COURT OF APPEALS
DECISION
DATED AND FILED

April 26, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1299-CR **Cir. Ct. No. 2010CF831**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JOSE L. GUTIERREZ-HERNANDEZ,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: NICHOLAS McNAMARA, Judge. *Reversed*.

Before Lundsten, P.J., Vergeront and Sherman, JJ.

¶1 PER CURIAM. The State appeals the circuit court's order granting a suppression motion. The State contends that the circuit court erred when it

concluded that Jose Gutierrez-Hernandez was in custody for purposes of ***Miranda***.[1] This erroneous conclusion, the State argues, led to the erroneous suppression of statements police obtained from Gutierrez-Hernandez and subsequently obtained physical evidence. We conclude that, under the totality of the circumstances, Gutierrez-Hernandez was not in custody when the statements and evidence were obtained. Accordingly, we reverse.

Background

¶2 In May 2010, the State charged Gutierrez-Hernandez with one count of second-degree sexual assault and one count of third-degree sexual assault. The charges were based in part on statements Gutierrez-Hernandez made to the police during station-house questioning and physical evidence obtained thereafter at the station and when police escorted Gutierrez-Hernandez to a hospital. Gutierrez-Hernandez moved to suppress this evidence, arguing that he was in custody at the police station and that police failed to advise him of his rights, in violation of ***Miranda***. The determinative issue posed to the circuit court, and on appeal, is whether Gutierrez-Hernandez was in custody for ***Miranda*** purposes.

¶3 A suppression hearing was held at which the investigating officers testified. The details of the officers' testimony will be summarized below. For now it is sufficient to note that the officers recounted that Gutierrez-Hernandez was contacted by police at his place of work and transported in a squad car to a police station room for questioning. The circuit court accepted the testimony of the police officers as to the facts surrounding the interrogation, but concluded that

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

Gutierrez-Hernandez was in custody for purposes of ***Miranda***. The court ordered the statements and physical evidence suppressed. The State appeals.

Standard of Review

¶4 On review of a circuit court's decision on a motion to suppress, we accept the court's findings of historical fact unless those findings are clearly erroneous. ***State v. Mosher***, 221 Wis. 2d 203, 211, 584 N.W.2d 553 (Ct. App. 1998). "However, whether a person is in custody for ***Miranda*** purposes is a question of law, which we review de novo." ***Id.***

Discussion

¶5 "Under ***Miranda***, police may not interrogate a suspect in custody without first advising the suspect of his or her constitutional rights." ***State v. Torkelson***, 2007 WI App 272, ¶11, 306 Wis. 2d 673, 743 N.W.2d 511. If statements are obtained in violation of ***Miranda***, those statements must be suppressed. ***Id.*** However, the ***Miranda*** requirements are only triggered if the suspect is "in custody." ***State v. Goetz***, 2001 WI App 294, ¶10, 249 Wis. 2d 380, 638 N.W.2d 386.

¶6 "A person is in custody for purposes of ***Miranda*** if the person is either formally arrested or has suffered a restraint on freedom of movement of the degree associated with a formal arrest." ***Id.***, ¶11. The test for whether a person was in custody at the time of interrogation is objective. ***Id.*** We look to "whether a reasonable person in the suspect's position would have considered himself or herself to be in custody." ***Id.*** We look to the totality of the circumstances, including "the defendant's freedom to leave the scene; the purpose, place and length of the interrogation; and the degree of restraint." *See* ***State v. Gruen***, 218

Wis. 2d 581, 593-94, 582 N.W.2d 728 (Ct. App. 1998). In examining the degree of restraint, we consider:

> (1) whether the defendant was handcuffed; (2) whether a gun was drawn on the defendant; (3) whether a … frisk was performed; (4) the manner in which the defendant was restrained; (5) whether the defendant was moved to another location; (6) whether the questioning took place in a police vehicle; and (7) the number of police officers involved.

Id. at 594-96 (footnotes omitted).

¶7 The State contends that, under the totality of the circumstances, Gutierrez-Hernandez was not in custody for purposes of ***Miranda***. The State contends that a reasonable person would not believe himself or herself to be in custody under the facts of this case. We agree.

¶8 At the outset, we address a dispute regarding a statement the circuit court made regarding voluntariness. After hearing testimony, the circuit court stated: "any reasonable person would realize that he really needed to go with the officers." Gutierrez-Hernandez contends this statement was a finding that Gutierrez-Hernandez did not go to the station voluntarily. According to Gutierrez-Hernandez, because this was a finding of fact, we must accord it deference. We disagree.

