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IN THE
COURT OF APPEALS OF INDIANA

KEITH E. ABERCROMBIE, SR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A04-0603-CR-162
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Robert L. Barnet, Judge
Cause No. 18C03-0509-FB-10

November 8, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Keith Abercrombie appeals his conviction for Class B felony unlawful possession of a firearm by a serious violent felon. We reverse.

Issue

Abercrombie raises one issue, which we restate as whether the trial court properly admitted evidence obtained during a search of Abercrombie's vehicle.

Facts

On September 19, 2005, Delaware County Sheriff's Deputy Kurt Walthour was dispatched to an alleged domestic dispute involving a gun. When Deputy Walthour arrived at the apartment, Brooke Meador told him that Abercrombie had just left with a sawed-off shotgun and that she heard Abercrombie shut the trunk of his car before he left. Meador gave Deputy Walthour a description of Abercrombie and his car and indicated where she thought he might be.

This information, in addition to Abercrombie's license plate number and the fact that Abercrombie was a convicted felon was dispatched to Delaware County Sheriff's Deputy Jeff Stanley, who was in the area where Meador thought Abercrombie could be found. Deputy Stanley saw Abercrombie's car parked on the side of the road and a man, later identified as Abercrombie, standing next to the car. Deputy Stanley pulled up next to Abercrombie's car and approached him. Deputy Stanley informed Abercrombie why he was there, and Abercrombie was cooperative and identified himself. Deputy Stanley then placed Abercrombie in handcuffs and advised him that he was doing so for officer safety and that Abercrombie was not under arrest. When asked if Abercrombie had a

firearm "on his person," he said no but indicated that there was a shotgun in the trunk of his vehicle. Tr. p. 25. Abercrombie then consented to a search of his trunk and later to a search of the passenger compartment of his car. The search of the trunk revealed a shotgun, and the search of the passenger compartment revealed shotgun ammunition.

On September 23, 2005, the State charged Abercrombie with Class B felony possession of a firearm by a serious violent felon. Abercrombie moved to suppress the statement he made to Deputy Stanley and the evidence discovered during the search of his vehicle. This motion was denied. After a jury trial, Abercrombie was convicted as charged. He now appeals.

Analysis

Abercrombie argues that the trial court improperly denied his motion to suppress. Because Abercrombie appeals following his trial, the issue is properly framed as whether the trial court abused its discretion by admitting the evidence at trial. See Miller v. State, 846 N.E.2d 1077, 1080 (Ind. App. Ct. 2006), trans. denied. "Our standard of review of rulings on the admissibility of evidence is essentially the same whether the challenge is made by a pre-trial motion to suppress or by trial objection." Id. We do not reweigh the evidence and consider conflicting evidence most favorable to the trial court's ruling. Id. We also consider the uncontested evidence favorable to the defendant. Id.

Abercrombie contends that he was not advised of his Miranda rights prior to Deputy Stanley questioning him about his possession of a firearm in violation of his Fifth Amendment rights. Abercrombie also argues that Deputy Stanley was required to

inform him of his right to consult with counsel before consenting a search of vehicle. See Pirtle v. State, 263 Ind. 16, 29, 323 N.E.2d 634, 640 (1975).

The United States Supreme Court held in Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966), that a person who has been taken into custody or otherwise deprived of his or her freedom of action in any significant way must, before being subjected to interrogation by law enforcement officers, be advised of the rights to remain silent and to the presence of an attorney and be warned that any statement he or she makes may be used as evidence against him or her. Loving v. State, 647 N.E.2d 1123, 1125 (Ind. 1995). "Statements elicited in violation of this rule are generally inadmissible in a criminal trial." Id. "Also, under the Indiana Constitution 'a person in custody must be informed of the right to consult with counsel about the possibility of consenting to a search before a valid consent can be given.'" Kubsch v. State, 784 N.E.2d 905, 917 (Ind. 2003) (quoting Jones v. State, 655 N.E.2d 49, 54 (Ind. 1995)).

The State counters that Abercrombie was handcuffed for officer safety and that "it was not unreasonable for Officer Stanley to handcuff Defendant for his own personal safety while questioning Defendant about weapons and conducting his limited search." Appellant's Br. p. 6. Indeed, "When a vehicle has been properly stopped for investigative purposes, if the officer reasonably believes that he or others might be in danger, he may conduct a limited search of the automobile's interior for weapons without first obtaining a search warrant." State v. Dodson, 733 N.E.2d 968, 971 (Ind. Ct. App. 2000). However, prior to searching Abercrombie's car for officer safety, Deputy Stanley placed Abercrombie in handcuffs, questioned him about the presence of

weapons, and requested consent to search the trunk and passenger compartment of Abercrombie's car. Deputy Stanley did not Mirandize Abercrombie and did not inform him of his right to consult with counsel prior to consenting to a search. Our focus, then, is whether Abercrombie was in custody when Deputy Stanley questioned him about the presence of weapons and requested consent to search the car.

