody by a law enforcement officer and (2) an interrogation. *Miranda*, 384 U.S. at 444; *accord Warren v. State*, 377 S.W.3d 9, 17 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd).

> A person may be in custody under any of these four general situations:
>
> (1) when the suspect is physically deprived of his freedom in any significant way, (2) when a law enforcement officer tells the suspect he cannot leave, (3) when law enforcement officers create a situation that would lead a reasonable person to believe his freedom of movement has been significantly restricted, and (4) when there is probable cause to arrest and law enforcement officers do not tell the suspect he is free to leave.

Dowthitt v. State, 931 S.W.2d 244, 255 (Tex. Crim. App. 1996).

"[R]estriction[s] upon freedom of movement must amount to the degree associated with an arrest as opposed to an investigative detention." *Martinez-Hernandez*, 468 S.W.3d at 757 (quoting *Dowthitt*, 931 S.W.2d at 255). Custody, for *Miranda* purposes, questions whether "'a reasonable person would believe that his freedom of movement was restrained to the degree associated with a formal arrest.'" *Herrera* 241 S.W.3d at 525 (quoting *Dowthitt*, 931 S.W.2d at 254). In Texas, the Texas Code of Criminal Procedure article 38.22 governs the admissibility of custodial interrogations in criminal proceedings. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22 (providing virtual identical warnings as *Miranda*, with the additional requirement that an accused be informed he "has the right to termination the interview at any time"); *see also Herrera*, 241 S.W.3d at 526. Only the objective circumstances surrounding the questioning are considered in determining custody. *Herrera*, 241 S.W.3d at 525.

Our inquiry therefore rests on whether Neely was in custody at the time he provided his statement to Detective Montes.

D. Analysis

A review of the totality of the objective circumstances surrounding Neely's detention shows that at no point during his detention was Neely physically deprived of his freedom in a significant way. *Cf. Martinez-Hernandez*, 468 S.W.3d at 758 (*citing Dowthitt*, 931 S.W.2d at 255). Detective Montes contacted Neely by telephone and notified Neely of the sexual assault investigation and requested Neely meet with Detective Montes to discuss the allegations. *See Brossette v. State*, 99 S.W.3d 277, 281 (Tex. App.—Texarkana 2003, pet. dism'd, untimely filed). Detective Montes specifically explained Neely was under no obligation to meet with him. *Id*. Neely voluntarily agreed to meet Detective Montes at the police station for preliminary questioning regarding the sexual assault allegations. *Id*. Courts have long held that "stationhouse questioning does not in and of itself, constitute custody." *See Herrera*, 241 S.W.3d at 535 (*citing Dowthitt*, 931 S.W.2d at 257); *see also Varela v. State*, No. 04-13-00303-CR, 2014 WL 1494607, at *4 (Tex. App.—San Antonio Apr. 16, 2014, no pet.) (mem. op., not designated for publication) (*citing Dancy v. State*, 728 S.W.2d 772, 778–79 (Tex. Crim. App. 1987)) (concluding action is voluntarily when a person is "acting only upon the invitation, request or even urging of the police").

Neely voluntarily traveled to meet with Detective Montes and "no threats, either express or implied," were made by Detective Montes. *See Dancy*, 728 S.W.2d at 778–79; *see also Frame v. State*, No. 02–05–00097–CR, 2006 WL 3627155, at *5–6 (Tex. App.—Fort Worth Dec. 14, 2006, pet. ref'd) (mem. op., not designated for publication) (holding that defendant was not in custody when she voluntarily went to police station for interview and was escorted to interrogation room in restricted area); *Scott v. State*, 165 S.W.3d 27, 42–43 & n.6 (Tex. App.—Austin 2005), *rev'd on other grounds*, 227 S.W.3d 670 (Tex. Crim. App. 2007) (holding that defendant was not in custody where police questioned him in a "secure area where the interview room was located"). Neely was informed on multiple occasions that he was free to leave at any point; and, at the end

of the interview, Neely left the police department and was not arrested until June 14, 2014. *See Wilson v. State*, 195 S.W.3d 193, 199 (Tex. App.—San Antonio 2006, no pet.). Affording the appropriate deference to the trial court's finding, we conclude that a reasonable person in Neely's situation would not believe his freedom of movement was restrained or that he was not free to leave at any time. *See Martinez-Hernandez*, 468 S.W.3d at 756; *Wilson*, 195 S.W.3d at 199. Because Neely was not in custody, neither *Miranda* nor Texas Code of Criminal Procedure article 38.22 apply. *See Herrera*, 241 S.W.3d at 525.

CONCLUSION

Because Neely's statement was both voluntary and non-custodial, we affirm the trial court's denial of Neely's motion to suppress the statements provided to Detective Montes on June 11, 2014.

Patricia O. Alvarez, Justice

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