¶9 Gutierrez-Hernandez apparently believes that in ***Mosher***, 221 Wis. 2d 203, we treated a circuit court determination on this same topic as a finding of fact. This is incorrect. Although it is true that we stated that "[t]he trial court *found* that Mosher went voluntarily to the station with [police] to answer questions," ***id.*** at 212 (emphasis supplied), our use of the word "found" was not meant to imply that this was a factual finding. To the contrary, the State correctly cites ***State v. Phillips***, 218 Wis. 2d 180, 194-98, 577 N.W.2d 794 (1998), for the

proposition that voluntariness is a question of law that we review de novo. To the extent Gutierrez-Hernandez's voluntariness is a factor in determining whether he was in custody for purposes of ***Miranda***, we discuss that topic below.

¶10 We note that the State asserts that several of the circuit court's statements regarding facts amount to clearly erroneous factual findings. For example, the State disputes the court's comment that paying customers were present at the restaurant where Gutierrez-Hernandez was first contacted. We conclude that the "findings" the State challenges are all either inconsequential or not actually findings of fact. Regardless, we view the facts in a light most favorable to the circuit court's decision. *See* ***State v. Goyette***, 2006 WI App 178, ¶22 n.11, 296 Wis. 2d 359, 722 N.W.2d 731. Thus, when reciting the facts below, we do so in a manner that is consistent with the facts that it is apparent the circuit court accepted as true.

¶11 We turn, then, to the historical facts relevant to the legal question of whether Gutierrez-Hernandez was in custody when he was interrogated by police.

¶12 At the hearing on the suppression motion, Officer Rodolfo Natera and Detective Ann Turner testified about their investigation into the reported sexual assault. Additionally, the circuit court received into evidence a buccal swab consent form signed by Gutierrez-Hernandez, Officer Natera's police report, the transcript of the police interview of Gutierrez-Hernandez, and a hospital evidence collection sheet with a consent form signed by Gutierrez-Hernandez.

¶13 According to the testimony and evidence at the suppression hearing, Officer Natera and Officer Brian Baney went to the restaurant where Gutierrez-Hernandez was working at around 10:00 a.m. to investigate a reported sexual assault implicating Gutierrez-Hernandez. Officer Natera was in police uniform

and was driving a marked squad car. Officer Natera made contact with Gutierrez-Hernandez while Officer Baney spoke with Gutierrez-Hernandez' employer. Officer Natera spoke with Gutierrez-Hernandez in Spanish because Gutierrez-Hernandez does not speak English well. Officer Natera asked Gutierrez-Hernandez if he would be willing to accompany him to speak with a detective about the incident, and also informed Gutierrez-Hernandez that he was not under arrest. Gutierrez-Hernandez stated that he was willing to do so.

¶14 Officer Natera and Gutierrez-Hernandez then proceeded to Officer Natera's squad car. Officer Natera asked Gutierrez-Hernandez if he could pat him down before he got in the car, and Gutierrez-Hernandez agreed to the pat-down. Officer Natera did not place Gutierrez-Hernandez in handcuffs. He asked Gutierrez-Hernandez to sit in the back of the squad car, and then drove to the police station.

¶15 At the police station, Detective Turner met Officer Natera and Gutierrez-Hernandez and led them to an interview room. Officer Baney was initially present, but did not participate in the interview. The door to the room was closed during the interview, which lasted about forty minutes. Officer Natera translated Detective Turner's questions and Gutierrez-Hernandez' answers.

¶16 When Detective Turner began interviewing Gutierrez-Hernandez, she informed him that he was not under arrest and she had no intention of arresting him that day. Later in the interview, Detective Turner provided Gutierrez-Hernandez with water, pretzels, and animal crackers. Detective Turner asked Gutierrez-Hernandez if he would consent to a buccal swab, and explained that it was to get DNA by rubbing the inside of his cheek with a Q-tip. Gutierrez-Hernandez agreed to the swab and signed a consent form, which was in English.

Detective Turner also asked Gutierrez-Hernandez if he would be willing to go to the hospital for an examination. Detective Turner told Gutierrez-Hernandez again that he was not under arrest, and also told Gutierrez-Hernandez that police would give him a ride back to work from the hospital. Gutierrez-Hernandez agreed to submit to testing at the hospital.

¶17 Officer Natera then transported Gutierrez-Hernandez to the hospital, and Detective Turner drove to the hospital in her own car. A nurse obtained physical samples from Gutierrez-Hernandez while Officer Natera remained in the room and Detective Turner stood outside the door. Gutierrez-Hernandez signed a consent form at the hospital, which was also in English. The testing at the hospital was completed around 2:30 p.m. Officer Natera then drove Gutierrez-Hernandez back to his workplace, about five hours after police first made contact with him.