"To determine whether a person was in custody, we examine all of the circumstances surrounding the interrogation." Wright v. State, 766 N.E.2d 1223, 1229 (Ind. Ct. App. 2002). In determining whether an investigatory detention becomes a custodial interrogation, we consider whether there has been a formal arrest or restraint on freedom of movement to a degree associated with a formal arrest. Id. at 1229-30. An arrest is said to occur when police officers interrupt the freedom of the accused and restrict his or her liberty of movement. Id. at 1230. Whether a person is in custody does not depend on the subjective views of either the interrogating officer or the subject being questioned, but upon the objective circumstances. Id. "[T]o determine whether a defendant is in custody 'we apply an objective test asking whether a reasonable person under the same circumstances would believe themselves to be under arrest or not free to resist the entreaties of the police.'" Kubsch, 784 N.E.2d at 917 (citation omitted).

The State contends that Abercrombie was not in custody because when Deputy Stanley placed Abercrombie in handcuffs Abercrombie "was not under arrest but merely being restrained for officer safety reasons." Appellee's Br. p. 7. Indeed, Deputy Stanley did not formally arrest Abercrombie when he placed Abercrombie in handcuffs. This is evidenced by Deputy Stanley's advisement that Abercrombie was not under arrest and

that Abercrombie was being placed in handcuffs for officer safety. Nevertheless, Abercrombie was in custody if the restraint on his freedom of movement was of the degree associated with a formal arrest. See Wright, 766 N.E.2d at 1229-30.

In Wright, the police officer removed Wright from his vehicle, placed him in handcuffs, and conducted a pat down search for officer safety reasons. Id. at 1230. The officer specifically informed Wright that Wright was not under arrest and that he was placing Wright in handcuffs for officer safety. Id. We observed, "the use of handcuffs would cause the reasonable person to feel that one was not free to leave, and that one's freedom of movement was restrained to the degree associated with a formal arrest." Id. We concluded that Wright was in custody when he was handcuffed for officer safety. Id.; see also Loving, 647 N.E.2d at 1125 (focusing on the initial use of handcuffs and concluding that defendant was in custody where he was questioned at the crime scene by various police officials, handcuffed, placed in the back of a marked police car, and taken to the police station by uniformed police officers, taken into an interrogation room, and questioned without being told he was free to leave); Miller v. State, 846 N.E.2d at 1081 (concluding that handcuffed defendant was in custody at the time he consented to the search of his vehicle and was entitled to be informed of his right to consult with counsel before consenting); Torres v. State, 673 N.E.2d 472, 474 (Ind. 1996) (determining that custody for Pirtle reasons depends on whether the police physically restrained the defendant or whether the defendant was interrogated in a manner necessitating the giving of Miranda warnings).

The facts of this case are much like those in Wright. We conclude that although, as the State argues, Deputy Stanley may have appropriately placed Abercrombie in handcuffs, doing so amounted to placing him in custody. We do not believe that a person in handcuffs would feel free to leave or resist the entreaties of the police. See Kubsch, 784 N.E.2d at 917. Further, contrary to the State's argument, the fact that Abercrombie could have refused to answer Deputy Stanley's questions does not mean Abercrombie was not in custody.

Said another way, although Deputy Stanley may have been permitted to conduct a limited search of the passenger compartment of Abercrombie's car based on the reasonable belief that Abercrombie was armed and dangerous, Deputy Stanley was not authorized to conduct a custodial interrogation[1] without Mirandizing Abercrombie or request consent to search while Abercrombie was in custody without first informing him of his right to consult with counsel. The trial court improperly admitted Abercrombie's statement regarding the presence of a shotgun in the trunk of his car and the evidence obtained during the searches of Abercrombie's car to which he consented.

The State does not argue that the admission of this evidence was harmless. Regardless, because there is little other evidence indicating that Abercrombie possessed a firearm, we cannot conclude that the admission of this evidence was harmless.

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[1] The State does not argue that Abercrombie was not interrogated.

Conclusion

Because Abercrombie was not Mirandized or advised of his right to consult with counsel prior to consenting to the search of his car, the trial court improperly admitted the statement made by Abercrombie regarding the shotgun in the trunk of his car and evidence obtained during a search of his car. We reverse.

Reversed.

SULLIVAN, J., and ROBB, J., concur.