COURT OF APPEALS
DECISION
DATED AND FILED

October 23, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP376-CR **Cir. Ct. No. 2013CM6**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID A. MYHRE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Crawford County: JAMES P. CZAJKOWSKI, Judge. *Affirmed.*

¶1 BLANCHARD, P.J.[1] David Myhre appeals a judgment of conviction for possession of a deer during the closed season and three counts of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

failure to attach an ear tag to a deer carcass. Myhre argues that the circuit court erred in denying his motion to suppress evidence obtained during an interview with a Wisconsin Department of Natural Resources (DNR) warden because Myhre was in custody at the time of the interview but was not advised of his rights pursuant to ***Miranda v. Arizona***, 384 U.S. 436 (1966). For the following reasons, I affirm.

BACKGROUND

¶2 The following facts are taken from the hearing on Myhre's motion to suppress, at which two DNR wardens and Myhre testified.[2]

¶3 Two wardens came to Myhre's house to investigate Myhre's alleged involvement in illegal deer hunting. They were driving an unmarked pick up truck. They were in uniform, armed, and equipped with handcuffs and radios. The truck was outfitted with a shotgun in a rack, a police radio, a computer, and internal emergency lights.

¶4 One of the wardens testified that after the two wardens arrived at Myhre's residence, Myhre came outside and one of the wardens asked him "to step inside" the truck. Myhre opened the truck door and sat in the passenger seat of the truck "on his own accord." The truck windows were closed but the doors were unlocked. One warden sat in the driver side seat as the other warden stayed

[2] Myhre's suppression hearing was jointly held with that for the defendant in a related but separate criminal action, and this court recently affirmed the circuit court's decision to deny the motion to suppress in that related case. *See* ***State v. Bolstad***, No. 2014AP915-CR, unpublished slip op. (WI App Oct. 2, 2014). Myhre is the sole appellant in this appeal.

outside, "following up on some other things," including speaking with another suspect.

¶5 The warden who spoke with Myhre testified that he informed Myhre that Myhre was not under arrest, was free to leave, did not have to answer questions if he did not want to, and could stop answering questions at anytime during the interview. The warden further testified that Myhre agreed to answer the warden's questions. The warden did not give Myhre a ***Miranda*** warning at anytime during the subsequent interview, which lasted about forty-five minutes.

¶6 At the close of the interview, the warden filled out a written form purporting to summarize what Myhre had said regarding his involvement in illegal deer hunting. The form included two preprinted paragraphs, one at the beginning and one at the end, which explained that the statement was given freely. After the warden completed this form, he gave it to Myhre to review as the warden read the statement aloud, including the two preprinted paragraphs. After the warden and Myhre made corrections and initialed them, they both signed the form. The warden then told Myhre there would be some follow up, but that Myhre was "free to go," and Myhre exited the truck.

¶7 In contrast to the warden's testimony, Myhre testified to the following. The warden did not inform him that he was not under arrest or that he was free to leave without answering questions. The warden "asked [Myhre] if [he] had time to come and answer a few questions that [the warden] had," and Myhre agreed to do so. The conversation with the warden in the truck "heated up and got kind of loud." The warden threatened Myhre and told him that he would be arrested if he withheld information and that he was a liar. The warden took Myhre's driver's license during the interview. Myhre remained in the truck

because the warden "was going to keep [him] there or arrest [him]." Myhre left the truck only after the warden told him that he "could do so," after the warden had "asked [him] all of the questions [the warden] intended to."

¶8 After hearing the testimony of the witnesses regarding the same interactions, the circuit court made the following findings of fact. The warden interviewed Myhre in the DNR truck without advising Myhre of his ***Miranda*** rights. The warden told Myhre he was not under arrest and that he "could leave at any time." Myhre told the warden that he understood and that he would answer the warden's questions. Myhre was not restrained in any way, he was not transported to the county jail, and he was not "handcuffed, frisked or ordered to the ground at gunpoint." After Myhre answered the warden's questions, the warden drafted a "voluntary statement" based on Myhre's answers. The warden read the statement to Myhre, who suggested corrections that both parties initialed. Myhre then signed the statement.

¶9 From these findings, the circuit court concluded that the warden was not required to advise Myhre of his ***Miranda*** rights because "a reasonable person under the circumstances would have concluded he was free to terminate the interview at any time and leave the DNR pickup truck." The circuit court denied the motion to suppress.

DISCUSSION

¶10 The issue on appeal is whether Myhre was "in custody" as contemplated by ***Miranda*** when he answered questions posed by the warden in the warden's pick up truck. For the following reasons, I conclude that Myhre was not in custody and therefore the warden was not required to advise him of his ***Miranda*** rights.

¶11 Pursuant to ***Miranda***:

> "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." "Custodial interrogation" means "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."

State v. Pounds, 176 Wis. 2d 315, 320-21, 500 N.W.2d 373 (Ct. App. 1993) (footnote omitted) (quoting ***Miranda***, 384 U.S. at 444). The requirements of ***Miranda*** apply when "a suspect's freedom is curtailed 'to the degree associated with formal arrest.'" ***Id.*** at 321 (quoted source omitted). The test as to the degree of curtailment necessary to trigger the requirements of ***Miranda*** is whether "'a reasonable person in the defendant's position would have considered himself or herself to be in custody, given the degree of restraint under the circumstances.'" ***Id.*** (quoted source omitted). In making this determination, the court must examine the totality of the circumstances including: "'the defendant's freedom to leave; the purpose, place, and length of the interrogation; and the degree of restraint.'" ***State v. Martin***, 2012 WI 96, ¶35, 343 Wis. 2d 278, 816 N.W.2d 270 (quoted source omitted).