¶18 We conclude that, under the totality of the circumstances, Gutierrez-Hernandez was not in custody for purposes of ***Miranda***. The facts set forth above show that Gutierrez-Hernandez voluntarily agreed to go to the police station to answer questions. *See* ***Mosher***, 221 Wis. 2d at 211-12 (considering fact that defendant went voluntarily to police station with police in totality of circumstances in determining suspect was not in custody when he gave statements to police). Significantly, the actual questioning at the police station lasted about forty minutes and, while at the police station, Gutierrez-Hernandez was told twice that he was not under arrest, was provided food and water, and was told he would be driven back to work after testing at the hospital.[2] The officers explained the

[2] We do not consider the English language consent forms, as the record does not establish that Gutierrez-Hernandez understood them.

physical tests, and Gutierrez-Hernandez verbally agreed to the tests and being transported to the hospital. While certainly there was some restraint on Gutierrez-Hernandez' freedom under these facts, we do not agree that Gutierrez-Hernandez was placed in a coercive or police-dominated atmosphere subjecting him to "'compelling pressures generated by the custodial setting itself,'" such that ***Miranda*** warnings were required. *See* ***Torkelson***, 306 Wis. 2d 673, ¶20 (citation omitted). Because we conclude that Gutierrez-Hernandez was not in custody, we reverse the circuit court's order suppressing his statements and the physical evidence[3] on the basis of a ***Miranda*** violation.

¶19 Determining custody for purposes of ***Miranda*** is a problematic area for many courts because the language used as the general test is a poor description of the actual test. Although the common formulation of the test asks whether a "reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave," ***Thompson v. Keohane***, 516 U.S. 99, 112 (1995), the ***Miranda*** custody issue does not turn simply on whether a reasonable person would feel comfortable to simply walk away from police. Rather, for ***Miranda*** purposes, "custody" is a "term of art that specifies circumstances that are thought generally to present a serious danger of coercion." ***Howes v. Fields***, __ U.S. __, 132 S. Ct. 1181, 1189 (2012).

[3] Gutierrez-Hernandez does not develop an argument that the physical evidence was obtained in violation of his Fourth Amendments rights. Gutierrez-Hernandez argues that police coerced him into agreeing to the tests, that he was never adequately informed that he could refuse the tests, and that he did not understand the English-language consent forms he signed. He cites the circuit court's finding that police coerced him by telling him the tests were only to establish what they already knew according to his previous statements. However, Gutierrez-Hernandez argues for suppression of the physical evidence only as fruit of the ***Miranda*** violation under the Fifth Amendment. In any event, the record is clear that Gutierrez-Hernandez verbally consented to the tests with the aid of a Spanish-English translator, and the facts do not render that consent involuntary.

¶20 The fact that there may be no custody for ***Miranda*** purposes even though a reasonable person would not feel free to simply walk away is clear from the seminal decision in ***Berkemer v. McCarty***, 468 U.S. 420, 437-38 (1984). In ***Berkemer***, police pulled over and detained a motorist for questioning. The ***Berkemer*** Court acknowledged that "a traffic stop significantly curtails the 'freedom of action' of the driver and the passengers," and that it is generally "a crime either to ignore a policeman's signal to stop one's car or, once having stopped, to drive away without permission." ***Id.*** at 436. The Court further acknowledged that "few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so." ***Id.*** Still, the motorist was not in ***Miranda*** "custody." ***Id.*** at 441-42; *see also* ***Mosher***, 221 Wis. 2d at 206-07, 211-13 (defendant who was transported to the police station in a police vehicle and taken to an interview room for questioning was not in custody for ***Miranda*** purposes).

¶21 The more helpful statements of law in this area focus on whether the police have created a coercive atmosphere. For example, in her dissent in ***Howes***, Justice Ginsburg accepted the proposition that a prisoner was not automatically in custody for purposes of ***Miranda*** and explained that the key inquiry is whether the person "was subjected to 'incommunicado interrogation ... in a police-dominated atmosphere,' whether he was placed, against his will, in an inherently stressful situation, and whether his 'freedom of action [was] curtailed in any significant way.'" ***Howes***, 132 S. Ct. at 1194 (Ginsburg, J., concurring in part and dissenting in part) (citations omitted). This is why countless state and federal cases describe situations in which a reasonable person would not actually feel comfortable abruptly terminating a police contact and walking away, yet there was no "custody" as that term is used in ***Miranda*** jurisprudence. That is why we

conclude, looking at the totality of the circumstances in this case, that Gutierrez-Hernandez was not in ***Miranda*** custody.

By the Court.—Order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).