¶12 When reviewing the circuit court's decision on a motion to suppress evidence, the circuit court's finding of historical fact are accepted as true unless they are clearly erroneous, but the application of those facts to constitutional principles is subject to de novo review. ***State v. Mosher***, 221 Wis. 2d 203, 211, 584 N.W.2d 553 (Ct. App. 1998).

¶13 Myhre now submits the following argument:

> Setting aside the conflicting testimonies of [the warden] and … Myhre about whether or not [the warden] privately informed Myhre he was not under arrest; was free to leave, could refuse to answer questions; and could stop the questioning at any time, *and* instead focusing on the uncontroverted testimonies of the parties and surrounding circumstances of Myhre's isolated interrogation, it is clear a reasonable person would have understood that his freedom of action had been curtailed to a degree associated with formal arrest.
>
> … Myhre was confined in a law enforcement vehicle controlled by law enforcement officers and described as nothing less than a mobile police station complete with weapons, radios, doors with locks, a computer, forms and supplies. Outside the vehicle was an armed guard; inside an armed law enforcement interrogating him and drafting a confession. Myhre's driver's license was taken from him, not as the result of a routine traffic stop, but as a perceptible assertion of control and authority and a method of restraint.
>
> … [The warden] told [Myhre] after a 45 minute interrogation and the signing of a prepared confession that he was free to leave because he didn't want him to stay in his DNR vehicle; he was done asking questions; and he had given him what he wanted and had nothing left to say. The additional fact that Myhre was also told somewhere in the interrogation process that he would be arrested if he was (with)holding [sic] evidence or not cooperating also raises the specter of coercion fashioned to undermine his free-will and refuting the prosecution's argument that his statement was voluntary.

(Emphasis in original.)

¶14 Myhre's argument fails on multiple levels. First, it is fundamentally flawed in resting on the premise that I may "set[] aside" facts explicitly found by the circuit court, even though Myhre fails to present me with any reason to conclude that any fact found by the court was clearly erroneous. *See* ***Mosher***, 221 Wis. 2d at 211.

¶15 The circuit court explicitly credited the testimony of the warden over that of Myhre, finding that the warden told Myhre he was not under arrest and that he was free to leave, that Myhre agreed to answer the warden's questions, and that Myhre was not restrained in anyway. These are highly significant facts, tipping the analysis against a finding of custody for ***Miranda*** purposes, which inform my analysis unless shown to be clearly erroneous.

¶16 Myhre tries to score unsupported rhetorical points, such as when he refers to the warden who stood outside the DNR truck as an "armed guard." The second warden testified that he was armed at the time, but there is no evidence in the record, much less in any pertinent finding by the circuit court, to support Myhre's characterization that he acted in the way that an "armed *guard*" might act so far as Myhre was concerned.

¶17 Myhre also asserts that the warden took his driver's license "not as the result of a routine traffic stop, but as a perceptible assertion of control and authority and a method of restraint." The circuit court did not make a finding as to whether the warden took Myhre's license. However, Myhre's own testimony on this point strongly suggests that, during the course of the interview, the warden requested and retained Myhre's license long enough to obtain identifying information to include it on the voluntary statement form. In any case, Myhre provides me with no reasonable basis to conclude that the warden used control over Myhre's license as a "method of restraint."

¶18 Second, Myhre's argument fails because, as best I can discern, it is premised on an erroneous application of the law. His argument is not clear, in part because his summaries of legal authority and his arguments are not consistent with each other. However, Myhre appears to assert that, because the warden

interrogated him in connection with a crime, the warden was required to advise him of his ***Miranda*** rights. However, as summarized above, ***Miranda*** rights are implicated only when a suspect makes a statement "stemming from [a] *custodial* interrogation." ***Pounds***, 176 Wis. 2d at 320-21 (emphasis added). It is undisputed that the interview here constituted an interrogation for ***Miranda*** purposes, but this is not a sufficient condition to trigger ***Miranda*** protections.

¶19 If Myhre means to argue that, even accepting as true the circuit court's findings of fact, he was in custody, he does not develop this argument and I will not attempt to construct an argument for him. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). In any case, I see no way in which any such argument could succeed. By his own account, the warden asked if Myhre "had time" to "answer a few questions." Myhre was then questioned by the warden for approximately forty-five minutes in a DNR truck parked in his driveway. Myhre entered the front passenger seat of the DNR truck of his own accord. Myhre was told that he was free to leave at any time, did not have to answer any questions, and was not under arrest. The warden used a form to summarize Myhre's statement, which includes a recitation that Myhre gave the statement freely. Myhre was not handcuffed or restrained in any way. He was not transported to the police station or jail. In sum, Myhre's freedom was not curtailed to the degree associated with formal arrest and a reasonable person in his position would not have believed he was in custody.

¶20 Finally, in response to Myhre's principal brief, the State appears to correctly frame the legal and factual issues in its brief, and Myhre has not filed a reply brief. This provides an additional basis to affirm. Myhre has passed on the chance to amplify or clarify any meritorious arguments that he may have referenced in his principal brief, even if the merits of those arguments are not

evident to me. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant's failure to respond in reply brief to an argument made in response brief may be taken as a concession).

CONCLUSION

¶21 For these reasons, I affirm the circuit court's denial of Myhre's motion to suppress.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.